PUBLIC

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

In the Matter of **Altria Group, Inc.** **a corporation;** **and** **JUUL Labs, Inc.** **a corporation.**

DOCKET NO. 9393

RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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[1] Consistent with the Court's Order on Post-Trial Filings (at 4), Respondents have "use[d] the same outline headings as used by [Complaint Counsel]" in this Reply to Complaint Counsel's Proposed Findings of Fact. As evident from the substance of Respondents' detailed responses to the individual Proposed Conclusions, Respondents do not agree with many of Complaint Counsel's headings.

References to Filings

References to the post-trial filings are made using the following abbreviations:

CC's Opening Br.—Complaint Counsel's Post-Trial Brief

Resps.' Opening Br.—Respondents' Post-Trial Brief

Resps.' Reply Br.—Respondents' Post-Trial Reply Brief

RFF—Respondents' Post-Trial Proposed Findings of Fact

RRFF—Respondents' Reply to Complaint Counsel's Proposed Findings of Fact

RCoL—Respondents Post-Trial Proposed Conclusions of Law

RRCoL—Respondents' Reply to Complaint Counsel's Proposed Conclusions of Law

I. JURISDICTION

1. Altria Group, Inc. ("Altria") is a for-profit corporation with its principal place of business at 6601 West Broad Street, Richmond, Virginia 23230. (JX0001 at 001 (¶ 1) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 1:

Respondents have no specific response.

2. JUUL Labs, Inc. ("JLI") is a for-profit corporation with its principal place of business at 1000 F Street NW, Washington, D.C., 20004. (JX0001 at 001 (¶ 6) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 2:

Respondents have no specific response.

3. Altria and JLI engage in activities in or affecting commerce as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. (JX0001 at 001 (¶¶ 4, 7) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 3:

Respondents have no specific response.

II. THE PARTIES

A. ALTRIA

4. Respondent Altria is a holding company incorporated in Virginia and headquartered at 6601 West Broad Street, Richmond, Virginia 23230. (JX0001 at 001 (¶¶ 2, 3) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 4:

Respondents have no specific response.

5. Altria is the parent company of multiple tobacco companies, including Philip Morris USA. (JX0001 at 001 (¶ 3) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 5:

Respondents have no specific response.

6. Philip Morris USA is the largest cigarette company in the United States. (PX9017 (Altria) at 005).

Response to Proposed Finding No. 6:

Respondents have no specific response.

7. Altria's operating subsidiaries are primarily engaged in the manufacture and sale of tobacco products in the United States. (JX0001 at 001 (¶ 3) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 7:

Respondents have no specific response.

8. Altria's tobacco subsidiaries' products include: smokable tobacco products consisting of combustible cigarettes manufactured and sold by PM USA and Nat Sherman; machine-made large cigars and pipe tobacco manufactured and sold by Middleton and premium cigars sold by Nat Sherman; smokeless tobacco products consisting of moist and smokeless tobacco ("MST") and snus products manufactured and sold by USSTC. (PX9017 (Altria) at 005 (Altria FY2018 10-K)).

Response to Proposed Finding No. 8:

Respondents have no specific response.

1. Nu Mark

9. Prior to December 2018, Altria participated in the e-vapor category and developed and commercialized innovative tobacco products through its operating subsidiary Nu Mark LLC ("Nu Mark"). (PX9017 (Altria) at 005 (Altria FY2018 10-K)).

Response to Proposed Finding No. 9:

Respondents have no specific response.

10. "Nu Mark was Altria's innovation business, primarily focused on competing in the e-vapor business." (PX7041 (Quigley (Altria), Dep. at 14-15)).

Response to Proposed Finding No. 10:

Respondents have no specific response.

11. "Nu Mark ha[d] a diverse products portfolio and a diverse pipeline of promising products." (Willard (Altria) Tr. 1157; PX9045 (Altria) at 007 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 11:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, Nu Mark had not even launched its pod-based product, Elite, and thus did not yet know how that product would perform on the market. (Schwartz (Altria) Tr. 1871). Knowing whether Elite could be successful is a critical piece of information in assessing Nu Mark's portfolio, because the pod-based product category came to dominate the market by 2018 and made pods necessary for any company seeking to compete. (Respondents' Post-Trial Proposed Findings of Fact ("RFF") ¶¶ 563-65, 1325). The evidence demonstrates that pod-based products and cig-a-likes have different product features, appeal to different consumers, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414).

Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-77). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio and pipeline were inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were

"five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (RFF ¶¶ 898-916, 1604-11).

12. In November 2017, Jody Begley, Nu Mark's President and General Manager, told investors that "MarkTen is currently available in about 65,000 stores and has nearly tripled its market share since 2014. It is now one of the leading e-vapor brands, with a 13.5% retail share in mainstream channels, and 27% retail share in major chain accounts selling MarkTen for the full third quarter of 2017." (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 12:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, Nu Mark had not even launched its pod-based product, Elite. (Schwartz (Altria) Tr. 1871). Instead, Nu Mark was competing at the time only in cig-a-likes, which the undisputed evidence shows was a declining category, while pod-based-products were expanding quickly. (RFF ¶¶ 276-300, 390, 1324-29). By November 2018, according to a JLI slide that Complaint Counsel presented during its opening statement, MarkTen brands accounted for just 4.7% of total e-vapor sales. (RFF ¶¶ 1442-43). In addition, by the end of 2018, Altria projected that Nu Mark would lose an additional $235 million over the next three years, not even including the millions in support that was not allocated specifically to Nu Mark. (RFF ¶¶ 1083-84). Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-77). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing successfully and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio and pipeline were inadequate, Altria announced on October 5, 2018, that it was

launching Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met); Gifford (Altria) Tr. 2778 (recalling Quigley explained to leadership that "competing in vapor was going to be an uphill battle with [Nu Mark's] portfolio" and new products likely would take "five to seven years" to bring to market because of the Deeming Rule)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (*See* RFF ¶¶ 898-916, 1604-11).

13. Nu Mark utilized Altria's "[e]xceptional speed to market made possible by: Partnerships with existing network of suppliers; Existing quality and compliance systems to integrate new suppliers; Collaboration with cross-functional teams." (PX1298 (Altria) at 028 (Nu Mark 2018-2020 Three Year Strategic Plan BOD Deck Draft; slide title: "Rapid Commercialization of Elite")).

Response to Proposed Finding No. 13:

The Proposed Finding is incomplete and misleading without additional context. Nu Mark's ability to leverage Altria's existing infrastructure and relationships to bring Elite to market quickly is meaningless if the product is not appealing to consumers. (RFF ¶ 457). The evidence shows that notwithstanding both substantial efforts to bring Elite to market quickly and substantial promotional efforts, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

14. Nu Mark had roughly 145 employees in the US as well as employees in Israel and China. (Quigley (Altria) Tr. 1938-39 ("Q. When you were president and CEO of NuMark, NuMark had roughly 145 employees, correct? A. That sounds -- that sounds about right. Q. Now, there were also employees in Israel, correct? A. Yes, there was an organization in

Israel called NMI."); Schwartz (Altria) Tr. 1857 ("They were Altria employees. So Richmond, China, Israel, Miami.")).

Response to Proposed Finding No. 14:

Respondents have no specific response.

15. NMI was a research and development facility located in Israel that conducted technology scouting efforts on behalf of Altria. (PX7016 (Jupe (Altria), Dep. at 28-29)).

Response to Proposed Finding No. 15:

Respondents have no specific response.

16. NMI also had "a facility that enabled the efficient prototyping of technologies and/or new products." (PX7016 (Jupe (Altria), Dep. at 28-29)).

Response to Proposed Finding No. 16:

Respondents have no specific response except to note that the ability to prototype technologies does not mean that Altria had the ability to develop successful e-vapor products that were competitive and capable of converting adult smokers. The evidence shows that Altria had tried and failed for decades to develop successful alternatives to conventional tobacco products. (RFF ¶¶ 140-73). The evidence further shows that Altria had never internally developed an e-vapor product that reached the market, let alone one that was successful. (RFF ¶¶ 181-91, 1553-611). Even if Altria could develop a new product, it would take years for that product to go through the PMTA process and potentially obtain FDA approval. (RFF ¶¶ 122-26, 1547-49).

17. NMI could manufacture "hundreds" of e-cigarette prototypes if necessary. (PX7016 (Jupe (Altria), Dep. at 153-54)).

Response to Proposed Finding No. 17:

Respondents have no specific response except to note that the ability to prototype technologies does not mean that Altria had the ability to develop successful e-vapor products that were competitive and capable of converting adult smokers. The evidence shows that Altria had tried and failed for decades to develop successful alternatives to conventional tobacco products.

(RFF ¶¶ 140-73). The evidence further shows that Altria had never internally developed an e-vapor product that reached the market, let alone one that was successful. (RFF ¶¶ 181-91, 1553-611). Even if Altria could develop a new product, it would take years for that product to go through the PMTA process and potentially obtain FDA approval. (RFF ¶¶ 122-26, 1547-49).

18. In 2018, Altria sought to invest additional resources to expand NMI's already good prototyping capacity. (PX7016 (Jupe (Altria), Dep. at 199) ("NMI had some very good prototyping capability. We wanted to improve that. We were looking for expanding the shop, if you will, so that they could do more prototyping for us.")).

Response to Proposed Finding No. 18:

Respondents have no specific response except to note that the ability to prototype technologies does not mean that Altria had the ability to develop successful e-vapor products that were competitive and capable of converting adult smokers. The evidence shows that Altria had tried and failed for decades to develop successful alternatives to conventional tobacco products. (RFF ¶¶ 140-73). The evidence further shows that Altria had never internally developed an e-vapor product that reached the market, let alone one that was successful. (RFF ¶¶ 181-91, 1553-611).

19. NMI's expansion included hiring new personnel as well as expanding the physical prototyping infrastructure. (PX7016 (Jupe (Altria), Dep. at 199-200)).

Response to Proposed Finding No. 19:

Respondents have no specific response except to note that the ability for NMI to hire new personnel or develop prototype technologies in Israel does not mean that Altria had the ability to develop successful e-vapor products that were competitive and capable of converting adult smokers. The evidence shows that Altria had tried and failed for decades to develop successful alternatives to conventional tobacco products. (RFF ¶¶ 140-73). The evidence further shows that Altria had never internally developed an e-vapor product that reached the market, let alone one that was successful. (RFF ¶¶ 181-91, 1553-611).

20. Nu Mark's August 2018 brand report on MarkTen highlighted the fact that it was the 2nd fastest growing e-vapor brand overall and the fastest growing cigalike brand in the U.S (PX1056 (Altria) at 028 (Nu Mark August 2018 Brand Report)).

Response to Proposed Finding No. 20:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited report, the evidence shows that sales of cig-a-likes were plummeting relative to sales of pod-based products like JUUL. (RFF ¶ 565; *see also* RFF ¶¶ 562-69). By the end of 2018, cig-a-like cartridge volume had declined to less than 19 percent, and by September 2020, it had plummeted further to only 5 percent of Complaint Counsel's alleged "market." (RFF ¶ 1325). As a result, the growth of MarkTen cig-a-likes in comparison to other cig-a-likes does not speak to whether Nu Mark had competitive e-vapor products. Further, Complaint Counsel did not present the exhibit cited in the Proposed Finding to any fact witnesses during discovery or at trial in this case, (CC Exhibit Index at 3), and therefore should not be entitled to rely on it to establish anything beyond the words on the page.

21. Until late-2018, Altria, through Nu Mark, sold the following products: MarkTen Elite and Apex pod-based products, MarkTen cigalikes, and Green Smoke cigalikes. (PX9114 (Altria) at 002 (Altria 2018Q3 Press Release); PX2002 (JLI) at 001; PX4029 (Altria) at 021 (April 2018 Nu Mark BOD Orientation); PX0015 (Altria) at 007-009 (Altria Response to Request for Additional Information and Documentary Materials dated Oct. 8, 2019) (*in camera*). Cigalikes sold under the MarkTen brand included MarkTen Bold, and MarkTen. (O'Hara (JLI) Tr. 506; PX9114 (Altria) at 009, 012 (Altria 2018Q3 Press Release)).

Response to Proposed Finding No. 21:

Respondents have no specific response.

22. [redacted] (PX0007 (Altria) at 005) (*in camera*)).

Response to Proposed Finding No. 22:

Respondents have no specific response.

23. [redacted]. (PX0015 (Altria) at 007 (Altria Response to Request for Additional Information and Documentary Materials dated Oct. 8, 2019)) (*in camera*)).

Response to Proposed Finding No. 23:

Respondents have no specific response except to note that Apex was available only through e-commerce and Green Smoke was available primarily through e-commerce. (RFF ¶ 1518; PX9080 (Altria) at 001).

24. [redacted] (PX0015 (Altria) at 007 (Altria Response to Request for Additional Information and Documentary Materials dated Oct. 8, 2019)) (*in camera*).

Response to Proposed Finding No. 24:

Respondents have no specific response.

25. [redacted] (PX5000 at 008 (¶ 19 n.13) (Rothman Expert Report) (*in camera*)).

Response to Proposed Finding No. 25:

The Proposed Finding is incomplete and misleading without additional context. In a dynamic market such as this, one cannot assess whether products are competitive or successful based on sales figures alone. That is especially true here given that Nu Mark was massively unprofitable. In 2017, Nu Mark lost $71 million; in 2018 before it was shuttered, Nu Mark lost $101 million; and in the future, Nu Mark was projected to lose hundreds of millions more. (RFF ¶¶ 1078-84). In addition, Nu Mark's sales in 2017 were exclusively from cig-a-likes, not from pod-based products, (RFF ¶ 277), and the evidence shows that sales of cig-a-likes were plummeting relative to sales of products like JUUL and others in the pod-based-product category, (RFF ¶ 565; *see also* RFF ¶¶ 562-69).

26. Nu Mark planned to triple its 2018 new product launch from $7 million to $23 million; $8 million of the increase was solely to accelerate the Mark Ten Elite launch. (PX1606 (Altria) at 015 (Altria 2018 Original Budget Update)).

Response to Proposed Finding No. 26:

The Proposed Finding is incomplete and misleading without additional context. Any investment in a product launch is meaningless if the product itself is not appealing to consumers. (RFF ¶ 457). The evidence shows that notwithstanding both substantial efforts to bring Elite to market quickly and substantial promotional efforts, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

B. JLI

27. JLI is a for-profit corporation incorporated in Delaware, with its principal place of business at 1000 F Street NW, Washington, D.C., 20004. (JX0001 at 001 (¶ 6) (Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 27:

Respondents have no specific response except to note that JLI relocated to its current principal place of business in 2020 and, during the negotiations and transaction at issue in the case, had a principal place of business in San Francisco, California. (PX2534 (JLI) at 002).

28. JLI was originally called Ploom, then changed to PAX, and finally to JUUL Labs, Inc. in 2015-2016. (Valani (JLI) Tr. 900).

Response to Proposed Finding No. 28:

The Proposed Finding is incomplete and misleading without additional context. JLI was originally founded as Ploom, Inc. (RFF ¶ 205). The company was renamed Pax Labs, Inc. in June 2015. (RFF ¶ 207). Pax Labs, Inc. renamed itself JUUL Labs, Inc. in June 2017 and spun out Pax Labs, Inc. as a separate, stand-alone corporation. (RFF ¶ 209).

29. JLI sells an e-cigarette, referred to as the "JUUL" or "Juul" product, which heats a nicotine-based liquid into an aerosol to deliver nicotine to users. (PX2218 (JLI) at 003 (HSR Notification Form)).

Response to Proposed Finding No. 29:

Respondents have no specific response.

30. The JUUL e-cigarette is a closed-system pod-based product and was first introduced in 2015. (PX0017 (Altria) at 003 (Altria's Minority Investment in JUUL Labs dated April 2, 2019)).

Response to Proposed Finding No. 30:

Respondents have no specific response.

31. In 2018, JUUL was the best-selling e-cigarette in the United States and the "market leader." (Pritzker (JLI) Tr. 729; PX2098 (JLI) at 001, 014; PX9017 (Altria Group, Inc. Form 10-K) at 058; *see also* Huckabee (Reynolds) Tr. 442-43 (*in camera*); PX1316 (Altria) at 007; PX3228 (Reynolds) at 006 (*in camera*)); PX1115 (Altria) at 003).

Response to Proposed Finding No. 31:

Respondents have no specific response except to object to the extent that the Proposed Finding implies or assumes that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (Respondents' Post-Trial Proposed Conclusions of Law ("RCoL") ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

32. JLI's sales in 2018 were over $1 billion. (PX2142 (JLI) at 006 (JUUL Project Tree Board of Directors Meeting, Dec. 19, 2018)).

Response to Proposed Finding No. 32:

Respondents have no specific response.

III. THE TRANSACTION

A. ALTRIA ACQUIRED A 35% NON-VOTING EQUITY INTEREST IN JLI

33. On December 20, 2018, Altria and JLI signed an agreement ("Purchase Agreement"), whereby Altria acquired a 35% non-voting equity interest in JLI for $12.8 billion in cash. (PX2141 (Altria/JLI) at 006-07 (Purchase Agreement, Dec. 20, 2018); PX2010 (JLI) at 003 (Q&A talking points regarding transaction, Dec. 20, 2018).

Response to Proposed Finding No. 33:

Respondents have no specific response.

34. On December 20, 2018, the 35% non-voting equity interest sale from JLI to Altria closed. (PX2218 (JLI) at 003 (Hart-Scott-Rodino ("HSR") notification); PX2010 (JLI) at 001, 003, 007-08 (Q&A talking points regarding transaction, Dec. 20, 2018)).

Response to Proposed Finding No. 34:

Respondents have no specific response.

35. Altria and JLI did not file an HSR notification to acquire the 35% non-voting equity interest in JLI for $12.8 billion. (PX2010 (JLI) at 007 (Q&A talking points regarding transaction, Dec. 20, 2018)).

Response to Proposed Finding No. 35:

Respondents have no specific response.

36. JLI distributed most of the proceeds from Altria's investment to JLI investors and employees as a special dividend. (PX2010 (JLI) at 003, 008 (Q&A talking points regarding transaction, Dec. 20, 2018) ("$12.7 billion of the capital received from Altria's investment is being paid to shareholders in the form of a dividend and to holders of options and RSUs pursuant to their provisions.")).

Response to Proposed Finding No. 36:

Respondents have no specific response.

1. Altria and JLI Entered Several Agreements As Part of Altria's Investment in JLI

37. The December 20, 2018 Purchase Agreement signed by Altria and JLI incorporates several agreements between Altria and JLI. (PX2141 (Altria/JLI) at 011 (Purchase Agreement, Dec. 20, 2018) (incorporating ancillary agreements); PX2216 (Altria/JLI) (Voting Agreement, Dec. 20, 2018); PX1276 (Altria/JLI) (Relationship Agreement, Dec. 20, 2018); PX1275 (Altria/JLI) (Services Agreement, Dec. 20, 2018); PX2214 (Altria/JLI) (Investors' Rights Agreement, Dec. 20, 2018); PX2215 (Altria/JLI) (Right of First Refusal and Co-Sale Agreement, Dec. 20, 2018); PX2139 (Altria/JLI) (Intellectual Property License Agreement, Dec. 20, 2018); PX2217 (Altria/JLI) (True-Up Convertible Security Agreement, Dec. 20, 2018)).

Response to Proposed Finding No. 37:

Respondents have no specific response.

a) Altria Agreed to a Non-Compete with JLI

38. Pursuant to the Relationship Agreement, Altria was prohibited from competing in all aspects of the e-vapor business, including research and development, for an initial term of

six years, with very limited exceptions. (PX1276 (Altria/JLI) at 025-27, 064 (Relationship Agreement, Dec. 20, 2018); PX1275 (Altria/JLI) at 005, 014 (Services Agreement, Dec. 20, 2018)). The initial term of six years is indefinitely extendable by three-year increments if not terminated by either party. (PX1276 (Altria/JLI) at 025-27, 064 (Relationship Agreement, Dec. 20, 2018); PX1275 (Altria/JLI) at 005, 014 (Services Agreement, Dec. 20, 2018)).

Response to Proposed Finding No. 38:

The Proposed Finding is incomplete and misleading without additional context. The noncompete expressly provides that it is operative only while the Services Agreement is in effect. (RFF ¶ 1128; PX1276 (JLI) at 025 § 3.1). In addition, the noncompete includes a carve-out permitting Altria to "engage in the business relating to [its existing e-vapor products] . . . as such business is presently conducted," pending HSR approval. (RFF ¶ 1128; PX1276 (JLI) at 025-26 § 3.1).

39. As part of the transaction with JLI, Altria agreed it would not do any more product development for e-cigarettes, including internal development and development collaborations with third parties. (Jupe (Altria) Tr. 2192-94). Jupe testified that, "As part of that JLI deal, one of the closers was we [Altria] would not be doing any more product development within the e-vapor space." (Jupe (Altria) Tr, 2192-93). Altria was "obliged to" end internal and external product development and to "unwind" product development collaborations. (Jupe (Altria) Tr. 2193-94).

Response to Proposed Finding No. 39:

The Proposed Finding is incomplete and misleading without additional context. The noncompete expressly provides that it is operative only while the Services Agreement is in effect. (RFF ¶ 1128; PX1276 (JLI) at 025 § 3.1). In addition, the noncompete includes a carve-out permitting Altria to "engage in the business relating to [its existing e-vapor products] . . . as such business is presently conducted," pending HSR approval. (RFF ¶ 1128; PX1276 (JLI) at 025-26 § 3.1).

40. As part of the transaction with JLI, Altria committed to participate in the e-vapor business exclusively through JLI. (PX1181 (Altria) at 067 ("E-Vapor Update" presentation prepared for Altria board of directors, Dec. 2018) ("[S]elected transaction terms […] Altria commits to conduct e-vapor operations exclusively through [JLI]"); PX1265 (Altria) at 002 (Email

from Murray Garnick, Dec. 10, 2018) ("[O]ur participation in e[-]vapor area will be exclusively through [JLI]."); Pritzker (JLI) Tr. 912 ("Q. During the course of negotiations with Altria, you told Mr. Willard and Mr. Gifford that, post-transaction, Altria would need to participate in e-vapor exclusively through JLI, correct? A. That is correct . . . .")).

Response to Proposed Finding No. 40:

The Proposed Finding is incomplete and misleading without additional context. The noncompete expressly provides that it is operative only while the Services Agreement is in effect. (RFF ¶ 1128; PX1276 (JLI) at 025 § 3.1). In addition, the noncompete includes a carveut permitting Altria to "engage in the business relating to [its existing e-vapor products] . . . as such business is presently conducted," pending HSR approval. (RFF ¶ 1128; PX1276 (JLI) at 025-26 § 3.1). To the extent the Proposed Finding is intended to imply that Altria discontinued its e-cigarette business as a result of an agreement with JLI and/or as a pre-condition of the transaction, that implication is contradicted by the evidence. The evidence demonstrates that there was no agreement to withdraw Altria's e-vapor products as a precondition to the transaction and that Altria instead decided to discontinue those products for independent reasons. (RFF ¶¶ 938-51, 1074-98).

41. The negotiations for the transaction began in the middle of 2017. (See CCFF ¶ 614, below) Prior to the signing of the final deal documents, Altria had already announced the removal of the MarkTen Elite pod products and the discontinuation of its e-cigarette business. (See CCFF ¶¶ 861-64, below).

Response to Proposed Finding No. 41:

The Proposed Finding accurately describes the chronology of events. To the extent the Proposed Finding is intended to imply that Altria discontinued its e-cigarette business as a result of an agreement with JLI and/or as a pre-condition of the transaction, that implication is contradicted by the evidence. The evidence demonstrates that there was no agreement to withdraw Altria's e-vapor products as a precondition to the transaction and that Altria instead decided to discontinue those products for independent reasons. (RFF ¶¶ 938-51, 1074-98).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 614, 861-64, Respondents incorporate their responses to those Proposed Findings herein.

b) Altria Appointed an Observer to JLI's Board of Directors

42. Pursuant to the Voting Agreement, Altria acquired the right to immediately appoint a non-voting board observer to JLI's board of directors. (PX2216 (Altria/JLI) at 008–009 (Voting Agreement, Dec. 20, 2018); PX2010 (JLI) at 007 (Q&A talking points regarding transaction, Dec. 20, 2018)).

Response to Proposed Finding No. 42:

Respondents have no specific response.

43. Following Altria's investment in JLI, Altria appointed a non-voting board observer, Altria's Chief Growth Officer, K.C. Crosthwaite, to JLI's board of directors. (PX7006 (Crosthwaite (Altria/JLI), IHT at 145)).

Response to Proposed Finding No. 43:

Respondents have no specific response except to note that K.C. Crosthwaite is no longer Altria's non-voting board observer. (PX7010 Gifford (Altria) IHT at 222-23).

c) Altria Agreed to Provide Services to JLI

44. Pursuant to the Services Agreement, Altria agreed to provide JLI with certain services, including mission support, government and regulatory affairs, distribution support, fixture services, database, legal and related services, direct marketing support, and sales services. (PX1275 (Altria/JLI) at 027-33 (Services Agreement, Dec. 20, 2018)).

Response to Proposed Finding No. 44:

Respondents have no specific response.

45. The services agreement had an initial six-year term, subject to early termination by mutual consent or in case of material breach, bankruptcy, or insolvency. (PX1275 (Altria/JLI) at 005, 014-15 (Services Agreement, Dec. 20, 2018)).

Response to Proposed Finding No. 45:

Respondents have no specific response.

46. On January 28, 2020, Altria and JLI amended the services agreement, thereby eliminating all services other than regulatory support services and retail shelf space through March 31, 2020. (*See* CCFF ¶¶ 1880-83, below).

Response to Proposed Finding No. 46:

Respondents have no specific response except to clarify that under the Amended Services Agreement, Altria continues to provide JLI regulatory support, while services related to retail shelf space were permitted to continue through March 31, 2020. (RFF ¶ 1134).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1880-83, Respondents incorporate their responses to those Proposed Findings herein.

B. ALTRIA AND JLI FILED FOR HSR CLEARANCE TO CONVERT ALTRIA'S INTERESTS TO VOTING SECURITIES IN FEBRUARY 2019

47. On February 4, 2019, Altria and JLI filed for HSR clearance to convert Altria's non-voting interests in JLI to voting interests and to appoint three members of JLI's board of directors. (PX2218 (JLI) at 003 (HSR notification) ("Altria is now filing notification to convert these economic interests into voting securities . . . ."); PX2141 (Altria/JLI) at 009-10, 037 (Purchase Agreement, Dec. 20, 2018); PX2216 (Altria/JLI) at 004-06, 052 (Voting Agreement, Dec. 20, 2018)).

Response to Proposed Finding No. 47:

Respondents have no specific response.

48. The HSR notification was filed two months after December 2018, when "Altria announced the decision to refocus its innovative product efforts, which included Nu Mark's discontinuation of production and distribution of all e-vapor products." (PX9017 (Altria) at 004 (Form 10-K, Feb. 26, 2019); *see* PX9080 (Altria) at 001 (noting that on Dec. 7, 2018, Altria announced discontinuation of MarkTen and Green Smoke); PX9114 (Altria) at 002 (noting that on Oct. 25, 2018, Altria announced plans to discontinue MarkTen Elite and Apex by MarkTen)).

Response to Proposed Finding No. 48:

The Proposed Finding is incomplete and misleading without additional context. *First*, on December 7, 2018, when "Altria announced the decision to refocus its innovative product efforts" by shutting down Nu Mark, it continued at that time with the Growth Teams, which were an effort internally to develop from scratch leapfrog e-vapor products. (RFF ¶ 1090). *Second*, to the extent the Proposed Finding is intended to imply that Altria discontinued its e-cigarette business as a result of an agreement with JLI and/or as a pre-condition of the transaction, that implication is

contradicted by the evidence. The evidence demonstrates that there was no agreement to withdraw Altria's e-vapor products as a precondition to the transaction and that Altria instead decided to discontinue those products for independent reasons. (RFF ¶¶ 938-51, 1074-98).

49. In November 2020, Altria announced the conversion of its non-voting JLI shares to voting shares, but did not exercise the right to elect directors to JLI's board of directors. (PX9099 (Altria) at 001).

Response to Proposed Finding No. 49:

Respondents have no specific response.

C. ALTRIA AND JLI AMENDED THE PURCHASE AGREEMENT AND INCORPORATED AGREEMENTS IN JANUARY 2020

50. On January 30, 2020, Altria announced that Altria and JLI had entered into an amended Purchase Agreement and amended Relationship Agreement. Altria also announced amendments to the Services Agreement and the Voting Agreement. (PX9028 (Altria) at 002; PX9029 (Altria) at 003 (Form 8-K); PX0010 (Altria/JLI) (Amended Purchase Agreement, Jan. 28, 2020); PX0011 (Altria/JLI) (Amended Relationship Agreement, Jan. 28, 2020); PX0012 (Altria/JLI) (Amended Services Agreement, Jan. 28, 2020); PX0014 (Altria/JLI) (Amended and Restated Voting Agreement, Jan. 28, 2020)). Altria and JLI also entered into a cooperation agreement. (PX0013 (Altria/JLI) (Cooperation Agreement, Jan. 28, 2020)).

Response to Proposed Finding No. 50:

Respondents have no specific response.

51. The Amended Services Agreement eliminated all services except for regulatory support services relating to JLI's PMTA and other approval processes. (PX0012 (Altria/JLI) at 002 (Amended Services Agreement, Jan. 28, 2020); PX1275 (Altria/JLI) at 028 (Services Agreement, Dec. 20, 2018); PX9029 (Altria) at 003 (Press Release, Jan. 30, 2020)).

Response to Proposed Finding No. 51:

Respondents have no specific response except to note that the amendment also permitted services related to retail shelf space to continue through March 31, 2020, while those services were phased out. (RFF ¶ 1134).

52. The Amended Services Agreement became effective on January 28, 2020. (PX0012 (Altria/JLI) at 001 (Amended Services Agreement, Jan. 28, 2020); PX9028 (Altria) at 002 (Form 8-K)).

Response to Proposed Finding No. 52:

Respondents have no specific response.

53. The amended Relationship Agreement gave Altria the option to be released from the non-compete if JLI is prohibited by federal law from selling e-cigarette products in the United States for at least a year or if Altria's internal valuation of the carrying value of its investment falls below 10 percent of the transaction amount of $12.8 billion. (PX0011 (Altria/JLI) at 002-003 (Amended Relationship Agreement, Jan. 28, 2020); PX9029 (Altria) at 003 (Press Release, Jan. 30, 2020)).

Response to Proposed Finding No. 53:

Respondents have no specific response.

54. The January 2020 amendments to the transaction were made at Altria's request. (PX7011 (Valani (JLI), IHT at 175-76, 183, 195)).

Response to Proposed Finding No. 54:

Respondents have no specific response.

55. Today, the only remaining services that Altria is providing JLI are those related to regulatory support services. (*See* CCFF ¶¶ 1880-83, below).

Response to Proposed Finding No. 55:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1880-83, Respondents incorporate their responses to those Proposed Findings herein.

IV. E-CIGARETTE INDUSTRY BACKGROUND

56. An electronic cigarette ("e-cigarette") is an electronic device that aerosolizes nicotine-containing liquid ("e-liquid"). (JX0001 at 002 (¶ 10)).

Response to Proposed Finding No. 56:

Respondents have no specific response.

57. The terms "e-cigarettes" and "e-vapor" can be used interchangeably. (JX0001 at 002 (¶ 11); Farrell (NJOY) Tr. 207). E-cigarettes and e-vapor products can also be referred to as vapor products. (Farrell (NJOY) Tr. 207; (Huckabee (Reynolds) Tr. 384).

Response to Proposed Finding No. 57:

Respondents have no specific response.

58. Electronic nicotine delivery systems is abbreviated as ("ENDS"). ENDS is a term the FDA uses to refer to "all the e-vapor products." (Willard (Altria) Tr. 1361; Murillo (Altria/JLI) Tr. 2908-09) ("ENDS is an acronym that the FDA uses for I believe it's electronic nicotine delivery system, and so it's yet another word for an e-cigarette or e-vapor.")).

Response to Proposed Finding No. 58:

Respondents have no specific response.

A. THE RISE OF ELECTRONIC CIGARETTES

1. E-Cigarettes Are the Fastest Growing Tobacco Segment

59. E-cigarettes are critically important to the future of tobacco companies because they represent a fast-growing category, whereas traditional combustible cigarette volumes have declined steadily. (*See* CCFF ¶¶ 60-74, 94-117, below.)

Response to Proposed Finding No. 59:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 136, 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074 (quoting Gifford (Altria) Tr. 2842)).

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 60-74, 94-117, Respondents incorporate their responses to those Proposed Findings herein.

60. Prior to 2017, demand for traditional cigarettes had decreased at a rate of around 2 to 4 percent annually. (PX5000 at 041 (¶ 94) (Rothman Expert Report); *see* Willard (Altria) Tr. 1324-25 (Altria's top-selling combustible cigarette was declining in volume); (PX7004 (Willard (Altria), IHT at 41-45) (estimating 3 to 4 percent annual decline in the volume of cigarette sales up until 2017 or 2018, and a 5.5 percent decline in the first nine months of 2019)).

Response to Proposed Finding No. 60:

Respondents have no specific response.

61. To offset this volume decline, cigarette manufacturers have relied on regular price increases. (PX7004 (Willard (Altria), IHT at 41-42)).

Response to Proposed Finding No. 61:

Respondents have no specific response.

62. In late 2017, the e-cigarette category experienced rapid growth. (PX1316 (Altria) at 005 ("E-vapor category growth has accelerated"); PX1424 (Altria) at 003-06, 010-11; PX1229 (Altria) at 007 (*in camera*)).

Response to Proposed Finding No. 62:

Respondents have no specific response.

63. Howard Willard testified that when Altria evaluates a product market's overall attractiveness, it will look to the size of the market, the market's growth rate, and the "competitive environment" in a segment. (PX7004 (Willard (Altria), IHT at 054-55)). In the first half of 2017, Altria assessed that the closed tank e-cigarette market was highly attractive because JLI "was starting to demonstrate some strong growth . . . ." (PX7004 (Willard (Altria), IHT at 55-56); PX1286 (Altria) at 009).

Response to Proposed Finding No. 63:

The Proposed Finding is incomplete and misleading without additional context. The Proposed Finding omits the rest of Willard's testimony in which he states, "[a]nd there were some other products that were similar in format to JUUL that were doing the same thing." (PX7004 Willard (Altria) IHT at 55).

64. The rapid growth in e-cigarettes was driven almost entirely by JLI's e-cigarette product, JUUL. (Willard (Altria) Tr. 1106 ("[A]s a category, it was growing faster than you had anticipated, and specifically what was driving that was pod-based products"); Schwartz (Altria) Tr. 1866 ("The pod business was growing exponentially, driven by JUUL. And, you know, we were getting our butts kicked week in and week out."); PX1424 (Altria) at 010-011; PX1041 (Altria) at 007; PX1229 (Altria) at 004-005, 012; PX1229 (Altria) at 007 (*in camera*); PX2040 (JLI) at 002 ("[W]e are the category killer"); PX2168 (JLI) at 006; PX4029 (Altria) at 016; PX3228 (Reynolds) at 003, 006 (*in camera*); *see also* King (PMI) Tr. 2378-79).

Response to Proposed Finding No. 64:

The Proposed Finding is vague as to time. Respondents have no specific response to the notion that the rapid growth in e-cigarettes in 2017 and 2018 was driven almost entirely by JUUL.

[redacted]

65. In 2018, JLI's share grew and sales exceeded $1 billion. (PX2142 (JLI) at 006). JLI's JUUL, a pod-based product, was the best-selling e-cigarette in the U.S. (Pritzker (JLI) Tr. 728-30).

Response to Proposed Finding No. 65:

Respondents have no specific response.

66. JLI intended to "kill" the cigarette category. (PX2040 (JLI) at 002 ("JUUL is an elegant cigarette alternative that provides satisfaction, rapid nicotine delivery, and convenience at a greater value than combustibles: **we are the category killer**") (*emphasis in original*); PX9050 (JLI) at 001; PX7011 (Valani (JLI), IHT at 41-42, 52) ("the goal for JUUL is to eliminate cigarettes, and so if you don't have cigarettes, there really won't be cigarette companies. . . Q. Did JUUL see its product as a possible threat to Big Tobacco? A. It's intended as an actual threat.")).

Response to Proposed Finding No. 66:

Respondents have no specific response except to note that the Proposed Finding confirms that JLI viewed its product as competing against cigarettes in the sense that JLI's mission was to convert adult cigarette smokers to e-vapor products.

67. In 2018, the closed-system e-cigarette segment was "growing rapidly" while the decline in the traditional cigarette segment was "noticeably increasing." (PX7023 (Fernandez (Altria), Dep. at 59) ("In 2018, the e-vapor category was growing rapidly, to very rapidly."); PX7021 (Pritzker (JLI), Dep. at 49); *see also* Willard (Altria) Tr. 1146)).

Response to Proposed Finding No. 67:

Respondents have no specific response except to note that Pritzker explained that the decline in cigarettes was increasing because "Juul was . . . having a serious impact in the marketplace on the cigarette business" which is "what Juul was intended to be doing." (PX7021 Pritzker (JLI) Dep. at 48-49). Unlike Altria's products, JUUL contained the salts necessary for

nicotine satisfaction and was "very successful in converting adult smokers." (RFF ¶¶ 226-236 (quoting Gifford (Altria) Tr. 2828); *see also* RFF ¶¶ 737-47).

68. Facing rapid e-cigarette growth driven by JUUL and the accelerating decline in combustible cigarette volumes, Altria tried to develop strategic options on how to respond, including pursuing a transaction with JLI. (PX1229 (Altria) at 005, 011, 026-27; PX1229 (Altria) at 007, 010, 025) (*in camera*)).

Response to Proposed Finding No. 68:

Respondents have no specific response.

69. In an August 2018 Altria presentation on Project Tree prepared for Altria's board of directors, Altria estimated that [redacted] (PX1124 (Altria) at 019 (*in camera*); *see also* PX1979 (Altria) at 008-011 (Altria Board of Directors Strategy Update, October 2018)). [redacted] (PX1443 (Altria) at 009).

Response to Proposed Finding No. 69:

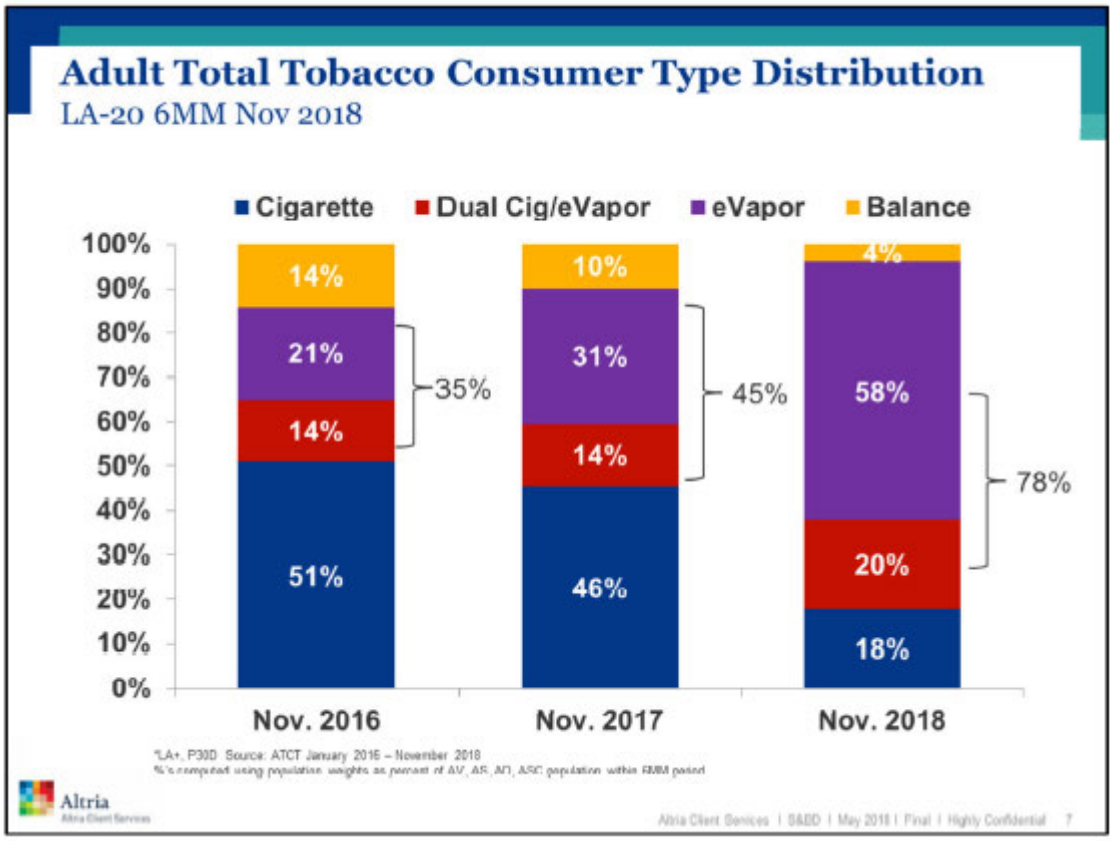
Respondents have no specific response except to note that [redacted]

70. As JLI's sales increased, cigarette sales continued to decline. (Pritzker (JLI) Tr. 782-783 ("[T]he revenues of JUUL were growing at this point something like 30 percent a month, and it was very noticeable that the -- that the rates of the -- that the revenues of cigarette companies were declining faster than ever, and it might have been reasonable to assume that that was – that there was causation there."); PX7021 (Pritzker (JLI), Dep. at 49) ("[T]he decline in cigarette revenues in the United States was increasing, noticeably increasing."); Willard (Altria) Tr. 1145-47; PX2098 (JLI) at 017; PX2168 (JLI) at 006; PX1229 (Altria) at 010 (*in camera*)). The rate of decline in traditional cigarette volumes increased to around 5-6 percent in 2019. (PX8011 at 002 (¶ 7) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 70:

Respondents have no specific response except to note that the Proposed Finding is evidence that JUUL was able to convert adult cigarette smokers. (RFF ¶¶ 219-36, 1031).

71. A January 2019 presentation prepared by Altria's Consumer & Marketplace Insights Group ("CMI") showed that tobacco users aged between the then-legal minimum to 20 years old were rapidly shifting from traditional cigarettes to e-cigarettes, with 51 percent of tobacco users in that age group using only traditional cigarettes in November 2016 and only 18 percent using only traditional cigarettes in November 2018. (PX4023 at 019) (Altria presentation entitled "E-Vapor Business Review," Jan. 8, 2019.)).



(PX4023 (Altria) at 019).

Response to Proposed Finding No. 71:

Respondents have no specific response except to note that Complaint Counsel did not present the slide pictured in the Proposed Finding to any fact witnesses during discovery or at trial

in this case, (CC Exhibit Index at 57), and therefore should not be entitled to rely on it to establish anything beyond the words on the page.

72. The decline in cigarettes "posed challenges" that Altria "would have to deal with in delivering against our earning growth objectives." (Willard (Altria) Tr. 1324; PX1172 (Altria) at 007 (Willard interview with the *Wall Street Journal* dated March 23, 2019); *see* King (PMI) Tr. 2378-79 ("The success of JUUL was causing investors to be very concerned about disruption for established cigarette companies, and we received a great number of questions from investors about what we were doing to be able to compete in the e-cigarette space.")).

Response to Proposed Finding No. 72:

Respondents have no specific response.

73. Altria viewed JLI as a threat to its core business, attributing the accelerated decline in cigarette sales to the growth of e-vapor and [redacted]. (PX1268 (Altria) at 3 (*in camera*); PX1041 (Altria) at 005-007 (*in camera*); PX1041 (Altria) at 003-004; PX9039 (Altria Earnings Call Transcript, Jan. 30, 2020) at 007; PX9030 (Altria Earnings Call Slides, Jan. 30, 2020) at 019.

Response to Proposed Finding No. 73:

Respondents have no specific response.

74. [redacted] (PX1166 (Altria) at 006 (*in camera*); *see also* PX1166 (Altria) at 007 ([redacted]), 009 [redacted] (*in camera*); PX1172 (Altria) at 007 (Willard interview with the *Wall Street Journal* dated March 23, 2019); *see* CCFF ¶¶ 94-117, 1794-802, below).

Response to Proposed Finding No. 74:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 94-117 and 1794-802, Respondents incorporate their responses to those Proposed Findings herein.

2. Closed-System E-Cigarettes

75. There are two main types of e-cigarettes: closed-system cigarettes and open tank e-cigarettes. (*See* CCFF ¶¶ 210-37, below).

Response to Proposed Finding No. 75:

The Proposed Finding is incomplete and misleading because it omits reference to cig-a-likes and pods. Cig-a-likes and pods are two distinct types of closed-system e-cigarettes that, the evidence demonstrates, should be in separate markets for purposes of the Court's antitrust analysis. (RFF ¶¶ 1387-414; RCoL ¶¶ 58-59).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 210-37, Respondents incorporate their responses to those Proposed Findings herein.

76. Closed system e-cigarettes are those with pods or cartridges that are prefilled with nicotine liquids. The pods or cartridges are not meant to be refilled by users. (Huckabee (Reynolds) Tr. 384 ("[C]losed-system terminology refers specifically to the cartridge or pod or tank which is not meant to be refillable."); Farrell (NJOY) Tr. 207, 210 ("Closed systems are comprised of a battery and a container that is referenced in a variety of ways, either called pods, cartridges, capsules, tanks, but suffice it to say there is a battery and then a container that comes prefilled with liquid, contains nicotine."); King (PMI) Tr. 2341-42; PX7035 (Masoudi (JLI), Dep. at 107); PX7022 (Begley (Altria), Dep. at 74)).

Response to Proposed Finding No. 76:

Respondents have no specific response.

77. "Closed systems are comprised of . . . a battery and then a container that comes prefilled with liquid [that] contains nicotine." (Farrell (NJOY) Tr. 207, 209-10; Schwartz (Altria) Tr. 1851-52; *see* Willard (Altria) Tr. 1352 ("[T]he cigalike product, in some respects, bears some similarity to these pod-based products in that you can unscrew the top part of that cigarette-looking thing, and I guess technically one could call the top part the pod and the bottom part the battery, but that's not the way consumers looked at it.")).

Response to Proposed Finding No. 77:

Respondents have no specific response except to note that the cited testimony confirms that cig-a-likes are distinguishable from pod-based products, and that consumers viewed them as such.

78. Closed system e-cigarettes can be sold as a kit including the battery and the prefilled pod or cartridge, or as separate components. (Farrell (NJOY) Tr. 214-15; PX7009 (Burns (JLI), IHT 022-23)).

Response to Proposed Finding No. 78:

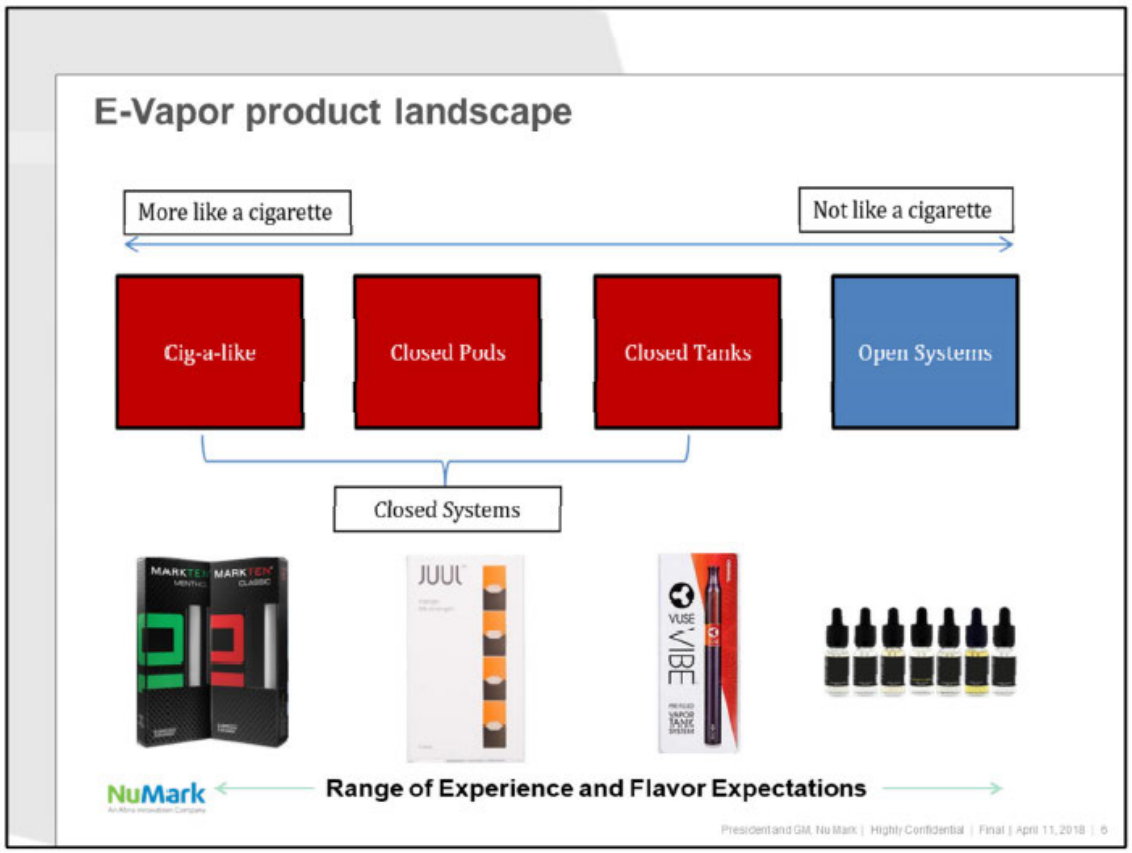
Respondents have no specific response.

79. Closed system e-cigarettes can take an array of forms or "form factors." (Huckabee (Reynolds) Tr. 384-85; Farrell (NJOY) Tr. 210-11; King (PMI) Tr. 2342; PX4014 (Altria) at 030).

Response to Proposed Finding No. 79:

Respondents have no specific response.

80. Cigalikes and pod-based products are closed system e-cigarettes. (Huckabee (Reynolds) Tr. 384-85 ("Q. Do you consider cigalike vapor products to be a closed system? A. I do. Q. And do you consider pod products to be a closed system? A. I do."); Crozier (Sheetz) Tr. 1492-93 (describing how Sheetz sells "a mix of pods and cigalike products in our e-cigarette assortment" which are closed-system); Begley (Altria) Tr. 969 ("Q. Cigalikes are closed-system e-vapor products? A. They are."); Farrell (NJOY) Tr. 206-07, 210-11; PX4029 (Altria) at 007 (*copied below*); PX2579 (JLI) at 181; PX7022 (Begley (Altria), Dep. at 74, 169)).



(PX4029 (Altria) at 007).

Response to Proposed Finding No. 80:

Respondents have no specific response except to note that, contrary to Complaint Counsel's proposed market definition, the slide pictured in the Proposed Finding expressly distinguishes between cig-a-likes and pods. (PX4029 (Altria) at 007).

81. Cigalike and pod-based e-cigarettes may or may not contain nicotine salts. (O'Hara (JLI) Tr. 504-05 ("The original myblu did not have nicotine salts."); PX4015 (Altria) at 012; PX4115 (Altria) at 010; PX3005 (ITG) at 008, 022-23 (*in camera*); Farrell (NJOY) Tr. 289-90 [redacted] (*in camera*); PX7012 (Eldridge (ITG), Dep. at 168); PX7013 (Brace (Altria), Dep. at 181-82) (describing that MarkTen Elite did not have nicotine salts but "MarkTen Bold Classic and MarkTen Bold Menthol had nicotine salts"); PX1166 (Altria) at 021 (*in camera*)).

Response to Proposed Finding No. 81:

Respondents have no specific response except to note that although MarkTen Bold (mentioned in the parenthetical in the Proposed Finding) had some nicotine salts, it did not employ the right salts formula and could not mimic the nicotine experience of a cigarette, and thus was a commercial failure. (RFF ¶¶ 638-51, 756-58).

82. Cigalike and pod-based products can have an array of nicotine strengths. (Begley (Altria) Tr. 982 (discussing PX9000 (Altria) at 017); Huckabee (Reynolds) Tr. 395; Farrell (NJOY) Tr. 228-29, 341-42 (*in camera*); Gardner (Altria) Tr. 2673-75); PX7025 (Burns (JLI), Dep. at 45-46); PX4115 (Altria) at 010; PX4014 (Altria) at 030).

Response to Proposed Finding No. 82:

Respondents have no specific response.

a) Cigalikes

83. "[A] cigalike product will be narrow and tubular in nature, similar to a traditional cigarette." (Huckabee (Reynolds) Tr. 385; Farrell (NJOY) Tr. 210-11, 213-14 (stating that a cigalike is "generally longer than it is wide, and reminds someone of a combustible cigarette."); (Gifford (Altria) Tr. 2721-22; PX4029 (Altria) at 007; PX7026 (Gardner (Altria), Dep. at 48)).

Response to Proposed Finding No. 83:

Respondents have no specific response.

84. Some cigalikes are disposable and "designed for one time use." (Farrell (NJOY) Tr. 213; Farrell (NJOY) Tr. 212-14, 285 (*in camera*), 290 (*in camera*), 361; Crozier (Sheetz) Tr. 1491; PX9101 at 004; PX7026 (Gardner (Altria), Dep. at 48-49); PX7012 (Eldridge (ITG), Dep. at 49); PX7019 (Crozier (Sheetz), Dep. at 55-56)).

Response to Proposed Finding No. 84:

Respondents have no specific response.

85. Some cigalikes have rechargeable batteries, and these cigalikes are not considered disposable. (*See* Farrell (NJOY) Tr. 212-14; PX9101 at 005; PX7026 (Gardner (Altria), Dep. at 48–49)).

Response to Proposed Finding No. 85:

Respondents have no specific response.

b) Pod-Based Products

86. "Pod products can vary. [Reynolds'] product is more rectangular in nature, larger, and not tubular or similar to a traditional cigarette." (Huckabee (Reynolds) Tr. 385; Farrell (NJOY) Tr. 210-11, 214). Pod-based products can look like a USB drive. (O'Hara (JLI) Tr. 496; Begley (Altria) Tr. 1095 (*in camera*); Farrell (NJOY) Tr. 210).

Response to Proposed Finding No. 86:

Respondents have no specific response.

87. Pod-based e-cigarettes are designed to be used with disposable pods or cartridges that come prefilled with liquid nicotine and attach to the device. (Crozier (Sheetz) Tr. 1487-89; King (PMI) Tr. 2346; Farrell (NJOY) Tr. 214-15; Gifford (Altria) Tr. 2722; PX7035 (Masoudi (JLI), Dep. at 107)).

Response to Proposed Finding No. 87:

Respondents have no specific response.

88. Pod-based e-cigarettes are also referred to as "hybrid." (Begley (Altria) Tr. 1041 (*in camera*); Gifford (Altria) Tr. 2722).

Response to Proposed Finding No. 88:

Respondents have no specific response.

3. Open-System E-Cigarettes

89. "Open system describes the ability of a consumer to refill a cartridge or tank in the device with a fluid, different than a closed system, which is a sealed cartridge or pod." (Huckabee (Reynolds) Tr. 383; Farrell (NJOY) Tr. 207-09; King (PMI) Tr. 2342; Crozier (Sheetz) Tr. 1492; PX7035 (Masoudi (JLI), Dep. at 107)).

Response to Proposed Finding No. 89:

Respondents have no specific response.

90. Open-tank e-cigarettes are "typically sold in vape shops." (Huckabee (Reynolds) Tr. 386-87; Farrell (NJOY) Tr. 208; Begley (Altria) Tr. 972-73; Gifford (Altria) Tr. 2756; PX4029 (Altria) at 008; Gifford (Altria) Tr. 2741; Crozier (Sheetz) Tr. 1494-95 ("Generally speaking, vape shops sell more of the open systems and C-stores sell more pod systems and cigalike-type products.").

Response to Proposed Finding No. 90:

Respondents have no specific response.

91. The term "open tank e-cigarettes" is interchangeable with "open system e-cigarette." (Begley (Altria) Tr. 969).

Response to Proposed Finding No. 91:

Respondents have no specific response.

B. E-CIGARETTES ARE STRATEGICALLY IMPORTANT TO TOBACCO COMPANIES

92. As cigarettes sales declined and e-cigarette sales rose, e-cigarettes became strategically important to tobacco companies, who invested for the long term. (*See* CCFF ¶¶ 59-74, above).

Response to Proposed Finding No. 92:

Respondents have no specific response except to note that [redacted]

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 59-74, Respondents incorporate their responses to those Proposed Findings herein.

1. Altria Was Committed to E-Cigarette Leadership

93. Altria is the leading tobacco company in the United States. (*See* CCFF ¶ 119, below).

Response to Proposed Finding No. 93:

To the extent the Proposed Finding is stating that Altria's subsidiary Philip Morris USA is the largest U.S. cigarette company, Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 119, Respondents incorporate their response to that Proposed Finding herein.

94. As early as 2016, Altria believed that e-cigarettes represented a "significant long-term opportunity." (PX7022 (Begley (Altria), Dep. at 92-94); PX4040 (Altria) at 018 ("Nu Mark 2016-2018 Strategic Plan") ("E-Vapor Category Represents a Significant Longer-Term Opportunity"); PX7023 (Fernandez (Altria), Dep. at 181-82)). In 2016, there were already more adult vapers than adult dippers or adult large mass cigar smokers. (PX4040 (Altria) at 018). Jody Begley, Altria's current EVP and COO and former President and General Manager of Nu Mark, testified that Altria saw a long-term opportunity in the e-cigarette market because "there is a significant consumer base that are interested in [e-cigarette] products." (PX7022 (Begley (Altria), Dep. at 92-94)).

Response to Proposed Finding No. 94:

The Proposed Finding is incomplete and misleading without additional context. The first wave of adult vapers were primarily dual users, and many tried and rejected vapor products. (PX1135 (Altria) at 035). [redacted] Nicotine satisfaction is the number one requirement for adult smokers, (RFF ¶ 704), and Altria recognized that "cig-a-like products were not going to be of sufficiently deep and broad appeal . . . to convert large numbers of [smokers]," (PX7007 Murillo (Altria/JLI) IHT at 117). "[T]he whole category changed when JUUL introduced their product to one that was really pod-based and delivered high nicotine satisfaction, and [Altria] had nothing in that space." (PX7014 Baculis (Altria) Dep. at 125).

95. [redacted] (Begley (Altria) Tr. 1019-20) (*in camera*)).

Response to Proposed Finding No. 95:

Respondents have no specific response.

96. Howard Willard testified that while he was CEO and COO of Altria, one of Altria's "strategic initiatives" was to attain a leading position in the U.S. e-vapor market. The decline in traditional cigarettes and growth in e-cigarettes "was one of the elements that made focusing on the e-vapor category attractive." (Willard (Altria) Tr. 1146-47; *see also* PX1172 (Altria) at 007 (Willard interview with the *Wall Street Journal* dated March 23, 2019); PX1268 (Altria) at 003 (*in camera*); PX7006 (Crosthwaite (Altria/JLI), IHT at 78-79) (*in camera*)).

Response to Proposed Finding No. 96:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 136, 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074 (quoting Gifford (Altria) Tr. 2842)).

97. Willard testified that Altria wanted to achieve leadership in the e-vapor category and "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341).

Response to Proposed Finding No. 97:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 136, 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074 (quoting Gifford (Altria) Tr. 2842)).

98. Begley testified that in November 2017, he told investors Altria's long term goal was to the lead the U.S. e-vapor category and that Altria "fully expected" to achieve its long-term goals. (Begley (Altria) Tr. 978-79; PX1229 (Altria) at 007 (*in camera*); PX4014 (Altria) at 029; *see also* Begley (Altria) Tr. 965, 1021-22 (*in camera*); PX4042 (Altria) at 006 [redacted] (*in camera*)).

Response to Proposed Finding No. 98:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement that Altria expected to achieve its long-term goals, Nu Mark had not even launched its pod-based product, Elite, and thus did not yet know how that product would perform on the market. (Schwartz (Altria) Tr. 1871). Knowing whether Elite could be successful is a critical piece of information in assessing Nu Mark's portfolio, as pod-based products came to dominate the market by 2018 and were necessary for any company seeking to compete. (RFF ¶¶ 563-65, 1325). Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-77). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and to try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have

made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (RFF ¶¶ 898-916, 1604-11).

99. Begley testified that at the time of his Investor Day remarks in November 2017, he believed that Nu Mark had a portfolio of products that could potentially compete into the future. (Begley (Altria) Tr. 979 ("Q. And so you did, in fact, believe at the time that NuMark had a portfolio of products that could potentially compete into the future? A. We did, but, again, it was early days for a number of the product formats."))

Response to Proposed Finding No. 99:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, Nu Mark had not even launched its pod-based product, Elite. (Schwartz (Altria) Tr. 1871). Instead, Nu Mark was competing at the time only in cig-a-likes, which the undisputed evidence shows were a declining category that were being overtaken by pod-based products. (RFF ¶¶ 276-300, 390, 1324-29). Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 1083-84). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and to try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining

that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (RFF ¶¶ 898-916, 1604-11).

100. In November 2017, Altria's former Chairman and CEO, Marty Barrington, told investors, "[s]o we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 100:

Respondents have no specific response except to note that, as Willard explained in the context of discussing the November 2017 Investor Day presentation referenced in the Proposed Finding, while Altria aspired to become the leader in e-vapor, it had not achieved that goal as of November 2017; it was "a distant player." (Willard (Altria) Tr. 1341; s*ee also* PX7013 Brace (Altria) Dep. at 174-75 (agreeing that "[m]any" of Nu Mark's "aspirations" failed to come true)). Respondents further note that the Investor Day presentation explained that Altria could pursue leadership in e-vapor in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 136, 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074 (quoting Gifford (Altria) Tr. 2842)).

101. Begley testified that Nu Mark's long-term goal of leading the U.S. e-vapor category was set before Begley became President and General Manager of Nu Mark. Begley testified he believed Altria's board was aligned with Nu Mark's long-term goal. (Begley (Altria) Tr. 966-67.)

Response to Proposed Finding No. 101:

Respondents have no specific response.

102. Begley testified that Nu Mark wanted to build a portfolio of e-vapor products because it didn't know which product platforms were going to be successful or how the market was going to evolve. As a result, Nu Mark thought it was important to place as many bets as it could in the closed-system market. (Begley (Altria) Tr. 967-69 (discussing (PX4040

(Altria) at 007 ("Nu Mark 2016-2018 Strategic Plan")); Begley (Altria) Tr. 979-80 (discussing PX4014 (Altria) at 030)).

Response to Proposed Finding No. 102:

Respondents have no specific response except to note that, notwithstanding this viewpoint, Nu Mark did not even launch a pod-based product until February 2018. (Schwartz (Altria) Tr. 1871). Nu Mark did not have a pod-based product with nicotine salts—the format that was overwhelmingly preferred by consumers and was driving the growth in e-vapor category. (RFF ¶¶ 226-36, 341-44, 398-400, 1503-04, 1513). Instead, as of November 2017, Nu Mark was competing at the time only in cig-a-likes, which the undisputed evidence shows were a declining category that were being overtaken by pod-based products. (RFF ¶¶ 276-300, 390, 1324-29).

103. Although he acknowledged that Altria had not achieved its goals, Willard testified that in February 2018, it was Altria's goal to achieve sustained long-term leadership in the e-vapor category. (Willard (Altria) Tr. 1151, 1155-56; *see also* PX9045 at 007 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018) ("Of course, the e-vapor category continues to evolve, and leadership has changed hands numerous times over the past seven years. 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 at 006 ("Nu Mark's goal is to lead the U.S. e-vapor category with a portfolio . . .")).

Response to Proposed Finding No. 103:

Respondents have no specific response.

104. Willard testified that in February 2018, it was Altria's strategy to use part of the income generated from its traditional business in innovation and harm reduction, which included investments in e-cigarettes. (Willard (Altria) Tr. 1151, 1154; *see also* PX9045 at 005 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 104:

Respondents have no specific response.

105. In February 2018, Marty Barrington, Altria's CEO, said in his prepared remarks for the 2018 Consumer Analyst Group of New York (CAGNY) Conference, "We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products. The range of tobacco

products available in the U.S. is diverse when compared to many international markets, and different product platforms appeal to different U.S. adult tobacco consumers. That's why we're taking a portfolio approach, focusing on the three most promising platforms for U.S. adult tobacco consumers: smokeless tobacco and oral nicotine-containing products, e-vapor and heated tobacco." (PX9045 (Altria) at 002).

Response to Proposed Finding No. 105:

Respondents have no specific response.

106. In May 2018, Nu Mark remained interested in building a portfolio of e-vapor products. (Begley (Altria) Tr. 969; *see* Willard (Altria) Tr. 1371-72).

Response to Proposed Finding No. 106:

The Proposed Finding is incomplete and misleading without additional context. In the portion of Begley's testimony just before that cited here, Begley provided context for this answer:

> *Q. When you left NuMark at the end of May 2018, the company was still interested in building a portfolio of e-vapor products, correct?*
>
> *A. Well, we were, but there appeared to be an emerging product that was leading in the space that had the ability to convert adult smokers, and that was JUUL.*
>
> Q. Nonetheless, when you left NuMark at the end of May 2018, NuMark remained interested in building a portfolio of e-vapor products, correct?
>
> A. That was the strategy at the time.

(Begley (Altria) Tr. 968-969 (emphasis added to Complaint Counsel's omission)).

Moreover, the fact that Nu Mark was interested in building a portfolio of e-vapor products has no bearing on the company's likelihood of achieving that goal. Ultimately, Altria was not able to develop or acquire a single e-vapor product that appealed to adult smokers, nevermind a portfolio. (RFF ¶¶ 596-747, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (RFF ¶¶ 76, 81, 596-613, 743-47)

107. In December 2018, Willard was quoted in an Altria press release as saying that Altria "remain[s] committed to being the leader in providing adult smokers innovative alternative products that reduce risk, including e-vapor." (PX9080 at 001). As part of the transaction

with JLI, Altria committed to participate in the e-vapor business exclusively through JLI. (PX1181 (Altria) at 067 (E-Vapor Update, Dec. 2018) ("[S]elected transaction terms […] Altria commits to conduct e-vapor operations exclusively through [JLI]"); PX1265 (Altria) at 002 (Email from Murray Garnick, Dec. 10, 2018) ("[O]ur participation in e[-]vapor area will be exclusively through [JLI]."); Pritzker (JLI) Tr. 912 ("Q. During the course of negotiations with Altria, you told Mr. Willard and Mr. Gifford that, post-transaction, Altria would need to participate in e-vapor exclusively through JLI, correct? A. That is correct . . . .")).

Response to Proposed Finding No. 107:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the press release quoted in the Proposed Finding, Altria's commitment manifested itself in the Growth Teams that had been announced on October 5, 2018. (RFF ¶¶ 962-70). Altria launched Growth Teams to start from scratch and to try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (*See* RFF ¶¶ 898-916, 1604-11). Further, the noncompete, which is referenced in the second sentence of the Proposed Finding, expressly provides that it is operative only while the Services Agreement is in effect. (RFF ¶ 1128; PX1276 (JLI) at 025 § 3.1). To the extent the Proposed Finding is intended to imply that Altria discontinued its e-cigarette business as a result of an agreement with JLI and/or as a pre-condition of the transaction, that implication is contradicted by the evidence. The evidence demonstrates that there was no agreement to withdraw Altria's e-vapor products as a precondition to the

transaction and that Altria instead decided to discontinue those products for independent reasons. (RFF ¶¶ 938-51, 1074-91).

108. In a 2019 interview with the *Wall Street Journal*, Willard acknowledged the critical importance of Altria's participation in e-vapor in view of changing market dynamics: "At a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don't invest in the new areas you potentially put your ability to deliver that financial result at risk." (PX1172 (Altria) at 007).

Response to Proposed Finding No. 108:

Respondents have no specific response except to note that the cited source also observes that "Altria's MarkTen e-cigarettes, launched nationally in 2014, had a look, shape and feel that mimicked a traditional cigarette, based on Altria's belief that smokers were looking to switch to something that felt familiar. Ultimately sales didn't support that idea." (PX1172 (Altria) at 009). By contrast, sales for JUUL, which "looked nothing like cigarettes," "surged." (PX1172 (Altria) at 009).

2. Other Tobacco Companies Committed to Significant Long-Term Investments in E-Cigarettes

109. [redacted] (*See* CCFF ¶¶ 110-14, 163-82, below). Philip Morris International ("PMI"), another tobacco company, has similarly [redacted] invested in e-cigarettes. (*See* CCFF ¶¶ 115-17, below). [redacted] (*See* CCFF ¶¶ 110-17, below). All of the tobacco companies, except for Altria, continue to invest and compete in the e-vapor segment today. (*See* CCFF ¶¶ 132, 169, 178, 185, below).

Response to Proposed Finding No. 109:

The Proposed Finding is incomplete and misleading without additional context. Although Reynolds and ITG continue to invest in e-cigarettes notwithstanding losses, both companies are currently on the market with the format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 243(d), 258(a), 1284-86, 1299-1307, 1315-37). Nu Mark did not have such a product on the market. (RFF ¶¶ 478, 571, 627-28, 638-51).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 110-17, 132, 163-82, and 185, Respondents incorporate their responses to those Proposed Findings herein.

110. [redacted]. (Huckabee (Reynolds) Tr. 406-07 (*in camera*)).

Response to Proposed Finding No. 110:

The Proposed Finding is incomplete and misleading without additional context. Although Reynolds continues to invest in e-cigarettes notwithstanding losses, it is currently on the market with the format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 243(d), 246, 1284-86, 1299-307, 1315-37). And Reynolds's consumer testing has indicated that "Alto rates significantly higher than any other nicotine salt Pod Mod product on a number of key consumer attributes and purchase intent." (RX1456 (JLI) at 001; RFF ¶ 1300).

111. [redacted]. (Huckabee (Reynolds) Tr. 406-07, 416-18) (*in camera*); PX8009 at 017 (¶ 50) (Gardner (Reynolds), Decl.) (*in camera*); *see also* King (PMI) Tr. 2379)).

Response to Proposed Finding No. 111:

The Proposed Finding is incomplete and misleading without additional context. Although Reynolds continues to invest in e-cigarettes notwithstanding losses, it is currently on the market with the format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 243(d), 246, 1284-86, 1299-307, 1315-37). And Reynolds's consumer testing has indicated that "Alto rates significantly higher than any other nicotine salt Pod Mod product on a number of key consumer attributes and purchase intent." (RX1456 (JLI) at 001; RFF ¶ 1300).

112. [redacted]

[redacted] (PX8011 at 007-08 (¶ 35) (Eldridge (ITG), Decl.)) (*in camera*)).

Response to Proposed Finding No. 112:

The Proposed Finding is incomplete and misleading without additional context. Although ITG continues to invest in e-cigarettes notwithstanding losses, it is currently on the market with the format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 258(a), 1315-37).

113. Eldridge testified that ITG remains committed to competing in e-vapor due to "an opportunity for growth." (PX7012 (Eldridge (ITG), Dep. at 188-89)).

Response to Proposed Finding No. 113:

Respondents have no specific response except to note that ITG currently has a pod-based product on the market with nicotine salts. (RFF ¶¶ 258(a), 1315-23).

114. [redacted] (PX3071 (ITG) at 002-05 [redacted] (*in camera*)).

Response to Proposed Finding No. 114:

The Proposed Finding is incomplete and misleading without additional context. Although ITG continues to invest in e-cigarettes notwithstanding losses, it is currently on the market with the format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 258(a), 1315-37).

115. Martin King, CEO of PMI America, testified that PMI started to develop e-cigarettes in 2008, with investments in research and development and personnel. PMI believes it is important to be able to participate in the e-cigarette business as a tobacco company. (King (PMI) Tr. 2371-72 ("There are obviously a lot of people that have been able to switch to e-cigarettes, so it's a very viable, very important segment, and we've always felt it was very important that we be able to participate in that segment. We've put a great deal of time and effort into having the very best possible products to place there."), 2374-78 (referring to 2008), 2379-80 ("[T]he investors and others were adamant that companies like PMI and Altria address the e-cigarette space and have some way to compete and make sure that they're not being disrupted, and it would have been, I think, unusual for a major tobacco

company at the time not to have some initiative or way to deal with the growth of e-cigarettes.")).

Response to Proposed Finding No. 115:

Respondents have no specific response.

116. [redacted] (King (PMI) Tr. 2382-83) (*in camera*).

Response to Proposed Finding No. 116:

Respondents have no specific response except to note [redacted]. (RFF ¶¶ 1619, [redacted]).

117. [redacted] (King (PMI) Tr. 2383) (*in camera*).

Response to Proposed Finding No. 117:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

C. THE MARKET FOR CLOSED-SYSTEM E-CIGARETTES IN THE UNITED STATES IS DOMINATED BY A SMALL GROUP OF COMPETITORS

118. Prior to December 2018, closed-system U.S. industry participants viewed their major competitors as JUUL, Reynolds, Altria, Logic, NJOY, and Blu. (Farrell (NJOY) Tr. 226-27; Huckabee (Reynolds) Tr. 39092, 408 (*in camera*); PX7012 (Eldridge (ITG), Dep. at 99-100, 170-71, 194); *see also* PX1229 (Altria) at 012; PX2061 (JLI) at 032).

Response to Proposed Finding No. 118:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context to the extent that it suggests that Altria's subsidiary Nu Mark was a significant competitor in the e-vapor industry prior to December 2018. Nu Mark did not have a pod-based product with nicotine salts—the format that was overwhelmingly preferred by consumers and was driving the growth in e-vapor category. (RFF ¶ 276-300, 390, 1324-29). Even after Elite entered the marketplace, Nu Mark's market share was declining precipitously: by September 2018, Nu Mark's unit share had declined to 7.5 percent, (RFF ¶ 1441), and by November 2018, Nu Mark's dollar share had declined to only 4.7 percent, (RFF ¶ 1443). This was because Nu Mark's market share was heavily weighted toward declining cig-a-like products. (RFF ¶¶ 1436-43).

1. Altria

119. Altria is the leader for tobacco products in the U.S. (Huckabee (Reynolds) Tr. 372; PX2010 (JLI) at 001 (quoting Kevin Burns, JLI CEO, discussing JLI's affiliation and partnership with "the largest tobacco company in the U.S."); PX9017 (Altria Group, Inc. Form 10-K) at 005 ("PM USA is the largest cigarette company in the United States," Marlboro "has been the largest-selling cigarette brand in the United States for over 40 years," and "USSTC is the leading producer and marketer of MST"); PX8011 at 006 (¶ 28) (Eldridge (ITG), Decl.) ("Given Altria's resources as the largest tobacco company in the U.S . . . .").

Response to Proposed Finding No. 119:

Respondents agree that Altria's subsidiary Philip Morris USA is the largest U.S. cigarette company. To the extent the Proposed Finding is intended to imply that Altria's size would translate into success as an e-vapor company, the Proposed Finding is incorrect. Altria's history shows that it has been unsuccessful in internally developing reduced-risk alternatives to combustible cigarettes, and additionally was unsuccessful, before the transaction with JLI in December 2018, in finding a viable e-cigarette product or company to purchase or invest in. (RFF ¶¶ 174-202, 301-17, 324-31, 596-747).

120. Altria is a holding company. (PX9017 (Altria Group, Inc. Form 10-K) at 004).

Response to Proposed Finding No. 120:

Respondents have no specific response.

121. Altria wholly owns Philip Morris USA Inc. ("PM USA"), which "is engaged in the manufacture and sale of cigarettes in the United States." (PX9017 (Altria Group, Inc. Form 10-K) at 004).

Response to Proposed Finding No. 121:

Respondents have no specific response.

122. Altria wholly owns U.S. Smokeless Tobacco Company LLC (USSTC). "USSTC is the leading producer and marketer of MST [most smokeless tobacco] products. The smokeless products segment includes the premium brands, *Copenhagen* and *Skoal*, and value brands, *Red Seal* and *Husky*. Substantially all of the smokeless tobacco products are manufactured and sold to customers in the United States." (PX9017 (Altria Group, Inc. Form 10-K) at 004-05).

Response to Proposed Finding No. 122:

Respondents have no specific response.

123. Howard Willard testified that Altria's strategy was to participate in all of the major tobacco categories during his tenure as chairman and CEO. (Willard (Altria) Tr. 1145).

Response to Proposed Finding No. 123:

Respondents have no specific response.

124. Altria never manufactured or sold open tank e-cigarettes. (Garnick (Altria) Tr. 1693; PX7014 (Baculis (Altria), Dep. at 79-80); PX4029 (Altria) at 021; *see also* Crozier (Sheetz) Tr. 1494).

Response to Proposed Finding No. 124:

Respondents have no specific response.

a) Nu Mark

125. In 2012, Altria established its Nu Mark operating company with the goal of developing and marketing innovative tobacco products, including e-cigarette products, for adult tobacco consumers. (JX0001 at 002 (¶ 12)).

Response to Proposed Finding No. 125:

Respondents have no specific response.

126. Nu Mark was an Altria operating company responsible for competing in the e-cigarette space in the United States. (Begley (Altria) Tr. 961-62 ("Q. NuMark was responsible for competing in the e-vapor space in the United States? A. That's correct."); PX9017 (Altria Group, Inc. Form 10-K) at 005 ("Nu Mark participated in the e-vapor category and developed and commercialized other innovative tobacco products.")).

Response to Proposed Finding No. 126:

Respondents have no specific response.

127. Nu Mark was Altria's innovation company that focused primarily on e-vapor products. (Quigley (Altria) Tr. 1937-38).

Response to Proposed Finding No. 127:

Respondents have no specific response.

128. "In 2018 and 2017, Altria's subsidiaries purchased certain intellectual property related to innovative tobacco products." (PX9017 (Altria Group, Inc. Form 10-K) at 005).

Response to Proposed Finding No. 128:

Respondents have no specific response.

129. Until October 25, 2018, Altria, through Nu Mark, sold the MarkTen Elite and Apex pod-based products; until December 2018, Nu Mark sold the MarkTen cigalikes, and Green Smoke cigalikes. (PX9114 (Altria) at 002; PX4029 (Altria) at 021; PX0015 (Altria) at 007-09 (Altria Response to Request for Additional Information and Documentary Materials dated Oct. 8, 2019) (*in camera*). Cigalikes sold under the MarkTen brand included MarkTen Bold, MarkTen XL, and MarkTen. (O'Hara (JLI) Tr. 506; PX9114 (Altria) at 009, 012). MarkTen XL was a larger version of MarkTen (PX7034 (Mountjoy (Altria), Dep. at 57)), and MarkTen XL had several varieties, including MarkTen Bold. (PX7015 (Gogova (Altria), Dep. at 30)).

Response to Proposed Finding No. 129:

Respondents have no specific response except to note that Apex was available only through e-commerce and Green Smoke was available primarily through e-commerce. (RFF ¶ 1518; PX9080 (Altria) at 001).

130. In June 2018, Howard Willard publicly said that the "primary products that we [Altria] have in distribution at retail in large numbers of stores are the original MarkTen, the MarkTen Bold product with nicotine salts, and then MarkTen Elite." (PX9047 (Altria) at 009 (Altria's Q2 2018 Earnings Call)).

Response to Proposed Finding No. 130:

Respondents have no specific response except to note that the MarkTen Bold products mentioned in the parenthetical in the Proposed Finding did not have the correct formula for nicotine salts and were in the declining cig-a-like format. (RFF ¶¶ 638-51, 1324-39, 1509).

131. Altria stopped selling MarkTen Elite and Apex after Altria announced it would remove the products from the market on October 25, 2018. (PX9114 (Altria) at 002; Willard (Altria) Tr. 1239-45, 1274, 1277).

Response to Proposed Finding No. 131:

Respondents have no specific response.

132. "In December 2018, Altria announced the decision to refocus its innovative product efforts, which included Nu Mark's discontinuation of production and distribution of all e-vapor products." (PX9017 (Altria) at 004 (Form 10-K, Feb. 2019)). Altria stopped selling all MarkTen cigalikes and Green Smoke cigalikes after it announced on December 7, 2018 that it would discontinue production and distribution of those products. (PX9080 (Altria) at 001; Willard (Altria) Tr. 1274, 1277).

Response to Proposed Finding No. 132:

Respondents have no specific response.

133. [redacted] (PX5000 at 043 (¶ 89) (Rothman Expert Report) (*in camera*); PX7048 (Rothman, Trial Dep. at 25-26)).

Response to Proposed Finding No. 133:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman's choice to use an average share from October 2017 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

(1) MarkTen

134. In 2013, Nu Mark launched the MarkTen cigalike. (JX0001 at 002 (¶ 13)).

Response to Proposed Finding No. 134:

Respondents have no specific response.

135. MarkTen Bold was a cigalike product that had higher levels of nicotine and included nicotine salt. (Begley (Altria) Tr. 980-81; PX9047 at 009 (Altria's Q2 2018 Earnings Call)). Nicotine salts mask the harshness of products with higher levels of nicotine in them. They allow more nicotine to be absorbed into the lungs. (Begley (Altria) Tr. 981).

Response to Proposed Finding No. 135:

Respondents have no specific response except to note that although MarkTen Bold had some nicotine salts, it did not employ the right salts formula and could not mimic the nicotine experience of a cigarette. (RFF ¶¶ 638-51). Nor could the MarkTen Bold e-liquid be used with a different device format. (Gifford (Altria) Tr. 2796-97 ("[B]ecause the market was . . . quasi frozen by the FDA, you had to have the have the type of product that you had had to be in the form that you had in the marketplace. So you couldn't take liquid from something else and put it into, [for] example, MarkTen Elite.")).

136. [redacted]. (Begley (Altria) Tr. 1022 (*in camera*); PX4042 at 006 [redacted] (*in camera*); PX4248 (Altria) at 004; *see* PX1098 (Altria) at 012-13).

Response to Proposed Finding No. 136:

Respondents have no specific response except to note that Nu Mark's market share was heavily weighted toward declining cig-a-like products. (RFF ¶¶ 1436-43, 1459-63). As a result, after 2017 Nu Mark's market share declined precipitously: By September 2018, Nu Mark's unit share had declined to 7.5 percent, (RFF ¶ 1441), and by November 2018, Nu Mark's dollar share had declined to only 4.7 percent, (RFF ¶ 1443).

137. In mid-2017, MarkTen held second place by market share in the multi-outlet convenience channel (PX1280 (Altria) at 010), which is [redacted] (Begley (Altria) Tr. 1122-23 (*in camera*)); PX4029 (Altria) at 008). [redacted] (Begley

(Altria) Tr. 1023 (*in camera*); PX4042 at 006, 018 [redacted] (*in camera*)).

Response to Proposed Finding No. 137:

Respondents have no specific response except to note that Nu Mark's market share then declined precipitously: By September 2018, Nu Mark's unit share had declined to 7.5 percent, (RFF ¶ 1441), and by November 2018, Nu Mark's dollar share had declined to only 4.7 percent, (RFF ¶ 1443).

138. In February 2018, Nu Mark launched MarkTen Elite, a pod-based closed system e-cigarette. (Jupe (Altria) Tr. 2244-45; Schwartz (Altria) Tr. 1871; Willard (Altria) Tr. 1308 (*in camera*), 1354; Begley (Altria) Tr. 984, 990, 1059 (*in camera*)). Altria acquired the right to MarkTen Elite in late 2017 from a Chinese manufacturer, Smoore. (Begley (Altria) Tr. 984-85; Jupe (Altria) Tr. 2244-45; Schwartz (Altria) Tr. 1862-64; Murillo (Altria/JLI) Tr. 2941-42; PX2084 (JLI) at 020). Nu Mark also entered into a partnership with a U.S. e-vapor company (Avail) that made e-liquids for Elite. (Begley (Altria) Tr. 984-85; PX9045 at 006 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 138:

Respondents have no specific response.

139. Elite's launch was accelerated. (Begley (Altria) Tr. 989-91) ("Q. . . . NuMark commercialized Elite within four months of executing the exclusivity agreement through which it acquired its rights, correct? A. I believe that's the appropriate timing. It was quick. Q. You don't recall ever launching a product so quickly, correct, Mr. Begley? A. I don't. Q. Mr. Begley, you asked your team at NuMark how quickly it could bring Elite to market, correct? A. I did. Q. And Elite's launch was accelerated by a few months as compared to the company's initial launch plans, correct? A. That's correct.").

Response to Proposed Finding No. 139:

Respondents have no specific response except to note that the speed at which Nu Mark launched Elite reflected the company's assessment that it needed a pod-based product to be competitive. (RFF ¶¶ 276-300, 368-72).

Moreover, it did not take long after Elite's accelerated launch for Altria to realize that the product was a flop. By the summer of 2018, AGDC had concluded based on the product's sales that Elite "wasn't working. We were not winning in this space." (Myers (Altria) Tr. 3337; RFF

¶ 458). Even with an accelerated launch and significant investments in shelf space, promotions, and expanded distribution, Elite was not a success. (Gifford (Altria) Tr. 2717 ("[E]ven with the investment behind it -- [we just weren't able to] get the consumer to uptake it to any great extent."); *see also* RFF ¶¶ 431-59).

140. Elite was sold on the market by another company before the August 8, 2016 Deeming Rule. (Begley (Altria) Tr. 984; Garnick (Altria) Tr. 1690; Jupe (Altria) Tr. 2134).

Response to Proposed Finding No. 140:

Respondents have no specific response.

141. Jody Begley, Nu Mark's former President and General Manager testified that Nu Mark was interested in acquiring Elite because the company had started to see pod-based products gain popularity in the marketplace. Nu Mark thought that it was important in terms of placing multiple bets to participate in the pod segment. (Begley (Altria) Tr. 985) ("Q. NuMark was interested in acquiring Elite because the company had started to see pod-based products gain in popularity in the marketplace? A. That's correct. Q. NuMark thought it was important in terms of placing the multiple bets that we've spoken of to participate in the pod segment, correct? A. We did. We saw fairly rapid growth of the pod segment and we thought it was important to compete.").

Response to Proposed Finding No. 141:

Respondents have no specific response.

142. Begley testified that Nu Mark "was hopeful" Elite would disrupt JUUL's growth when Altria launched Elite. (Begley (Altria) Tr. 985, 990-91). Nu Mark took into account the price of JUUL in setting Elite's price. (Begley (Altria) Tr. 991). A January 2018 JLI slide deck titled "Major Next-Gen Competitor Products," prepared for JLI's co-founder for the purpose of providing "an overview of the next gen competitive landscape," included a slide on MarkTen Elite. (PX2081 (JLI) at 002, 008; O'Hara (JLI) Tr. 551-53).

Response to Proposed Finding No. 142:

The Proposed Finding is incomplete and misleading without additional context. In particular, as of the January 2018 slide deck cited in the Proposed Finding, Nu Mark had not even launched its pod-based product, Elite, and thus no one—neither Altria nor JLI—knew how that product would perform on the market. (Schwartz (Altria) Tr. 1871). The evidence shows that when Elite was launched, JLI and its employees, including O'Hara (whose testimony is cited in

the Proposed Finding), immediately recognized that the product would be a failure because among other reasons it did not provide a satisfying nicotine experience necessary to convert adult smokers. (RFF ¶¶ 478-80). For example, the day Elite was launched, O'Hara wrote: "Net takeaway is that we believe that the MarkTen Elite is a meaningful positive for us relative to expectations based on (1) low nicotine content pods, (2) no salts, and (3) lack of marketing roll-out." (PX2086 (JLI) at 001). O'Hara explained at trial that based on these shortcomings, from Elite's inception, he "did not expect that [it] would be a particularly strong competitor," "especially [because of] the first two points"—it had "low nicotine content" and "no salts." (O'Hara (JLI) Tr. 632).

(2) Apex

143. Apex was a closed-system pod-based product that was developed by PMI. (Willard (Altria) Tr. 1157-58, 1240; Schwartz (Altria) Tr. 1916; PX9114 (Altria) at 002)). Altria had the rights to commercialize Apex in the United States pursuant to a research, development, and distribution agreement between Altria and PMI. (Begley (Altria) Tr. 983-84; Jupe (Altria) Tr. 2133); King (PMI) Tr. 2545).

Response to Proposed Finding No. 143:

Respondents have no specific response except to note that even PMI did not intend for Apex to be "anything other than a limited test," (King (PMI) Tr. 2547); the product lacked nicotine salts, was "big" and "bulky,"(PX7023 Fernandez (Altria) Dep. at 197), and PMI understood from the outset that it would need to be "quite a bit smaller" to be a commercially viable product, (King (PMI) Tr. 2547; RFF ¶ 1523; *see also* King (PMI) Tr. 2535 ("Q. And you knew from the very beginning that the version [of mesh] you placed on that test market would be difficult for consumers to accept, right? A. Well, we knew the form factor, in particular, was something we needed to work on. It was too large.")).

144. Around August 2018, Altria was selling Apex in e-commerce. (Murillo (Altria/JLI) Tr. 3053; King (PMI) Tr. 2535; Begley (Altria) Tr. 984; PX2022-002). Apex was introduced in the U.S. prior to the 2016 Deeming Rule. (PX7020 (King (PMI), Dep. at 228)).

Response to Proposed Finding No. 144:

Respondents have no specific response except to note that Apex was commercialized "in a very limited e-commerce distribution." (PX7017 Magness (Altria) Dep. at 288; *see also* RFF ¶ 1518). It was only available for online purchase in ten states. (PX1072 (Altria) at 004).

145. Altria had a strategic partnership with PMI focused on next-generation nicotine products. The partnership included a Joint Research, Development and Technology Sharing Agreement ("JRDTA") pursuant to which Altria and PMI would "collaborate to develop the next generation of e-vapor products for commercialization in the United States by Altria and in markets outside the United States by PMI." (PX1484 (Altria) at 003; *see also* RX0873 (Altria/PMI) [redacted] (*in camera*); Schwartz (Altria) Tr. 1916; Begley (Altria) Tr. 983-84; King (PMI) Tr. 2357-60, 2407; PX4480 (Altria) at 001-02).

Response to Proposed Finding No. 145:

The Proposed Finding is incomplete and misleading without additional context. [redacted].

146. After Altria entered into the transaction with JLI in December 2018, [redacted] King (PMI) Tr. 2389 (*in camera*); PX3106 (PMI) (*in camera*) [redacted]).

Response to Proposed Finding No. 146:

The Proposed Finding about the status of the JRDTA after the December 2018 transaction is irrelevant to Apex because Altria announced that it was withdrawing Apex from e-commerce on October 25, 2018, nearly two months before the transaction. (RFF ¶¶ 943, 1002; PX1071 (Altria) at 003).

[redacted]

Third, there is no evidence that the JRDTA was resulting in any usable joint development work. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at

244; *see also* [redacted]). Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

Ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that while PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cigalike in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). As King himself said, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (PX7020 King (PMI) Tr. 209).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35, 2547). The product had a "large," "baton"-like shape that was seen as

too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011), and it had nicotine satisfaction deficits that were so disabling that "PMI never intended for it to be successful on its own," (King (PMI) Tr. 2547; RFF ¶¶ 1522-23). [redacted]. And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would require FDA approval before it could be launched, [redacted].

147. PMI sells a closed-system e-cigarette outside of the U.S. called VEEV, which "is a pod-based system that uses a proprietary technology to create the aerosol." PMI calls the technology "MESH" and the product has been launched in "a number of countries." (King (PMI) Tr. 2344-45, 2350-51). VEEV is not currently sold in the U.S. (King (PMI) Tr. 2354-55).

Response to Proposed Finding No. 147:

The Proposed Finding is not relevant to Apex, which is a different product. (King (PMI) Tr. 2536; PX3112 (Altria) at 001).

The Proposed Finding is also incomplete and misleading without additional context. VEEV was not commercialized in any country until the end of 2020, two years after the transaction. (King (PMI) Tr. 2355). To date, VEEV has only been launched in a handful of foreign countries. (King (PMI) Tr. 2354-55).

[redacted]

[redacted]

148. [redacted]. (King (PMI) Tr. 2432-33) (*in camera*). [redacted] (King (PMI) Tr. 2432-33) (*in camera*); *see also* Jupe (Altria) Tr. 2174). [redacted] (PX3009 (PMI) at 034-37 (*in camera*) [redacted]).

Response to Proposed Finding No. 148:

The Proposed Finding is incomplete and misleading without additional context. Altria gained access to the first iteration of PMI's mesh technology and launched that product under the brand name Apex. (RFF ¶¶ 1614-16). But Apex was a very different product from VEEV. (King (PMI) Tr. 2536; PX3112 (Altria) at 001). Apex had [redacted], and was "never intended to be successful on its own" or to "be anything other than a limited test," (King (PMI) Tr. 2547).

149. PMI has not considered exiting e-cigarettes because of Apex's performance. In fact, according to Martin King, the performance of Apex "reassured us that we had something reliable and that we needed to continue with finishing the improvements and get it on the market as soon as possible." (King (PMI) Tr. 2547).

Response to Proposed Finding No. 149:

The Proposed Finding is incomplete and misleading without additional context. Just as Altria chose to withdraw products that were not commercially successful and faced regulatory challenges, (RFF ¶¶ 940-43, 1001-02, 1074-92), [redacted].

[redacted]

[redacted]; *see also* RFF ¶¶ 66-70, 370).

The follow-on product to Apex, VEEV, was under development throughout the term of the JRDTA, and, nearly three years since Altria decided to invest in JLI, [redacted]. And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would require FDA approval before it could be launched, [redacted]. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process); [redacted].

(3) Green Smoke

150. Green Smoke was a cigalike. (PX9114 (Altria) at 002).

Response to Proposed Finding No. 150:

Respondents have no specific response.

151. "In April 2014, Nu Mark acquired the e-vapor business of Green Smoke, Inc. and its affiliates, which began selling e-vapor products in 2009." (PX9017 (Altria Group, Inc. Form 10-K) at 005).

Response to Proposed Finding No. 151:

Respondents have no specific response.

152. Altria sold Green Smoke primarily through e-commerce. (PX9080 (Altria) at 001).

Response to Proposed Finding No. 152:

Respondents have no specific response.

2. JLI

153. What is now known as JLI was founded in 2007 by Adam Bowen and James Monsees, two former graduate students at Stanford University. JLI was originally incorporated as PLOOM, Inc. in 2007. It was later renamed Pax Labs, Inc. On June 30, 2017, Pax Labs renamed itself Juul Labs, Inc., and spun off certain assets and employees and other non-nicotine vaporizer product into a new company Pax Labs, Inc. (JX0001 at 003 (¶ 14)).

Response to Proposed Finding No. 153:

Respondents have no specific response.

154. In 2015, JLI, then operating under the name Pax Labs, launched a product called JUUL. (JX0001 at 003 (¶ 15)).

Response to Proposed Finding No. 154:

Respondents have no specific response.

155. JUUL is a closed-system pod-based e-cigarette. (Pritzker (JLI) Tr. 729; Begley (Altria) Tr. 975-76; PX0017 (Altria) at 003)).

Response to Proposed Finding No. 155:

Respondents have no specific response.

156. [redacted] (Huckabee (Reynolds) Tr. 410 *(in camera)*.

Response to Proposed Finding No. 156:

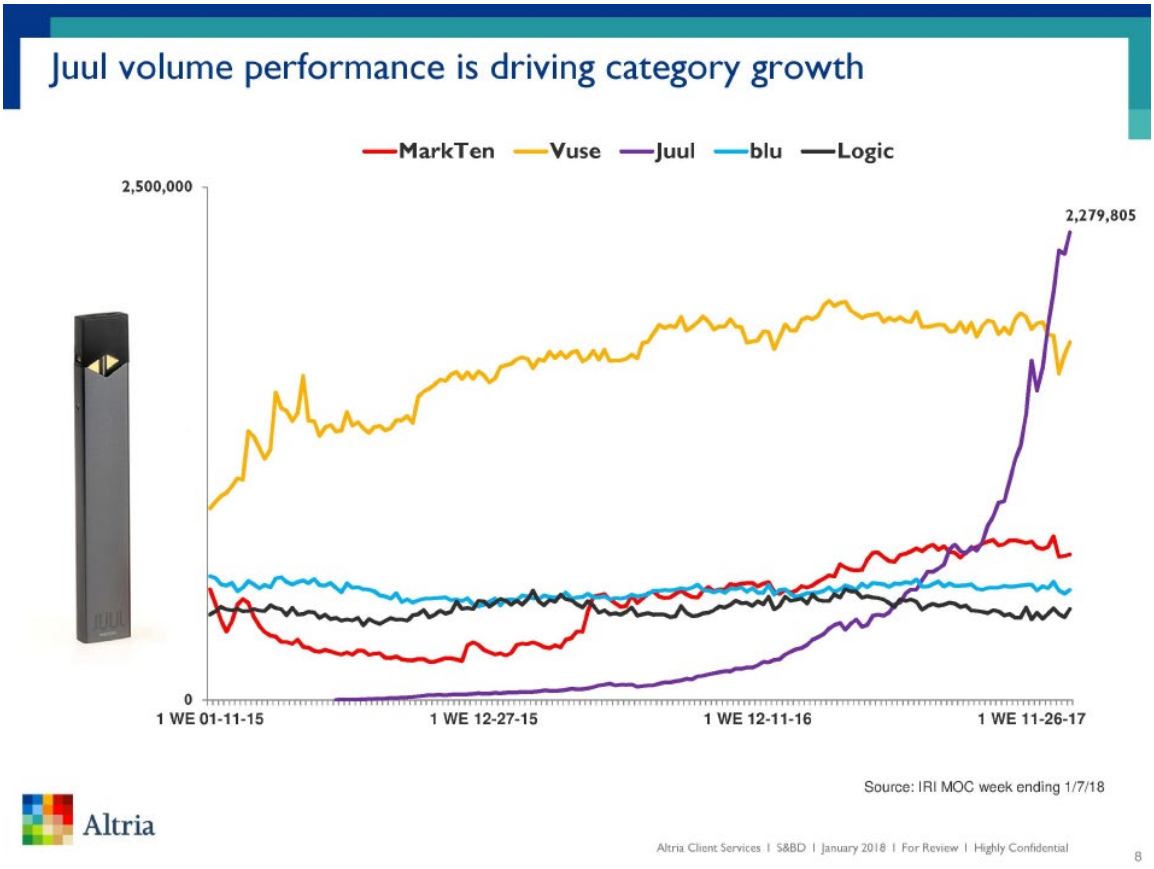
Respondents have no specific response.

157. "MOC" stands for "multi-outlet convenience" and refers to the sales channel that includes "conventional convenience stores, supermarkets, and various other outlets where cigarettes are sold." (Begley (Altria) Tr. 1090).

Response to Proposed Finding No. 157:

Respondents have no specific response.

158. Altria's January 2018 draft Board presentation noted that "Juul volume performance is driving category growth . . . Juul is now the MOC e-vapor market share leader." (PX1280 (Altria) at 009-10); *see also* PX1424 (Altria) at 011 (Altria August 2018 Board presentation) ("JUUL volume performance is driving e-vapor category growth."); King, (PMI) Tr. 2378-79)).



(PX1280 (Altria) at 009).

Response to Proposed Finding No. 158:

Respondents have no specific response.

159. In 2018, JLI was the best-selling e-cigarette in the United States and "market leader." (Pritzker (JLI) Tr. 729 (discussing PX2022) ("Q. As of the date of this letter, JUUL was the best-selling e-cigarette product in the U.S., correct? A. "I believe so, yes."); PX2098 at 014 ("JUUL continues to lead the vapor category"); PX9017 (Altria Group, Inc. Form 10-K) at 058 ("On December 20, 2018, Altria entered into a stock purchase agreement with, JUUL, the U.S. leader in e-vapor"); PX1115 (Altria) at 003 ("JUUL is the undisputed leader in the U.S. e-vapor market")).

Response to Proposed Finding No. 159:

Respondents have no specific response except to note that since 2018, other competitors' products—such as Reynolds' Vuse product—have seen substantial growth and have in fact overtaken JUUL in some metrics. (RFF ¶¶ 245-46, 1285-86, 1299-1323). For example, by

September 2020, Vuse had 60 percent of the device share; by contrast, JUUL's device share had fallen to 30 percent. (RFF ¶¶ 1371-73).

160. In 2018, JLI's sales grew and exceeded $1 billion. (PX2142 (JLI) at 006). JUUL, a pod-based product, was the best-selling e-cigarette in the U.S. (Pritzker (JLI) Tr. 728-30).

Response to Proposed Finding No. 160:

Respondents have no specific response except to note that [redacted]. For example, by September 2020, Vuse had 60 percent of the device share; by contrast, JUUL's device share had fallen to 30 percent. (RFF ¶¶ 1371-73).

161. JLI became the dominant supplier of e-cigarettes in the U.S. in 2018. (*See* PX3107 (PMI) at 004 (*in camera*) ([redacted]). JUUL led in sales in the multi-outlet convenience channel (PX1280 (Altria) at 010), which is comprised almost entirely of closed-system e-vapor products. (Begley, (Altria) Tr. 1123; PX4029 (Altria) at 008).

Response to Proposed Finding No. 161:

The Proposed Finding is incorrect to the extent it assumes dominance from market share in what Complaint Counsel's own expert described as a dynamic industry. (RFF ¶ 1420). Additionally, Respondents note that since 2018, other competitors' products—such as Reynolds' Vuse product—have seen substantial growth and have in fact overtaken JUUL in some metrics. (RFF ¶¶ 245-46, 1285-86, 1299-323). For example, by September 2020, Vuse had 60 percent of the device share; by contrast, JUUL's device share had fallen to 30 percent. (RFF ¶¶ 1371-73).

162. Dr. Rothman analyzed market shares for the twelve months prior to Altria's exit (ending in Sept. 2018) and concluded that JLI's share of the closed-system e-cigarette market was approximately 51 percent. (PX5000 at 043 (¶ 89) (Rothman Expert Report)); PX7048 (Rothman, Trial Dep. at 025-26).

Response to Proposed Finding No. 162:

Respondents have no specific response except to note that it is improper to use a 12-month average to calculate shares for purposes of Dr. Rothman's analyses given the dynamic nature of the market. (RFF ¶¶ 1338-76, 1434-43). By using a 12-month period to calculate shares, Dr. Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share. (RFF ¶¶ 1438-43). Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440-41). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

Respondents also object to the extent that the Proposed Finding implies that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

3. Reynolds

163. Reynolds American, Inc. owns RJR Tobacco Company and RAI Innovations Company. RAI Innovations Company owns RJR Vapor Company ("Reynolds"). British American Tobacco owns Reynolds American, Inc. (Huckabee (Reynolds) Tr. 371-72; O'Hara (JLI) Tr. 501).

Response to Proposed Finding No. 163:

Respondents have no specific response.

164. Reynolds is the second-largest tobacco company in the U.S. after Altria. (Begley (Altria) Tr. 1120; Huckabee (Reynolds) Tr. 372).

Response to Proposed Finding No. 164:

Respondents have no specific response.

165. Reynolds currently sells four e-cigarettes under the Vuse brand: Vuse Solo, Vuse Ciro, Vuse Vibe, and Vuse Alto. (Huckabee (Reynolds) Tr. 377). All of these products are closed-system e-cigarettes. (Huckabee (Reynolds) Tr. 381-82).

Response to Proposed Finding No. 165:

Respondents have no specific response except to note that Reynolds has sold an open-system e-vapor product but no longer does. (Huckabee (Reynolds) Tr. 383-84).

166. [redacted] (Huckabee (Reynolds) Tr. 444-45) (*in camera*).

Response to Proposed Finding No. 166:

Respondents have no specific response.

167. Vuse Solo, Vuse Vibe, and Vuse Ciro are cigalikes. (O'Hara (JLI) Tr. 502; Huckabee (Reynolds) Tr. 378, 441 (*in camera*)).

Response to Proposed Finding No. 167:

Respondents have no specific response.

168. Vuse Alto is a pod product. (Huckabee (Reynolds) Tr. 378). [redacted] (Huckabee (Reynolds) Tr. 405) (*in camera*). Vuse Alto was launched in August 2018 by Reynolds. (Huckabee (Reynolds) Tr. 395).

Response to Proposed Finding No. 168:

Respondents have no specific response.

169. Vuse Alto today is offered in three nicotine strengths: 1.8%, 2.4%, and 5%. (Huckabee Tr. 395). Wade Huckabee testified that Reynolds offers different nicotine strengths because "there are a range of consumers with a range of desired product attributes, we've found that consumers prefer different nicotine strengths as well. Some consumers prefer a higher nicotine strength product. Others, like myself, prefer a lower nicotine strength product.") (Huckabee (Reynolds) Tr. 395).

Response to Proposed Finding No. 169:

Respondents have no specific response except to note that [redacted].

170. [redacted] (Huckabee (Reynolds) Tr. 409-10 (*in camera*); PX1280 (Altria) at 009-10).

Response to Proposed Finding No. 170:

Respondents have no specific response except to note that Vuse again became the market leader in device share, capturing 60 percent of device share by September 2020. (RFF ¶ 1371).

171. Dr. Rothman analyzed market shares for the twelve months prior to Altria's exit (ending in Sept. 2018) and concluded that Reynolds' share of the closed-system e-cigarette market was approximately 22.7 percent. (PX5000 at 043 (¶ 89) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 025-26)).

Response to Proposed Finding No. 171:

Respondents have no specific response except to note that it is improper to use a 12-month average to calculate shares for purposes of Dr. Rothman's analyses given the dynamic nature of the e-vapor market. (RFF ¶ 1338-76, 1434-43). By using a 12-month period to calculate shares, Dr. Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share. (RFF ¶¶ 1438-43). Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440-41). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

Respondents also object to the extent that the Proposed Finding implies that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

172. Reynolds does not sell open-tank e-cigarettes. (Huckabee (Reynolds) Tr. 383-84; *see also* Crozier (Sheetz) Tr. 1494).

Response to Proposed Finding No. 172:

Respondents have no specific response except to note that Reynolds has sold an open-system e-vapor product but no longer does. (Huckabee (Reynolds) Tr. 383-84).

4. ITG

173. ITG Brands ("ITG") is the third-largest tobacco company in the U.S. (PX8011 at 001 (¶ 2) (Eldridge (ITG), Decl.); PX8010 at 001 (¶ 2) (Folmar (ITG), Decl.)).

Response to Proposed Finding No. 173:

Respondents have no specific response.

174. ITG is a subsidiary of British-based tobacco company Imperial Brands PLC. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.); PX8010 at 001 (¶ 1) (Folmar (ITG), Decl.)).

Response to Proposed Finding No. 174:

Respondents have no specific response.

175. Like ITG, Fontem US is a subsidiary of Imperial Brands. (PX7012 (Eldridge (ITG), Dep. at 32-33; PX8011 at ¶ 4 (Eldridge (ITG), Decl.). Fontem US is focused on next-generation nicotine products, and its primary product is the blu brand of e-cigarettes. (PX3025 (ITG) at 004) ("Fontem US is devoted to the development of next generation nicotine products and has developed the blu brand of electronic cigarettes . . . ."). ITG is the sales agent for Fontem US. (PX7012 (Eldridge (ITG), Dep. at 32-33)).

Response to Proposed Finding No. 175:

Respondents have no specific response.

176. ITG sells e-cigarettes under the brand name blu. (PX8011 at 004 (¶ 19) (Eldridge (ITG), Decl.); PX8010 at 001 (¶ 2) (Folmar (ITG), Decl.)). Blu is a closed system product line. (Begley (Altria) Tr. 976).

Response to Proposed Finding No. 176:

Respondents have no specific response.

177. ITG shares responsibility for blu vapor products with Fontem U.S. LLC, whose ultimate parent is Imperial Brands PLC. (PX8011 at 001 (¶ 4) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 177:

Respondents have no specific response.

178. ITG sells three types of closed system e-cigarettes: *my*blu pod device; the blu Plus+ cigalike, and the single-use blu Disposable, which is a cigalike. (PX7012 (Eldridge (ITG), Dep. at 49-50; PX8011 at 004-05 (¶ 19) (Eldridge (ITG), Decl.); PX8010 at 001 (¶ 2) (Folmar (ITG), Decl.)).

Response to Proposed Finding No. 178:

Respondents have no specific response.

179. ITG introduced the *my*blu device and *my*blu pods in 2017. (PX8011 at 005 (¶ 19) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 179:

Respondents have no specific response.

180. Imperial Brands acquired its blu e-cigarette brand in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 180:

Respondents have no specific response.

181. Dr. Rothman analyzed market shares for the twelve months prior to Altria's exit (ending in Sept. 2018) and concluded that ITG had approximately 6.6 percent of the closed-system e-cigarette market. (PX5000 at 043 (¶ 89) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 025-26)).

Response to Proposed Finding No. 181:

Respondents have no specific response except to note that it is improper to use a 12-month average to calculate shares for purposes of Dr. Rothman's analyses given the dynamic nature of the market. (RFF ¶ 1338-76, 1434-43). By using a 12-month period to calculate shares, Dr. Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share. (RFF ¶¶ 1438-43). Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440-41). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

Respondents also object to the extent that the Proposed Finding implies that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

182. ITG does not sell open tank e-cigarettes. (PX7012 (Eldridge (ITG), Dep. at 170)).

Response to Proposed Finding No. 182:

Respondents have no specific response.

5. JTI

183. JTI is a tobacco company that sells the Logic e-cigarette brand. (Begley (Altria) Tr. 977; Crozier (Sheetz) Tr. 1489; Farrell (NJOY) Tr. 272 (*in camera*); PX7022 (Begley (Altria), Dep. at 92)).

Response to Proposed Finding No. 183:

Respondents have no specific response.

184. Logic sells closed-system e-cigarettes. (Crozier (Sheetz) Tr. 1488-89; Begley (Altria), 977).

Response to Proposed Finding No. 184:

Respondents have no specific response.

185. Logic sells several products, including Logic Pro (Crozier (Sheetz) Tr. 1489) and Logic Power (PX2597 (JLI) at 040). Logic also sells a pod-based product called Logic Compact. (PX2084 (Altria) at 020; O'Hara (JLI) Tr. 575-76).

Response to Proposed Finding No. 185:

Respondents have no specific response.

186. Logic Compact is manufactured by Smoore. (PX2084 (Altria) at 020; O'Hara (JLI) Tr. 575-76).

Response to Proposed Finding No. 186:

Respondents have no specific response.

187. Dr. Rothman analyzed market shares for the twelve months prior to Altria's exit (ending in Sept. 2018) and concluded that Logic's share of the closed-system e-cigarette market was approximately 3.7 percent. (PX5000 at 043 (¶ 89) (Rothman Expert Report)).

Response to Proposed Finding No. 187:

Respondents have no specific response except to note that it is improper to use a 12-month average to calculate shares for purposes of Dr. Rothman's analyses given the dynamic nature of the market. (RFF ¶ 1338-76, 1434-43). By using a 12-month period to calculate shares, Dr. Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share. (RFF ¶¶ 1438-43). Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440-41). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

Respondents also object to the extent that the Proposed Finding implies that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

6. NJOY

188. NJOY is a privately held "manufacturer of e-cigarettes." (Farrell (NJOY) Tr. 200).

Response to Proposed Finding No. 188:

Respondents have no specific response.

189. [redacted] (Farrell (NJOY) Tr. 326) (*in camera*); O'Hara (JLI) Tr. 505).

Response to Proposed Finding No. 189:

Respondents have no specific response.

190. NJOY "currently sells a closed-system pod" product with a rechargeable battery called the NJOY Ace, and a closed system disposable NJOY Daily. (Farrell (NJOY) Tr. 206; PX3216 (NJOY) at 003-04). NOJ Daily is a cigalike. (Farrell (NJOY) Tr. 214).

Response to Proposed Finding No. 190:

Respondents have no specific response.

191. [redacted] (Farrell (NJOY) Tr. 336) (*in camera*).

Response to Proposed Finding No. 191:

Respondents have no specific response.

192. In 2018, NJOY also sold three e-cigarettes: Loop, PFT, and King, all of which were closed-system products. (Farrell (NJOY) Tr. 206-07).

Response to Proposed Finding No. 192:

Respondents have no specific response except to note that NJOY discontinued all three products referenced in the Proposed Finding for independent business reasons, and that the Loop and King products were cig-a-likes. (RFF ¶ 251).

193. NJOY Ace is manufactured by Smoore. (O'Hara (JLI) Tr. 577; PX3195 (NJOY) at 10 (*in camera*)).

Response to Proposed Finding No. 193:

Respondents have no specific response.

194. NJOY's products are made in China. (PX7029 (Farrell (NJOY), Dep. at 157)).

Response to Proposed Finding No. 194:

Respondents have no specific response.

195. Dr. Rothman analyzed market shares for the twelve months prior to Altria's exit (ending in Sept. 2018) and concluded that NJOY's share of the closed-system e-cigarette market was around 1.8 percent. (PX5000 at 043 (¶ 89) (Rothman Expert Report)).

Response to Proposed Finding No. 195:

Respondents have no specific response except to note that it is improper to use a 12-month average to calculate shares for purposes of Dr. Rothman's analyses given the dynamic nature of the market. (RFF ¶ 1338-76, 1434-43). By using a 12-month period to calculate shares, Dr.

Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share. (RFF ¶¶ 1438-43). Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440-41). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

Respondents also object to the extent that the Proposed Finding implies that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

196. NJOY does not sell open tank e-cigarettes. (PX7029 (Farrell (NJOY), Dep. at 145); Farrell (NJOY) Tr. 206-07)).

Response to Proposed Finding No. 196:

Respondents have no specific response.

D. FDA'S REGULATION OF E-CIGARETTES AND THE PMTA PROCESS

197. The U.S. Food & Drug Administration's ("FDA") 2016 Deeming Rule designated e-cigarette products as "tobacco products" under the Tobacco Control Act, requiring manufacturers to obtain FDA authorization before introducing any e-cigarette products to the market. 81 Fed. Reg. 28,974 (May 10, 2016); *see* 21 U.S.C. § 387j(a)(1). (JX0001 at 002 (¶ 16)).

Response to Proposed Finding No. 197:

Respondents have no specific response.

198. The FDA deferred enforcement action against products that were sold in the United States before August 8, 2016 provided that the manufacturer submitted, by a specified date, a premarket tobacco product application ("PMTA") seeking FDA authorization. 81 Fed. Reg. at 29,009 to 29,015; 21 U.S.C. § 387j(c)(4). (JX0001 at 002 (¶ 17)).

Response to Proposed Finding No. 198:

Respondents have no specific response.

199. Any e-cigarette product requires PMTA authorization before it can be sold in the United States unless (a) it was on the market as of August 8, 2016, and (b) a PMTA for that product was submitted by a deadline that changed multiple times, but ultimately was set as September 9, 2020. (JX0001 at 002 (¶ 18)).

Response to Proposed Finding No. 199:

Respondents have no specific response.

200. E-cigarette manufacturers can submit PMTAs for their new products after the September 9, 2020 deadline, but they cannot sell those products until receiving FDA authorization. (JX0001 at 003 (¶ 19)).

Response to Proposed Finding No. 200:

Respondents have no specific response.

201. Under the 2016 Deeming Rule, the deadline for submitting a PMTA was initially August 2018. The deadline was moved to November 2018 by a May 2017 FDA guidance and further extended to August 2022 by a July 2017 FDA guidance. In July 2019, however, a federal judge presiding over a legal challenge to the deferral policy in the Deeming Rule imposed a new deadline of May 2020. *See Am. Acad. Of Pediatrics v. FDA*, 399 F. Supp. 3d 479 (D. Md. 2019); *Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461 (D. Md. 2019). That deadline was eventually moved to September 2020 due to the COVID-19 pandemic. (JX0001 at 003 (¶ 20)).

Response to Proposed Finding No. 201:

Respondents have no specific response.

202. Submitting PMTAs can require [redacted]. (*See* CCFF ¶¶ 1794-802, below).

Response to Proposed Finding No. 202:

The Proposed Finding is incomplete and misleading without additional context. Respondents agree that submitting PMTAs can require millions of dollars: The evidence in this case shows that a PMTA for a single product line easily can cost up from $50 to $100 million, and JLI spent over $100 million submitting its PMTA. (RFF ¶¶ 95, 97(d)). The assertion that submitting a PMTA can take "up to three years" understates the time it could take even sophisticated manufacturers to gain regulatory approval for an e-vapor product. Much of the

testing and work on the PMTA cannot take place until the design is locked down, and assuming that testing after that point does not reveal new design flaws, it takes approximately two years after design lock to prepare the PMTA. (RFF ¶¶ 87-88). In addition, once a PMTA has been submitted, it takes a "long time" for FDA to review the application. (RFF ¶ 122 (quoting Jupe (Altria) Tr. 2301)). For example, for the handful of tobacco products in other categories that have previously received PMTA approval, FDA review alone took between two and four years. (RFF ¶ 125).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1794-802, Respondents incorporate their responses to those Proposed Findings herein.

203. FDA regulations did not require an e-cigarette to remain on the market continuously since August 8, 2016 in order to be grandfathered by the Deeming Rule. (Murillo (Altria/JLI) Tr. 3022) ("Q. Okay. For a product to be grandfathered under the FDA's deeming regulation, it didn't have to be on the market continuously since August 8th of 2016, is that right, just as of that date? A. Correct. It needed -- well, I think the language was it needed to have been in commerce in the U.S. on or before that date.").

Response to Proposed Finding No. 203:

Respondents have no specific response.

204. An e-cigarette that was grandfathered under FDA's regulations could be transferred from one company to another and remain on the market. (Murillo (Altria/JLI) Tr. 3026). ("Q. … Is it your understanding that if a company decided to transfer a grandfathered product to another company, that other company could sell it on the market without a PMTA as long as it was before the deadline? In other words, it's a grandfathered product regardless of who's selling it? A. Yes, if it's the same product.").

Response to Proposed Finding No. 204:

Respondents have no specific response.

205. Not all product modifications to a grandfathered product constitute a "new product" that would require a new PMTA application. (PX7026 (Gardner (Altria), Dep. at 41-42) ("To introduce a new product into the market, you needed a PMTA -- new product into the market after August of 2016, you needed a preapproval from the agency to launch that product. Product modifications that led to a product being defined as new was – was something we were looking to understand. You know, changing a supplier on a material that has no significant impact on the product or the delivery or the consumer usage, it's a change, but we did not think that was a material change to warrant it being a new product."); *see also* King (PMI) Tr. 2548 ("at the time, there was some discussion around

whether small differences or small enough differences would be still considered grandfathered, and there were a number of companies that apparently were making some improvements to their devices and still having them under the grandfather piece.")).

Response to Proposed Finding No. 205:

Respondents have no specific response except to note that significant modifications, particularly those impacting the aerosol, would result in the product being considered new for regulatory purposes. (RFF ¶¶ 66-67).

206. "[A]ny significant change resulted in a new tobacco product for which you needed preapproval, but exactly where the line was was [sic] unclear …." (Garnick (Altria) Tr. 1691; *see also* King (PMI) Tr. 2548).

Response to Proposed Finding No. 206:

Respondents have no specific response except to note that, in the absence of specific FDA guidance on this issue, manufacturers such as Altria relied on the guidance issued by FDA for vape shops. (RFF ¶¶ 68-70).

207. FDA permits the use of "bridging" data from an existing product to a new PMTA application. (Gardner (Altria,) Tr. 2572-73) ("Bridging is an approach that's allowed. The FDA accepts it in the pharmaceutical industry and has mentioned it's appropriate for use in tobacco products, too -- also. So bridging is literally bridging -- building a bridge from the prior data to a new product.")).In January 2020, the FDA announced a new enforcement policy that required all non-tobacco, non-menthol flavored cartridge-based e-cigarettes (such as fruit and mint-flavored pods and cigalikes) be removed from the market until they receive PMTA approval. (PX9016 (FDA) at 001).

Response to Proposed Finding No. 207:

Respondents have no specific response except to note that bridging is possible only in limited circumstances; it requires a substantial degree of similarity and is not possible for certain types of evidence. (RFF ¶¶ 91-93).

V. THE RELEVANT MARKET IS THE SALE OF CLOSED-SYSTEM E-CIGARETTES IN THE UNITED STATES

208. The relevant market is the sale of closed-system e-cigarettes in the United States. (*See* CCFF ¶¶ 209-408, below).

Response to Proposed Finding No. 208:

The Proposed Finding is incorrect and is not supported by the cited findings. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426). In proposing a relevant product market of closed-system e-cigarettes, Complaint Counsel ignores "considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RFF ¶ 1386 (quoting RX1217 Murphy Report ¶ 113)). Complaint Counsel's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). Further, the evidence demonstrates that pod-based products and cig-a-likes have different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 209-408, Respondents incorporate their responses to those Proposed Findings herein.

209. Dr. Rothman concluded that the relevant antitrust market in this matter is "[t]he sale of closed-system e-cigarettes in the United States." (PX7048 (Rothman, Trial Dep. at 13-14); PX5000 at 031 (¶ 62) (Rothman Expert Report)). In reaching this conclusion, Dr. Rothman followed the hypothetical monopolist test as set forth in the U.S. Department of Justice & Federal Trade Commission Horizontal Merger Guidelines (2010) ("Horizontal Merger Guidelines"). (PX7048 (Rothman, Trial Dep. at 14); PX5000 at 031-32 (¶¶ 64-66) (Rothman Expert Report); PX9098 (Horizontal Merger Guidelines) § 4.1.1 at 011-13).

Response to Proposed Finding No. 209:

The Proposed Finding is incorrect. Dr. Rothman purported to make such a conclusion and to follow the hypothetical monopolist test. However, his conclusion ignores "considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RFF ¶ 1386 (quoting RX1217 Murphy Report ¶ 113)). Further, Dr. Rothman did not use a hypothetical

monopolist test to analyze whether pods and cig-a-likes could constitute distinct markets. (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). Dr. Rothman also disregarded evidence demonstrating that pod-based products and cig-a-likes have different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414).

A. CLOSED-SYSTEM E-CIGARETTES IS A RELEVANT PRODUCT MARKET

210. The qualitative and quantitative evidence make clear that closed-system e-cigarettes make up a relevant product market. (*See* CCFF ¶¶ 218-407, below).

Response to Proposed Finding No. 210:

The Proposed Finding is incorrect and not supported by the cited findings. Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426). In proposing a relevant product market of closed-system e-cigarettes, Complaint Counsel ignores "considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RFF ¶ 1386 (quoting RX1217 Murphy Report ¶ 113)). Complaint Counsel's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). Further, the evidence demonstrates that pod-based products and cig-a-likes have different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 218-407, Respondents incorporate their responses to those Proposed Findings herein.

211. Market participants agree that the distinct features of closed-system e-cigarettes offer a user experience that is more simple, convenient, and discreet as compared to open-system products. (*See* CCFF ¶¶ 218-37, below).

Response to Proposed Finding No. 211:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 218-37, Respondents incorporate their responses to those Proposed Findings herein.

212. Both Altria and JLI viewed themselves as competing in a market for closed-system e-cigarettes, and the views of other market participants are consistent. (*See* CCFF ¶¶ 238-67, below).

Response to Proposed Finding No. 212:

Respondents have no specific response except to note that (1) major closed-system e-vapor manufacturers have occasionally competed in the open-system market, (*see, e.g.*, Huckabee (Reynolds) Tr. 383-84), and (2) Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes, (RCoL ¶ 55; RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 238-67, Respondents incorporate their responses to those Proposed Findings herein.

213. Testimony and ordinary-course documents demonstrate that cigalikes and pod-based products compete in the same market for closed-system e-cigarettes. (*See* CCFF ¶¶ 268-350, below). Both form factors consist of a battery and a sealed pod or cartridge, provide a similar user experience, are subject to the same FDA regulations, and are distributed largely through the multi-outlet and convenience channel. (*See* CCFF ¶¶ 278-98, below).

Response to Proposed Finding No. 213:

The Proposed Finding is incorrect and not supported by the cited findings. Complaint Counsel ignores the evidence that demonstrates that pod-based products and cig-a-likes have

different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 268-350, Respondents incorporate their responses to those Proposed Findings herein.

214. Ordinary-course evidence consistently shows that JLI and Altria each saw themselves as competing with both cigalikes and pod-based products, as did other closed-system e-cigarette producers. (*See* CCFF ¶¶ 299-350, below).

Response to Proposed Finding No. 214:

The Proposed Finding is incorrect and not supported by the cited findings. The evidence demonstrates that JLI, which only made a pod-based product, did not view itself as competing directly against cig-a-likes. (RFF ¶ 1412). To the contrary, evidence from JLI shows that the company thought cig-a-likes were underpowered and did not provide enough satisfaction for smokers and vapers and that retention rates for cig-a-likes were low. (RFF ¶¶ 11, 17, 27). "[I]nadequate nicotine delivery and deficient product design/form-factor ultimately limited broad-based acceptance" of cig-a-likes. (RFF ¶ 27 (quoting PX2531 (JLI) at 034)). JLI did not make pricing decisions for its pod-based product based on information about cig-a-like products. (RFF ¶¶ 1639-46). Indeed, JLI was so dismissive of Nu Mark's cig-a-likes that neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had removed Nu Mark's remaining cig-a-like products in December 2018. (RFF ¶ 1102). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 299-350, Respondents incorporate their responses to those Proposed Findings herein.

215. Open systems and other reduced-risk products are not close substitutes for closed-system e-cigarettes. (*See* CCFF ¶¶ 351-94, below). Open systems differ from closed systems in that they are larger, more complex, and highly customizable, allowing users to swap out device parts and mix their own e-liquid. (*See* CCFF ¶¶ 352-62, below). Open systems appeal to a different customer base than closed systems, and are largely distributed through separate retail channels. (*See* CCFF ¶¶ 363-78, below). Moreover, market participants recognize the reality that consumers do not view open- and closed-system products as close substitutes. (*See* CCFF ¶¶ 379-83, below).

Response to Proposed Finding No. 215:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 351-94, Respondents incorporate their responses to those Proposed Findings herein.

216. Based on his review of testimony and ordinary-course documents, and confirmed by his application of the hypothetical monopolist test, Dr. Rothman likewise concluded that closed-system e-cigarettes are a relevant product market. (*See* CCFF ¶ 209, above; ¶¶ 395-407, below).

Response to Proposed Finding No. 216:

The Proposed Finding is incorrect and not supported by the cited findings. Dr. Rothman purported to make such a conclusion and to follow the hypothetical monopolist test. However, his conclusion ignores "considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RFF ¶ 1386 (quoting RX1217 Murphy Report ¶ 113)). Further, Dr. Rothman did not use a hypothetical monopolist test to analyze whether pods and cig-a-likes could constitute distinct markets. (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the

Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). Dr. Rothman also disregarded evidence demonstrating that pod-based products and cig-a-likes have different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 209 and 395-407, Respondents incorporate their responses to those Proposed Findings herein.

217. Dr. Murphy failed to perform quantitative analysis to define the relevant market. (*See* CCFF ¶¶ 2086-93, below).

Response to Proposed Finding No. 217:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not perform this specific analysis, he did address Complaint Counsel and Dr. Rothman's market definition analysis. As Dr. Murphy testified at trial, Dr. Rothman made a "critical mistake[]" by failing to consider varying degrees of substitutability between different categories of e-vapor products. (Murphy Tr. 3235; *see also* RX1217 Murphy Report ¶ 98 ("Dr. Rothman's market definition analysis ignores or understates important competitive constraints on JUUL from other competitive products while at the same time overstating the significance of the competitive interaction between the JUUL and MarkTen as well as MarkTen Elite products."); RFF ¶¶ 1383-86).

Moreover, although Complaint Counsel bears the burden on this issue, (RCoL ¶ 55), Dr. Rothman did not use the hypothetical monopolist test to analyze whether pods and cig-a-likes could constitute distinct markets. (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical

analysis examining whether pod-based products would qualify as a separate market is contrary to the Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). Dr. Rothman also disregarded evidence demonstrating that pod-based products and cig-a-likes have different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (RFF ¶¶ 1387-414).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 2086-93, Respondents incorporate their responses to those Proposed Findings herein.

1. Closed-System E-Cigarettes Have Distinct Product Features

218. Closed-system e-cigarettes "are comprised of a battery and a container that is referenced in a variety of ways, either called pods, cartridges, capsules, tanks, but suffice it to say there is a battery and then a container that comes prefilled with liquid, contains nicotine." (Farrell (NJOY) Tr. 207-08).

Response to Proposed Finding No. 218:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

219. Closed-system e-cigarettes are typically smaller than open-system products. (Gifford (Altria) Tr. 2722, 2793; Jupe (Altria) Tr. 2241).

Response to Proposed Finding No. 219:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

220. An open-system product allows the user to customize the device by swapping out components, such as the mouthpiece and coil. (*See* CCFF ¶ 354, below). By contrast, a closed-system device "is a single system built to work as a single system," meaning "[t]here is no mixing and matching of batteries or cartridges with batteries." (Schwartz (Altria) Tr. 1851-52).

Response to Proposed Finding No. 220:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 354, Respondents incorporate their response to that Proposed Finding herein.

221. An open-system product requires the user to refill the tank with e-liquid, and allows the user to mix his or her own e-liquid. (*See* CCFF ¶¶ 352-53, 355-56, below). By contrast, in a closed-system product, the pod or cartridge containing e-liquid is not refillable by the consumer. (PX7012 (Eldridge (ITG), Dep. at 22); PX7004 (Willard (Altria), IHT at 56); PX7002 (Schwartz (Altria), IHT at 25-26); PX8008 at 005-06 (¶ 12) (Huckabee (Reynolds), Decl.); PX8004 at 002 (¶ 11) (Farrell (NJOY), Decl.)).

Response to Proposed Finding No. 221:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 352-53 and 355-56, Respondents incorporate their responses to those Proposed Findings herein.

222. For most participants in the closed-system market, a consumer buys pods, which are "not designed to be tampered with and emptied and have another e-liquid inserted in them." (Farrell (NJOY) Tr. 210).

Response to Proposed Finding No. 222:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

223. In a May 2017 pricing survey for JLI, McKinsey, a consulting firm, noted that "[c]losed-system vaporizers . . . include disposable e-cigarettes or e-cigarettes that use replaceable cartridges or pods" that "are not intended to be refilled or used with bottled e-juice." (PX2579 (JLI) at 181). The pricing survey also distinguished closed systems from open

systems, which it described as "vaporizers used with refillable tanks or re-buildable atomizers used for vaporizing bottled e-juice." (PX2579 (JLI) at 181).

Response to Proposed Finding No. 223:

Respondents have no specific response except to note that, contrary to Complaint Counsel's proposed market definition, the presentation cited in the Proposed Finding expressly distinguishes between cig-a-likes and other types of e-cigarettes and includes data showing that sales of cig-a-likes between 2009 and 2019 lagged behind sales of all vapor devices. (PX2579 (JLI) at 159-60). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

224. In contrast to an open-system product, the consumer lacks the ability to adjust the performance of a closed-system device. (Begley (Altria) Tr. 970; PX7022 (Begley (Altria), Dep. at 74-76); PX7002 (Schwartz (Altria), IHT at 28)).

Response to Proposed Finding No. 224:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

225. A reviewer's guide for the *my*blu PMTA submission notes that the product "was designed with the express intent to minimize the ability of adult consumers to modify the system, components, or function in any manner whatsoever." (PX3020 (ITG) at 008).

Response to Proposed Finding No. 225:

Respondents have no specific response.

2. Closed-System E-Cigarettes Provide a Unique User Experience and Are Distributed in Distinct Retail Channels

226. Open systems tend to appeal to hobbyists or enthusiasts, who enjoy customizing their device and sampling different or unusual flavors. (*See* CCFF ¶¶ 363-67, below).

Response to Proposed Finding No. 226:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 363-67, Respondents incorporate their responses to those Proposed Findings herein.

227. In contrast to open systems, "[c]losed system e-cigarette products are a little bit more convenient," having fewer "component parts" and requiring "less maintenance." (Farrell (NJOY) Tr. 209-10).

Response to Proposed Finding No. 227:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

228. Altria's Begley testified that as of 2016 "there were different product characteristics that were appealing to different types of consumers," explaining that "a number of adult vapers used, for example, open system products, which allowed consumers to both customize their device as well as customize the liquid and a number of different elements," and that "there were also consumers that preferred the simplicity of closed system products." (PX7022 (Begley (Altria), Dep. at 72-73)).

Response to Proposed Finding No. 228:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426). At trial, Begley testified that cig-a-likes, open-system products, closed-tank products, and pod products are distinct segments that appealed to different consumer segments. (Begley (Altria) Tr. 1091). The rapid growth of pods in recent years, paired with cig-a-likes' continued failure to resonate with customers and their ongoing decline, proves the point. (PX7024 Crosthwaite (Altria/JLI) Dep. at 214 (explaining that cig-a-likes "are essentially irrelevant" today); [redacted]).

229. Although some consumers may like the complexity of an open-system product, "for most adult tobacco consumers, if there are choices that are more simple and still quite satisfying rather than complex . . . a number of consumers would prefer the simpler product, assuming it provides a use experience that's acceptable." (PX7004 (Willard (Altria), IHT at 57-58)).

Response to Proposed Finding No. 229:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

230. In Altria's 2017 Investor Day remarks, Begley noted that closed-system products "consist of pre-filled cartridges of e-liquid that are used in different format devices," and that "[a]dult tobacco consumers interested in these products . . . want flavor and nicotine satisfaction . . . without the complexity of open system products." (PX9000 (Altria) at 018).

Response to Proposed Finding No. 230:

Respondents have no specific response except to note that the comments cited in the Proposed Finding were made in context of differentiating "the cig-a-like segment" from other closed-tank products, further demonstrating that cig-a-likes and pod-based products are distinct product types that belong in separate markets for purposes of an antitrust analysis. (PX9000 (Altria) at 018).

231. In contrast to open systems, closed-system e-cigarettes "contain a smaller battery and a pod or cartridge that is pre-filled with e-liquid," are "simpler to use," and "require very little cleaning or maintenance." (PX8004 at 002 (¶ 11) (Farrell (NJOY), Decl.)).

Response to Proposed Finding No. 231:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

232. A closed-system e-cigarette offers an "appealing" combination of factors to consumers in that it is "a convenient product that is also typically very discreet in nature, meaning its vapor cloud is relatively low." (Huckabee (Reynolds) Tr. 385-86).

Response to Proposed Finding No. 232:

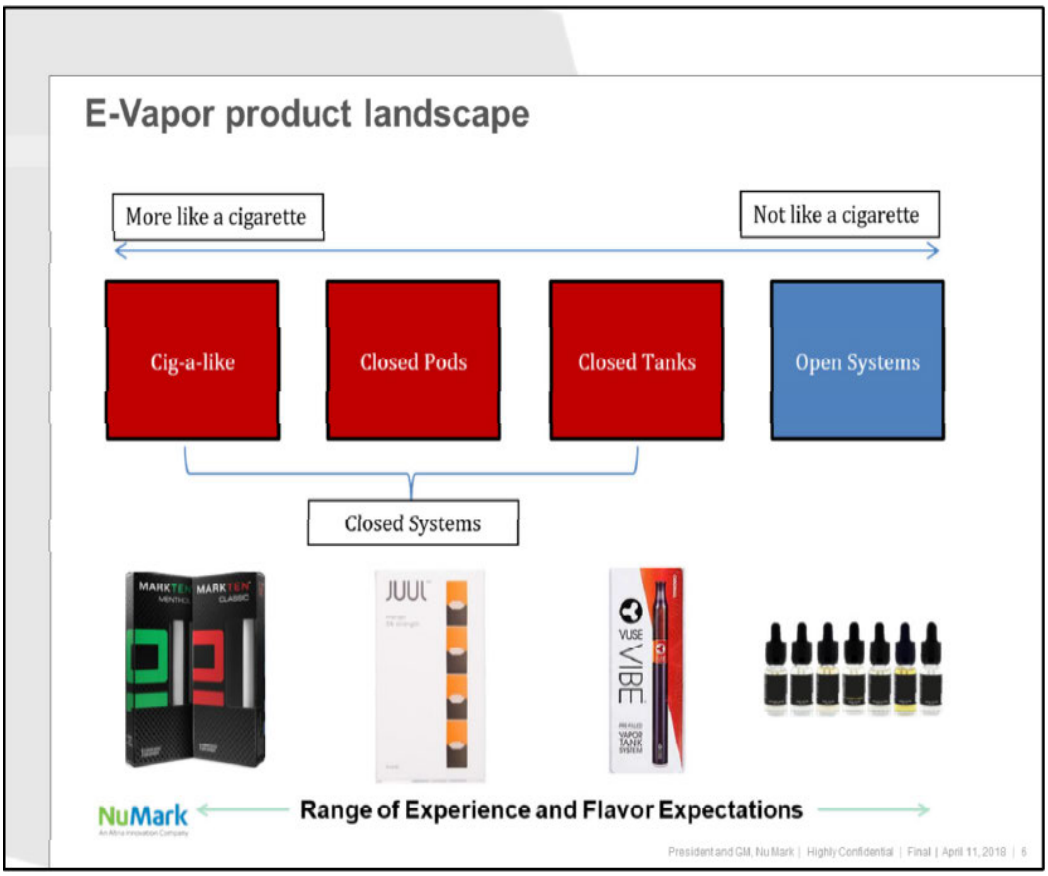
Respondents have no specific response except to note that the appeal, discreet nature, and size and visibility of vapor clouds can vary between closed-system products and depending on the user. (Begley (Altria) Tr. 980; PX4014 (Altria) at 030).

233. Closed-system products can be "very appealing" to consumers "[i]n occasions where they are perhaps in their car . . . if they are traveling, if they are driving to work, if they are in an area where . . . they may be moving or with a group of friends where discretion is more important." (Huckabee (Reynolds) Tr. 386; *see also* PX8008 at 005-06 (¶ 12) (Huckabee (Reynolds), Decl.)).

Response to Proposed Finding No. 233:

The Proposed Finding is incomplete and misleading without additional context. The appeal of an e-cigarette can vary between closed-system products and depending on the user. (Begley (Altria) Tr. 980; PX4014 (Altria) at 030). There are numerous other differences between the types of products, including whether they are shaped to resemble a cigarette (thus triggering the stigma of cigarette smoking), the size of the battery, and the manner in which the cartridge generally attaches. (RFF ¶¶ 1388-97). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

234. An April 2018 Nu Mark presentation to the Altria Board of Directors distinguishes closed systems from open systems in terms of a consumer's range of experience and flavor expectations. (PX4029 (Altria) at 007)).



(PX4029 (Altria) at 007).

Response to Proposed Finding No. 234:

Respondents have no specific response except to note that, contrary to Complaint Counsel's proposed market definition, the slide pictured in the Proposed Finding expressly distinguishes between cig-a-likes and pod-based products. (PX4029 (Altria) at 007).

235. Open-system products tend to be sold in vape shops. (*See* CCFF ¶¶ 368-72, below). By contrast, closed-system e-cigarettes are sold primarily in gas stations and convenience stores. (Begley (Altria) Tr. 971-72 (acknowledging that the MOC channel is the major sales channel for the sale of closed-system e-vapor products); Huckabee (Reynolds) Tr. 387 (testifying that Reynolds "sells the vast majority of our closed-system products in traditional retail channels, convenience stores being the biggest percentage by far"); Farrell (NJOY) Tr. 220-21 ("NJOY has focused its attention on convenience and gas stores, so a convenience market."); PX8008 at 006 (¶ 14) (Huckabee (Reynolds), Decl.); PX8004 at 002 (¶ 11) (Farrell (NJOY), Decl.)).

Response to Proposed Finding No. 235:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 368-72, Respondents incorporate their responses to those Proposed Findings herein.

236. The MOC channel is almost entirely closed-system e-vapor products. (Begley (Altria) Tr. 1123).

Response to Proposed Finding No. 236:

Respondents have no specific response.

237. In an April 2018 presentation to Altria's Board, Nu Mark indicated that in the MOC channel, closed-system sales account for 90% of the volume, whereas in the vape store channel the majority of volume is open-system. (PX4029 (Altria) at 008).

Response to Proposed Finding No. 237:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

3. Respondents View Closed-System E-Cigarettes As a Distinct Market

238. During Begley's tenure as President and General Manager of Nu Mark, all of the e-cigarettes that Nu Mark sold or had in development were closed-system products. (Begley (Altria) Tr. 970-71; PX7022 (Begley (Altria), Dep. at 76-77); *see also* PX7014 (Baculis (Altria), Dep. at 32-33, 78-80) (testifying that "everything [Altria] sold was closed, and everything [Altria was] working on developing was closed")).

Response to Proposed Finding No. 238:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

239. Nu Mark's 2016-2018 strategic plan states that one of Nu Mark's "strategies" for 2017 was to "[e]stablish *MarkTen*® as a leading brand in the closed system e-vapor segment within multi-outlet & convenience stores (MOC), while utilizing *Green Smoke*® to flank *MarkTen*®." (PX4040 (Altria) at 007).

Response to Proposed Finding No. 239:

The Proposed Finding is incomplete and misleading without additional context. The cited document was prepared in February 2016, (PX4040 (Altria) at 001), when the e-vapor market was very different than it was at the time of the transaction or is today. In February 2016, JUUL had not yet experienced its explosive growth and created the market for pod-based products. (RFF ¶¶ 297-300). Indeed, Altria did not even launch its pod-based product, Elite, until two years later. (Schwartz (Altria) Tr. 1871). As a result, the cited document does not carry Complaint Counsel's burden of establishing that the relevant product market is all closed-system e-vapor products. Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

240. A 2016 memorandum to the Altria Board notes that [redacted] Begley (Altria) Tr. 1018 (*in camera*)). Begley confirmed that that share target was based on the MOC channel, which consists almost entirely of closed-system e-vapor products. (Begley (Altria) Tr. 1123).

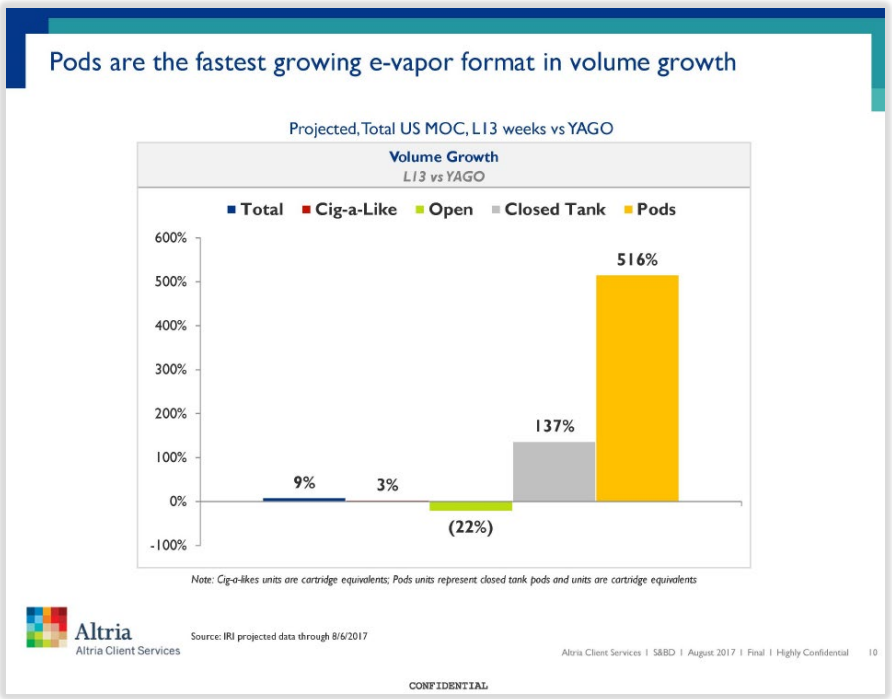
Response to Proposed Finding No. 240:

The Proposed Finding is incomplete and misleading without additional context. The cited document was prepared in 2016, (PX4073 (Altria) at 002), when the e-vapor market very different than it was at the time of the transaction or is today. In 2016, JUUL had not yet experienced its explosive growth and created the market for pod-based products. (RFF ¶¶ 297-300). Indeed, Altria did not even launch its pod-based product, Elite, until two years later. (Schwartz (Altria) Tr. 1871). As a result, the cited document does not carry Complaint Counsel's burden of establishing that the relevant product market is all closed-system e-vapor products.

241. Nu Mark regularly tracked its share in the MOC channel, which reflected, at a high level, Nu Mark's share of the closed-system e-cigarette market. (Begley (Altria) Tr. 973); *see, e.g.*, PX1280 (Altria) at 010 (Altria Board update); PX1087 (Altria) at 004 (MarkTen weekly share report); PX1703 (Altria) at 043-44 (Nu Mark business update); (PX1284 (Altria) at 016).

Response to Proposed Finding No. 241:

The Proposed Finding is incomplete and misleading without additional context. As the pod-based category emerged, Altria and Nu Mark consistently differentiated between pod-based products and cig-a-likes, and those products' potential for commercial and regulatory success, in internal documents and analyses. (RFF ¶¶ 1408-11). For example, even in the presentation cited by Complaint Counsel, Altria distinguished between pods and cig-a-likes and noted that pods were "the fastest growing e-vapor format." (PX1284 (Altria) at 011):



In addition, in a May 2018 presentation to the Altria board, the company's management included a slide demonstrating that cig-a-likes were plummeting in terms of share of the market relative to pod-based products. (RX0272 (Altria) at 013; *see also* RFF ¶¶ 562-69). The declining

performance of cig-a-likes relative to pod-based products was one reason Altria invested in its pod-based product, Elite, and also contributed to Altria's decision in December 2018 to discontinue the rest of Nu Mark's e-vapor product portfolio, which at that time was solely composed of cig-a-likes. (RFF ¶¶ 1002-03, 1082-83, 1090-91).

242. Altria tracked the sales performance of its MarkTen brand along with Vuse, Juul, Blu, and Logic. (*See, e.g.*, PX1424 (Altria) at 011 (E-vapor update to Altria Board); PX1229 (Altria) at 005 (Altria Board update); PX1294 (Altria) at 005, 011 (weekly Juul performance update); PX4012 (Altria) at 012 ("Nu Mark 2018 Three Year Strategic Plan"); PX4028 (Altria) at 011 (Nu Mark update to Altria Board); PX4029 (Altria) at 013 (Nu Mark Board orientation).

Response to Proposed Finding No. 242:

The Proposed Finding is incomplete and misleading without additional context. As the pod-based category emerged, Altria and Nu Mark consistently differentiated between pod-based products and cig-a-likes, and those products' potential for commercial and regulatory success, in internal documents and analyses. (RFF ¶¶ 1408-11). For example, in a May 2018 presentation to the Altria board, the company's management included a slide demonstrating that cig-a-likes were plummeting in terms of share of the market relative to pod-based products. (RFF ¶ 565; *see also* RFF ¶¶ 562-69). The declining performance of cig-a-likes relative to pod-based products was one reason Altria invested in its pod-based product, Elite, and also contributed to Altria's decision in December 2018 to discontinue the rest of Nu Mark's product portfolio, which at that time was solely composed of cig-a-likes. (RFF ¶¶ 1002-03, 1082-83, 1090-91).

243. Nu Mark's 2018 three-year strategic plan from February 2018 includes a slide showing Nu Mark's retail share target for 2018. (PX4012 (Altria) at 009; Begley (Altria) Tr. 1122-23). That target was based on e-vapor product sold in the multi-outlet and convenience channel, which is predominantly closed-system products. (Begley (Altria) Tr. 1122-23).

Response to Proposed Finding No. 243:

The Proposed Finding is incomplete and misleading without additional context. Although the share target in the cited presentation was based on the MOC channel, the presentation also

specifically distinguished between cig-a-likes and pod-based products. For example, the presentation tracked cig-a-likes' percentage of the e-vapor category in 2017, reporting that they accounted for only a small percentage of the overall category and were expected to further decline over the next three years. (PX4012 (Altria) at 006-07, 009). By contrast, the presentation anticipated that pod-based sales would increase over the next three years. (PX4012 (Altria) at 006-07, 009).

244. In an August 2018 brand update, Nu Mark compared MarkTen Elite against *my*blu and Juul in terms of sales volume following their date of introduction. (PX1013 (Altria) at 009).

Response to Proposed Finding No. 244:

Respondents have no specific response except to note that the Proposed Finding undercuts Complaint Counsel's assertion that the relevant product market includes all closed-system e-vapor products. In the cited document, Nu Mark is specifically comparing the performance of Elite, its pod-based product, against the performance of other pod-based products, *my*blu, (RFF ¶ 258(a)), and JUUL, (RFF ¶ 217). (PX1013 (Altria) at 009).

245. In an August 2018 brand update, Nu Mark tracked the promotion and launch activities of *my*blu, Juul, and Vuse. (PX1056 (Altria) at 023).

Response to Proposed Finding No. 245:

Respondents have no specific response except to note that the Proposed Finding undercuts Complaint Counsel's assertion that the relevant product market includes all closed-system e-vapor products. In the cited document, Nu Mark is specifically comparing the performance of Elite, its pod-based product, against the performance of other pod-based products, *my*blu, (RFF ¶ 258(a)), JUUL, (RFF ¶ 217), and Vuse Alto, (RFF ¶ 243(d)). (PX1056 (Altria) at 023). The cited slide does not include cig-a-like products at all. (PX1056 (Altria) at 023).

246. Nu Mark tracked the prices for e-vapor products under the brands Vuse, Juul, Blu, and Logic, and compared them against products sold under the MarkTen brand. (PX1087 (Altria) at 005) (weekly share report); PX1100 (Altria) at 040 (Nu Mark business update).

Response to Proposed Finding No. 246:

The Proposed Finding is incomplete and misleading without additional context. To the extent the Proposed Finding is intended to imply that pod-based products and cig-a-likes belong in the same market for purposes of an antitrust analysis, that implication is contradicted by the cited documents, which expressly distinguish between the performance of cig-a-likes and pod-based products. (PX1087 (Altria) at 003, 005 (contrasting the performance of Nu Mark's cig-a-like and pod-based products); PX1100 (Altria) at 009 (contrasting the performance of closed, open, and "hybrid" products over time)).

247. An April 2018 weekly business update prepared by Altria's Consumer & Marketplace Insights group includes only closed-system products among competitive products. (PX1098 (Altria) at 004).

Response to Proposed Finding No. 247:

The Proposed Finding is incomplete and misleading without additional context. Contrary to Complaint Counsel's proposed market definition, the presentation cited in the Proposed Finding expressly distinguishes between cig-a-likes and pod-based (or "hybrid") products, (PX1098 (Altria) at 092), and further demonstrates that cig-a-likes were a declining category being overtaken by pod-based products, (PX1098 (Altria) at 092; *see also* RFF ¶¶ 276-300, 390, 1324-29).

248. A September 2018 competitive update summary prepared by Altria's Consumer Insights & Engagement group includes a slide showing that volume sales grew for MarkTen, Vuse, Blu, and Logic in 2018 even though their shares fell as sales of Juul increased. (PX1098 (Altria) at 040).

Response to Proposed Finding No. 248:

The Proposed Finding is incomplete and misleading without additional context. Contrary to Complaint Counsel's proposed market definition, the presentation cited in the Proposed Finding expressly distinguishes between cig-a-likes and pod-based products, (PX1098 (Altria) at 009), and

further demonstrates that pod-based products were driving growth in the e-vapor category while other types of products showed flat or declining sales volume, (PX1098 (Altria) at 009, 092).

249. As Michelle Baculis testified, "Really, all of the vapor products in closed systems sold in MOC were part of the competitive set for Nu Mark." PX7014 (Baculis (Altria), Dep. at 75)). Specifically, she identified Blu, Vuse, and Juul, all closed-system products, as included in that set. (PX7014 (Baculis (Altria), Dep. at 71)).

Response to Proposed Finding No. 249:

Respondents have no specific response except to note that Baculis testified that the lack of a pod-based product (prior to acquiring Elite in 2017) was a "significant gap in [Nu Mark's] portfolio" and that "people [at Nu Mark] wanted to have a product that was not a cig-a-like [and] that could compete in the growing category of pods." (PX7014 Baculis (Altria) Dep. at 145).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

250. Quigley referred to "the four major brands" as "Mark Ten, Vuse, Blu, and JUUL," which are all closed-system products (PX7003 (Quigley (Altria), IHT at 92-93 (discussing PX1174 (Altria) at 011) (August 2018 Nu Mark slide deck)).

Response to Proposed Finding No. 250:

The Proposed Finding is incomplete and misleading without additional context. Contrary to Complaint Counsel's proposed market definition of all closed-system products, the cited presentation expressly distinguishes between cig-a-likes and pod products (referred to as "hybrids") in stating volume sales for the four brands. (PX1174 (Altria) at 011; *see also* RFF ¶ 6 (noting that pods are sometimes referred to as hybrids)).

251. During deal negotiations between Altria and JLI, [redacted] (PX7001 (Devitre (Altria), IHT at 74-75) (*in camera*)).

Response to Proposed Finding No. 251:

Respondents have no specific response except to note that Devitre was an Altria board member and had no on-the-ground job responsibilities. (PX7001 Devitre (Altria) IHT at 14-16 (describing responsibilities as Altria board member)).

252. In a draft credit investor presentation from November 2018, JLI included a slide titled "U.S. competition overview" showing sales for Vuse, Juul, MarkTen XL Bold, Elite, Logic Power, Blu Plus, and *my*blu, which are all closed-system e-cigarette products. (PX2145 (JLI) at 023; *see also* PX2532 (JLI) at 016 ("JUUL continues to grow despite competitive launches")).

Response to Proposed Finding No. 252:

The Proposed Finding is incomplete and misleading without additional context. *First*, the presentation is dated August 2018 and the cited sales figures found in the slide titled "U.S. competition overview" are dated through June 2018. (PX2145 (JLI) at 002, 023). *Second*, this presentation just as easily supports other, equally plausible contentions at odds with Complaint Counsel's contention, including that the relevant product market encompasses all products containing nicotine: The very same "U.S. competition overview" slide that Complaint Counsel cites also lists IQOS, a heat-not-burn product, (PX2145 (JLI) at 23; *see also* RFF ¶ 85), and other slides found in the presentation compare JUUL to a variety of products containing nicotine including "Cigarettes," "Heat-Not-Burn," "Other E-Cigs," and nicotine gum, (PX2145 (JLI) at 010, 011, 012; *see also* PX2532 (JLI) at 016 (listing IQOS, a heat-not-burn product, among competitive launches)). Accordingly, the presentation cited by Complaint Counsel does not support its arbitrary market definition but rather underscores JLI's incredibly broad view of the market as including all products containing nicotine. (PX7039 Robbins (JLI) Dep. at 46 (explaining that "98 or 99 percent of the market was cigarettes. . . . [T]he whole market was cigarettes.")).

253. An internal JLI email dated February 2018 notes developments including the upcoming rollout of Elite and Altria's testing of "other closed-system devices in 2018." (PX2176 (JLI) at 001).

Response to Proposed Finding No. 253:

The Proposed Finding is incomplete and misleading without additional context. Among the "developments" listed in the email is the more than $2 billion that Philip Morris International (PMI) had spent in 2017 on IQOS, a heat-not-burn product, and PMI's expectation that IQOS would soon receive regulatory authorization. (PX2176 (JLI) at 001; *see also* RFF ¶ 85). Rather than demonstrate any focus on "other closed-system devices," this email largely focuses on PMI's heat-not-burn product, (PX2176 (JLI) at 001), and equally could support a contention of a broader market of products containing nicotine. Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

254. A JLI slide deck from January 2018 includes a slide titled "Other Competitive Product Pipelines" that features new products by Blu and MarkTen, including MarkTen Bold and MarkTen Elite. (PX2044 (JLI) at 005).

Response to Proposed Finding No. 254:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel fails to note that the slides preceding the slide titled "Other Competitive Product Pipelines" focus on heat-not-burn technology, including PMI's IQOS and British American Tobacco's glo products. (PX2044 (JLI) at 003-04). This email equally could support a contention of a broader market of products containing nicotine. Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

255. In an internal JLI Email Robbins references "our competitors (Vuse, Blu, Logic & Mark10)." PX2485 (JLI) at 001.

Response to Proposed Finding No. 255:

The Proposed Finding is incomplete and misleading without additional context. This email specifically concerns whether e-cigarette manufacturers globally place certain language on their packaging. (PX2485 (JLI) at 001). It does not address JLI's views on the universe of competitive products.

256. Internal JLI documents show that JLI tracked the performance of MarkTen, Vuse, Blu, Logic, and sometimes NJOY, all of which are closed-system products. (*See, e.g.*, PX2062 (JLI) at 007 (sales and marketing deck); PX2471 (JLI) at 031 (Email attaching internal JLI report); PX2528 (JLI) at 022 (weekly data report); PX2289 (JLI) at 021 (Email attaching competitive analysis framework).

Response to Proposed Finding No. 256:

The Proposed Finding is incomplete and misleading without additional context. The cited documents equally demonstrate that JLI also tracked the performance of JUUL relative to other products containing nicotine, including combustible cigarettes and disposable and open-system e-cigarettes. (*See* PX2062 (JLI) at 006 (comparing JUUL's sales to those of combustible cigarette brands Maverick, Winston, American Spirit, L&M, Pall Mall, Camel, Newport, and Marlboro); PX2471 (JLI) at 002 (listing competitors as Marlboro, VUSE, and Newport), 022 (comparing aided awareness among competitive systems, including disposable and open-system e-cigarette brands such as Halo, Sourin, and Kandypens); PX2289 (JLI) at 021 (competitive analysis framework listing heat-not-burn products IQOS and glo)).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

257. In a confidential information memorandum from November 2018, JLI includes a graph that depicts U.S. e-vapor sales and includes Vuse, MarkTen, Blu, Logic, and Juul. (PX2531 (JLI) at 034).

Response to Proposed Finding No. 257:

The Proposed Finding is incomplete and misleading without additional context. The graph cited by Complaint Counsel is located within a section of the confidential information memorandum regarding the potentially reduced-risk product landscape. (PX2531 (JLI) at 033-37). This section describes "original electronic nicotine delivery products, including Blu, Vuse, MarkTen, Logic, and NJOY" as "fail[ing] to provide effective nicotine delivery." (PX2531 (JLI) at 033). Within this same section, JLI goes on to list Glo and IQOS, two heat-not-burn products, as higher nicotine satisfaction products. (PX2531 (JLI) at 035). This document equally could support a contention of a broader market of products containing nicotine. Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

258. A December 2018 Email attaches a JLI quarterly update that includes a slide describing the "[c]ompetitive landscape" and referring to Vuse, MarkTen, Blu, Logic, and Juul. (PX2526 (JLI) at 007; *see* PX7042 (Danaher (JLI), Dep. at 61-69)).

Response to Proposed Finding No. 258:

The Proposed Finding is incomplete and misleading without additional context. On the same slide cited by Complaint Counsel, JLI compares search interest in JUUL with that in combustible cigarettes and heat-not-burn products. (PX2526 (JLI) at 007). On the next slide, JLI compares its pod volume share against the combined U.S. cigarette and e-cigarette market. (PX2526 (JLI) at 008). This document equally could support a contention that heat-not-burn products, combustible cigarettes, and pod-based and cig-a-like e-cigarettes compete in the same market. Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

259. A JLI investor update for FY2018 and 2018 Q4, dated February 2019, includes a slide titled "Competitive landscape" showing JLI's growth in share of the vapor category as compared to Vuse, MarkTen, Blu, and Logic. (PX2098 (JLI) at 014).

Response to Proposed Finding No. 259:

The Proposed Finding is incomplete and misleading without additional context. On the same slide cited by Complaint Counsel, JLI compares search interest in JUUL with combustible cigarettes and heat-not-burn products. (PX2098 (JLI) at 014). On a later slide, JLI compares its volume share against the combined U.S. cigarette and e-cigarette market. (PX2098 (JLI) at 017). This document equally could support a contention that heat-not-burn products, combustible cigarettes, and pod-based and cig-a-like e-cigarettes compete in the same market. Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

4. Other Market Participants View Closed-System E-Cigarettes As a Distinct Market

260. Reynolds sees the primary competitors for its Vuse products as [redacted] (PX8008 at 012 (¶ 22) (Huckabee (Reynolds), Decl.) (*in camera*)).

Response to Proposed Finding No. 260:

The Proposed Finding is incomplete and misleading without additional context. At trial, Huckabee testified that [redacted]

[redacted]

261. In setting prices for its Vuse products, Reynolds considers a range of factors that includes closed-system competitor pricing but does not include the pricing of open systems. (PX8008 at 021 (¶ 41) (Huckabee (Reynolds), Decl.)).

Response to Proposed Finding No. 261:

The Proposed Finding is incomplete and misleading without additional context. At trial, Huckabee testified that [redacted].

262. Reynolds "has focused its efforts on the promotion and sales of closed systems because closed systems are more consistent with Reynolds' existing distribution system and strengths in marketing." (PX8008 at 011 (¶ 20) (Huckabee (Reynolds), Decl.)).

Response to Proposed Finding No. 262:

The Proposed Finding is incomplete and misleading without additional context. At trial, Huckabee testified that [redacted].

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

263. As of December 2020, ITG's primary e-vapor competitors were Juul, Reynolds' Vuse, and NJOY, all of which are closed-system brands. (PX7012 (Eldridge (ITG), Dep. at 170)).

Response to Proposed Finding No. 263:

The Proposed Finding is incomplete and misleading without additional context. In setting price, ITG Brands "compare[s] pods to pods, " (RFF ¶ 1406(c) (quoting PX7012 Eldridge (ITG Brands) Dep. at 130)), and, [redacted]. In addition, most of ITG Brands's marketing focuses on its pod-based device with nicotine salts. (RFF ¶ 261).

264. ITG tracks market shares for Juul, Reynolds' Vuse, and NJOY. (PX7012 (Eldridge (ITG), Dep. at 170-71)).

Response to Proposed Finding No. 264:

The Proposed Finding is incomplete and misleading without additional context. In setting price, ITG Brands "compare[s] pods to pods," (RFF ¶ 1406(c) (quoting PX7012 Eldridge (ITG Brands) Dep. at 130)), and, [redacted]. In addition, most of ITG Brands's marketing focuses on its pod-based device with nicotine salts. (RFF ¶ 261). [redacted].

265. Andrew Farrell considers NJOY's main competitors to be Juul, Vuse, Blu, and Logic, all of which are closed-system brands. (Farrell (NJOY) Tr. 225; PX7029 (Farrell (NJOY), Dep. at 147); PX8004 at 002 (¶ 12) (Farrell (NJOY), Decl.)). In 2018, he viewed Altria's MarkTen brand as a main competitor as well. (Farrell (NJOY) Tr. 226-27; PX8004 at 002 (¶ 12) (Farrell (NJOY), Decl.)).

Response to Proposed Finding No. 265:

The Proposed Finding is incomplete and misleading without additional context. At trial, Farrell testified to differences between cig-a-like and pod-based products. Farrell testified, for example, that while cig-a-likes are consistently cylindrical, pod-based devices are larger and more varied in shape. (RFF ¶ 30; Farrell (NJOY) Tr. 210-11). [redacted]. Farrell testified that adult smokers evaluating cig-a-likes as an alternative to combustible cigarettes will see some similarities between the cig-a-like and the cigarettes. (RFF ¶ 1389; Farrell (NJOY) Tr. 365). [redacted]

266. Internal NJOY documents from 2017 show that NJOY tracked its performance against Vuse, MarkTen, Blu, and Logic, all of which are closed-system e-cigarette brands. (PX3003 (NJOY) at 011-12 (February 2017 business plan); PX3002 (NJOY) at 035 (showing key account targets)).

Response to Proposed Finding No. 266:

The Proposed Finding is incomplete and misleading without additional context. Except for Logic, which sold the pod-based Logic Pro as of 2017, the other competitor brands listed in the Proposed Finding were solely comprised of cig-a-likes in 2017. (RFF ¶¶ 243, 258, 262, 277; PX3003 (NJOY) at 011-12). The fact that NJOY was tracking the performance of cig-a-likes and pod-based products in 2017 is more a reflection of the lack of pod-based products on the market at the time than it is evidence supporting Complaint Counsel's argument that the relevant product market should be all cig-a-like and pod-based products.

267. PMI sells closed-system products because, in PMI's view, "it's very important to be able to control and know what the consumer is getting in both how the device performs but also in the liquid that they use in order to make sure that they perform appropriately together." (King (PMI) Tr. 2342-43; *see also* PX7020 (King (PMI), Dep. at 12-13)).

Response to Proposed Finding No. 267:

Respondents have no specific response.

5. Both Cigalikes and Pod-Based Products Are Properly Included in the Relevant Product Market

268. Dr. Rothman concluded that, despite differences in shape between cigalikes and pod-based products, "all closed-system e-cigarettes are part of the same competitive set." (PX7048 (Rothman, Trial Dep. at 21); PX5001 at 017-18 (¶¶ 27-29) (Rothman Rebuttal Report)).

Response to Proposed Finding No. 268:

The Proposed Finding is incorrect. Dr. Rothman purported to make such a conclusion. However, his conclusion ignores "considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RFF ¶ 1386 (quoting RX1217 Murphy Report ¶ 113)). Further, Dr. Rothman did not use a hypothetical monopolist test to analyze whether pods and cig-a-likes could constitute distinct markets. (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). There are numerous other differences between the types of products, including whether they are shaped to resemble a cigarette (thus triggering the stigma of cigarette smoking), the size of the battery, and the manner in which the cartridge generally attaches. (RFF ¶¶ 1388-97).

269. In reaching his conclusion that closed-system e-cigarettes are a relevant product market, Dr. Rothman explained that both cigalikes and pod-based products "share the same essential features" in that "[t]hey all heat pre-filled liquid nicotine to create a vapor which is then inhaled," that both are "primarily sold in convenience stores," and that "JLI considered Altria to be a competitive threat" prior to February 2018 when Altria was only selling cigalikes. (PX7048 (Rothman, Trial Dep. at 21-22); PX5001 at 018-19 (¶ 30) (Rothman Rebuttal Report)).

Response to Proposed Finding No. 269:

The Proposed Finding is incorrect and misleading without additional context. Dr. Rothman purported to make such a conclusion and to base it on the considerations cited in the Proposed Finding. However, his conclusion ignores "considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RFF ¶ 1386 (quoting RX1217 Murphy Report ¶ 113)). Further, Dr. Rothman did not use a hypothetical monopolist test to analyze whether pods and cig-a-likes could constitute distinct markets. (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the Horizontal Merger Guidelines' "smallest market principle." (RFF ¶ 1417). There are numerous other differences between the types of products, including whether they are shaped to resemble a cigarette (thus triggering the stigma of cigarette smoking), the size of the battery, and the manner in which the cartridge generally attaches. (RFF ¶¶ 1388-97).

The Proposed Finding is also incorrect and misleading regarding the notion that JLI considered Altria to be a competitive threat prior to February 2018. The evidence demonstrates that JLI, which only makes a pod-based product, did not view itself as competing directly against cig-a-likes such as MarkTen. (RFF ¶ 1412). To the contrary, evidence from JLI shows that the company thought cig-a-likes were underpowered and did not provide enough satisfaction for smokers and vapers and that retention rates for cig-a-likes were low. (RFF ¶¶ 11, 17, 27). "[I]nadequate nicotine delivery and deficient product design/form-factor ultimately limited broad-based acceptance" of cig-a-likes. (RFF ¶ 27 (quoting PX2531 (JLI) at 034)). JLI did not make pricing decisions for its pod-based product based on information about cig-a-like products. (RFF ¶¶ 1639-46). Indeed, JLI was so dismissive of Nu Mark's cig-a-likes that neither Pritzker nor

Valani could even recall learning prior to this litigation that Altria had removed Nu Mark's remaining cig-a-like products in December 2018. (RFF ¶ 1102).

270. Altria introduced MarkTen Elite, its first pod-based product, into the U.S. market in February 2018. (Willard (Altria) Tr. 1356-57).

Response to Proposed Finding No. 270:

Respondents have no specific response.

271. Ordinary-course documents show that JLI tracked and compared its pod-based Juul product against Altria's MarkTen cigalike products well before Altria introduced its pod-based Elite product in February 2018. (*See* CCFF ¶¶ 299-308, below). During that time, Altria also tracked JUUL's performance. (*See* CCFF ¶¶ 331-35, below). Even after Altria introduced MarkTen Elite, JLI continued to track Altria's cigalike and pod products. (*See* CCFF ¶¶ 309-26, below).

Response to Proposed Finding No. 271:

The Proposed Finding is incomplete and misleading without additional context. The evidence demonstrates that although JLI tracked the data on the market shares of e-vapor products in the marketplace like MarkTen cig-a-likes (among many other products), it never saw those products as a competitive threat to JUUL. (RFF ¶¶ 11, 17, 27, 1102). Relatedly, the evidence demonstrates that JLI, which only makes a pod-based product, did not view itself as competing directly against cig-a-likes such as MarkTen. (RFF ¶ 1412). To the contrary, evidence from JLI shows that the company thought cig-a-likes were underpowered and did not provide enough satisfaction for smokers and vapers and that retention rates for cig-a-likes were low. (RFF ¶¶ 11, 17, 27). "[I]nadequate nicotine delivery and deficient product design/form-factor ultimately limited broad-based acceptance" of cig-a-likes. (RFF ¶ 27 (quoting PX2531 (JLI) at 034)). JLI did not make pricing decisions for its pod-based product based on information about cig-a-like products. (RFF ¶¶ 1639-46). Indeed, JLI was so dismissive of Nu Mark's cig-a-likes that neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had removed Nu Mark's remaining cig-a-like products in December 2018. (RFF ¶ 1102).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 299-326 and 331-35, Respondents incorporate their responses to those Proposed Findings herein.

272. [redacted]

Response to Proposed Finding No. 272:

Respondents have no specific response.

273. Ordinary-course documents show that JLI tracked and compared its pod-based Juul product against Reynolds' Vuse cigalike products well before Reynolds introduced its pod-based Alto product in August 2018. (*See* CCFF ¶¶ 301-09, 314-18, below). During that time, Reynolds also considered Juul a competitor. (*See* CCFF ¶¶ 346-47, below).

Response to Proposed Finding No. 273:

The Proposed Finding is incomplete and misleading without additional context. The evidence demonstrates that although JLI tracked the data on market shares of e-vapor products in the marketplace, which included cig-a-likes (among many other products), it never saw those products as a competitive threat to JUUL. (RFF ¶¶ 11, 17, 27, 1102). Relatedly, the evidence demonstrates that JLI, which only makes a pod-based product, did not view itself as competing directly against cig-a-likes such as the Vuse product. (RFF ¶ 1412). To the contrary, evidence from JLI shows that the company thought cig-a-likes were underpowered and did not provide enough satisfaction for smokers and vapers and that retention rates for cig-a-likes were low. (RFF ¶¶ 11, 17, 27). "[I]nadequate nicotine delivery and deficient product design/form-factor ultimately limited broad-based acceptance" of cig-a-likes. (RFF ¶ 27 (quoting PX2531 (JLI) at 034)). JLI did not make pricing decisions for its pod-based product based on information about cig-a-like products. (RFF ¶¶ 1639-46). Indeed, JLI was so dismissive of Nu Mark's cig-a-likes that neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had removed Nu Mark's remaining cig-a-like products in December 2018. (RFF ¶ 1102).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 301-09, 314-18, and 346-47, Respondents incorporate their responses to those Proposed Findings herein.

274. Closed-system e-cigarette producers, including Altria and JLI, tracked each other and identified each other as competitors regardless of whether their business focused on cigalikes, pod products, or both. (*See* CCFF ¶¶ 299-350, below).

Response to Proposed Finding No. 274:

The Proposed Finding is incorrect and not supported by the cited findings. The evidence demonstrates that although Altria and JLI tracked the data on market shares of all e-vapor products, including from cig-a-likes and pod-based products, both companies consistently differentiated between pod-based products and cig-a-likes, and their potential for commercial and regulatory success, in internal documents and analyses. (RFF ¶¶ 1407-12). As for JLI, it only made a pod-based product, and did not view itself as competing directly against cig-a-likes. (RFF ¶ 1412). To the contrary, evidence from JLI shows that the company thought cig-a-likes were underpowered and did not provide enough satisfaction for smokers and vapers and that retention rates for cig-a-likes were low. (RFF ¶¶ 11, 17, 27). "[I]nadequate nicotine delivery and deficient product design/form-factor ultimately limited broad-based acceptance" of cig-a-likes. (RFF ¶ 27 (quoting PX2531 (JLI) at 034)). JLI did not make pricing decisions for its pod-based product based on information about cig-a-like products. (RFF ¶¶ 1639-46). Indeed, JLI was so dismissive of Nu Mark's cig-a-likes that neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had removed Nu Mark's remaining cig-a-like products in December 2018. (RFF ¶ 1102).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 299-350, Respondents incorporate their responses to those Proposed Findings herein.

275. Consistent with Respondents' ordinary-course documents, Dr. Rothman notes that "[d]ata that the [R]espondents use in the ordinary course of business—including Nielsen, IRI, and

STARS—track sales in these retail channels and appear not to distinguish between cig-a-like and pod-based products." (PX5001 at 026 (¶ 38) (Rothman Rebuttal Report)).

Response to Proposed Finding No. 275:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, the cited data also does not distinguish between open and closed systems, and so equally could support a market consisting of all e-vapor products. (*See* PX5001 Rothman Rebuttal ¶ 38 n. 112 (explaining that "IRI data include a product description field that often contains text, but it is not systematic"); Robbins (JLI) Tr. 3244 (explaining that Nielsen and IRI "grouped [products] by brand family" not product type)). (Note that RX0027, labeled "IRI Data" on the exhibit list, is the data set relied on by Professor Murphy and contains fields that were added by his team; only the columns labeled <Geography Description>, <Time Description>, <UPC 13 Digit>, <Product Description>, <Dollar Sales>, <Unit Sales>, and <Volume Sales> contain data directly from IRI.)

Moreover, the record evidence confirms that the cited data, such as IRI data, was of limited use precisely because it did not distinguish between different types of e-vapor products. (PX7034 Mountjoy (Altria) Dep. at 15-20). As a result, manufacturers, including both JLI and Altria, used these data sets as mere starting points and would conduct their own analyses of the data where they would split out the different types of e-vapor products. For example, Robbins explained that JLI would "split out cigalikes from pod-based products" in the data. (Robbins (JLI) Tr. 3244-45). Both Begley and Quigley testified that Altria did the same, (Quigley (Altria) Tr. 2034); Begley (Altria) Tr. 1091), and Altria's presentations analyzing IRI data repeatedly distinguish between the market performance of cig-a-likes and pod-based products., (*See, e.g.*, PX1424 (Altria) at 012; *see also* RFF ¶¶ 1408-11).

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

276. [redacted]

Response to Proposed Finding No. 276:

Respondents have no specific response.

277. ITG continues to sell a cigalike product called Blu Plus. (PX7012 (Eldridge (ITG), Dep. at 49)).

Response to Proposed Finding No. 277:

Respondents have no specific response.

a) Cigalikes and Pod-Based Products Have Similar Features

278. Closed-system products come in different shapes, referred to as "form factors." (Farrell (NJOY) Tr. 210-11). For example, the "NJOY Ace is an oval shape" and "rather short," the Juul devices "looks like a flash drive" and "is a little bit longer," and cigalikes "are long and thin and look like a cigarette." (Farrell (NJOY) Tr. 210-11). The "JUUL [device] was a rectangular device and Elite was a sort of smashed diamond shape." (PX7026 (Gardner (Altria), Dep. at 211); *see also* Crozier (Sheetz) Tr. 1488 (noting that the Juul device "kind of looks like a long USB thumb drive")).

Response to Proposed Finding No. 278:

Respondents have no specific response.

279. The cigalike format "is cigarette-like. It looks like a cigarette. It's a closed-system. It usually has two parts, the battery and the cartridge assembly." (PX7026 (Gardner (Altria), Dep. at 48); *see also* PX7004 (Willard (Altria), IHT at 104)).

Response to Proposed Finding No. 279:

Respondents have no specific response.

280. The MarkTen XL was an Altria cigalike product. (Begley (Altria) Tr. 1072-73).

Response to Proposed Finding No. 280:

Respondents have no specific response.

281. [redacted]

Response to Proposed Finding No. 281:

Respondents have no specific response.

282. The Blu Plus is an ITG cigalike product. (PX8011 at 004-5 (¶ 19) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 282:

Respondents have no specific response.

283. Cigalikes are considered closed-system e-vapor products. (Valani (JLI) Tr. 969; PX7022 (Begley (Altria), Dep. at 74)).

Response to Proposed Finding No. 283:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

284. MarkTen Elite, a pod-based product, was a closed-system e-cigarette product. (PX7022 (Begley (Altria), Dep. at 169)).

Response to Proposed Finding No. 284:

Respondents have no specific response.

285. The MarkTen cigalike "in some respects, bears some similarity to these pod-based products" in that both consisted of a cartridge and a rechargeable battery. (Willard (Altria) Tr. 1352-53).

Response to Proposed Finding No. 285:

The Proposed Finding is incomplete and misleading without additional context. Although both pod-based products and cig-a-likes have a cartridge and a rechargeable battery, there are numerous other differences between them, including whether they are shaped to resemble a

cigarette (thus triggering the stigma of cigarette smoking), the size of the battery, and the manner in which the cartridge generally attaches. (RFF ¶¶ 1388-97).

286. Both cigalikes and pod-based products are closed-system e-cigarettes, and, as such, both use pre-filled, sealed cartridges or pods. (PX8008 at 005-06 (¶¶ 11-12) (Huckabee (Reynolds), Decl.)).

Response to Proposed Finding No. 286:

The Proposed Finding is incomplete and misleading without additional context. Although both pod-based products and cig-a-likes use pre-filled, sealed cartridges, there are numerous other differences between them, including whether they are shaped to resemble a cigarette (thus triggering the stigma of cigarette smoking), the size of the battery, and the manner in which the cartridge generally attaches. (RFF ¶¶ 1388-97).

287. In a May 2017 pricing survey commissioned by JLI, McKinsey noted that "[c]losed-system vaporizers, sometimes known as cigalikes and e-cigs . . . include disposable e-cigarettes or e-cigarettes that use replaceable cartridges or pods" that "are not intended to be refilled or used with bottled e-juice." (PX2579 (JLI) at 181).

Response to Proposed Finding No. 287:

Respondents have no specific response except to note that, contrary to Complaint Counsel's proposed market definition, the presentation cited in the Proposed Finding expressly distinguishes between cig-a-likes and other types of e-cigarettes and includes data showing that sales of cig-a-likes between 2009 and 2019 lagged behind sales of all vapor devices. (PX2579 (JLI) at 160).

288. Both cigalikes and pod-based e-cigarettes may or may not contain nicotine salts. (PX1129 (Altria) at 012 (describing Bold formulation for MarkTen cigalike as using "a proprietary recipe for nicotine salts)); PX1029 (Altria) at 003-04 (Email attaching slides comparing MarkTen against both pods and cigalikes in terms of various product attributes).

Response to Proposed Finding No. 288:

Respondents have no specific response.

289. [redacted]

Response to Proposed Finding No. 289:

The Proposed Finding is incomplete and misleading without additional context. The availability of flavors has changed significantly over time due to independent actions of the e-cigarette manufacturers and also regulatory guidance. Although both pod-based products and cig-a-likes historically have used a variety of flavors (which since have been limited by FDA's flavor ban, (PX9016 (FDA) at 002)), there are numerous other differences between them, including whether they are shaped to resemble a cigarette (thus triggering the stigma of cigarette smoking), the size of the battery, and the manner in which the cartridge generally attaches, (RFF ¶¶ 1388-97).

b) Cigalikes and Pod-Based Products Are Similar in Terms of User Experience and Distribution, and Are Regulated Similarly by the FDA

290. An April 2018 Nu Mark presentation to the Altria Board of Directors identifies both cigalikes and closed pods as closed-system products and distinguishes them from open systems in terms of consumer experience and flavor expectations. (PX4029 (Altria) at 007)).

Response to Proposed Finding No. 290:

Respondents have no specific response except to note that, contrary to Complaint Counsel's proposed market definition, the slide pictured in the Proposed Finding expressly distinguishes between cig-a-likes and pods. (PX4029 (Altria) at 007).

291. A Nu Mark situation update from August 2018 includes slides showing both pods and cigalikes appealed to the same consumer experience segments. (PX1174 (Altria) at 016-17; *see also* PX7041 (Quigley (Altria), Dep. at 20-22)).

Response to Proposed Finding No. 291:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The cited slides do not conclude that pods and cig-a-likes appeal to identical consumer experience segments. Instead, the slides merely reflected Nu Mark's "current understanding" that there were cig-a-likes and pod-based products that could provide certain attributes such as "[s]imple satisfaction." (PX1174 (Altria) at 016). Both in the cited slides and elsewhere, the presentation expressly distinguishes between cig-a-likes and pod-based products and assesses them separately. (PX1174 (Altria) at 016-18).

Moreover, there is abundant evidence that pod-based products and cig-a-likes appealed to distinct consumers. (RFF ¶¶ 1398-403).

292. In terms of price-setting for Reynolds' Vuse products, "the consumers that are purchasing [Vuse] products in stores are making decisions across brands based on the competitive set that's present in those stores." (Huckabee (Reynolds) Tr. 389-90).

Response to Proposed Finding No. 292:

The Proposed Finding is incomplete and misleading without additional context. Huckabee explained at trial that [redacted], notwithstanding aggressive discounting by numerous manufacturers in the pod-based category, (RFF ¶¶ 1345-51).

293. Altria categorized e-vapor products, including both cigalikes and pod-based products, as reduced-risk products. (PX7041 (Quigley (Altria), Dep. at 127)).

Response to Proposed Finding No. 293:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

294. The FDA's flavor ban that went into effect in February 2020 applied to both pod-based products and rechargeable cigalikes equally. (Sheetz (Crozier) Tr. 1495-96; PX9016 at 001-02 (Jan. 2020 FDA news release)).

Response to Proposed Finding No. 294:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

295. Crozier, Category Manager at retailer Sheetz, testified that "[g]enerally speaking, vape shops sell more of the open systems and C-stores sell more pod systems and cigalike-type products." (Crozier (Sheetz) Tr. 1494-95). Sheetz retail stores carry "a mix of pods and cigalike products in our e-cigarette assortment," both types being closed-system products. (Crozier (Sheetz) Tr. 1492-93).

Response to Proposed Finding No. 295:

The Proposed Finding is incomplete and misleading without additional context. Crozier made clear in his testimony that, based on his experience at Sheetz, he understands that there are form differences between cig-a-likes and pod-based products, (RFF ¶ 1397), [redacted]. Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

296. Nu Mark's 2018 three-year strategic plan includes a plan for future merchandising shelf space showing both its pod-based Elite and its MarkTen cigalike displayed on adjacent shelves. (PX4012 (Altria) at 40)).

Response to Proposed Finding No. 296:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

297. NJOY uses the same distributors for both its pod-based product Ace and its cigalike product Daily. (Farrell (NJOY) Tr. 257-58).

Response to Proposed Finding No. 297:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

298. The majority of retailers who sell NJOY's e-cigarette products sell both NJOY's pod-based product Ace and its cigalike product Daily. Moreover, at a majority of those retailers, both products are displayed next to each other on shelves. (Farrell (NJOY) Tr. 257-58).

Response to Proposed Finding No. 298:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

c) Respondents View Cigalikes and Pod-Based Products As Competing in the Same Market

(1) JLI View Cigalikes and Pod-Based Products As Competing in the Same Market

299. In an internal Email exchange from April 2017, before Elite was introduced, JLI executives discussed the extent to which MarkTen's growth was funded by couponing as well as the nature of MarkTen promotions over the previous year. (PX2585 (JLI) at 001).

Response to Proposed Finding No. 299:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

300. In an internal Email exchange from April 2017, before Elite was introduced, JLI executives discussed retailer feedback and one JLI executive noted, "MarkTen promotions worth taking a look at." (PX2586 (JLI) at 001).

Response to Proposed Finding No. 300:

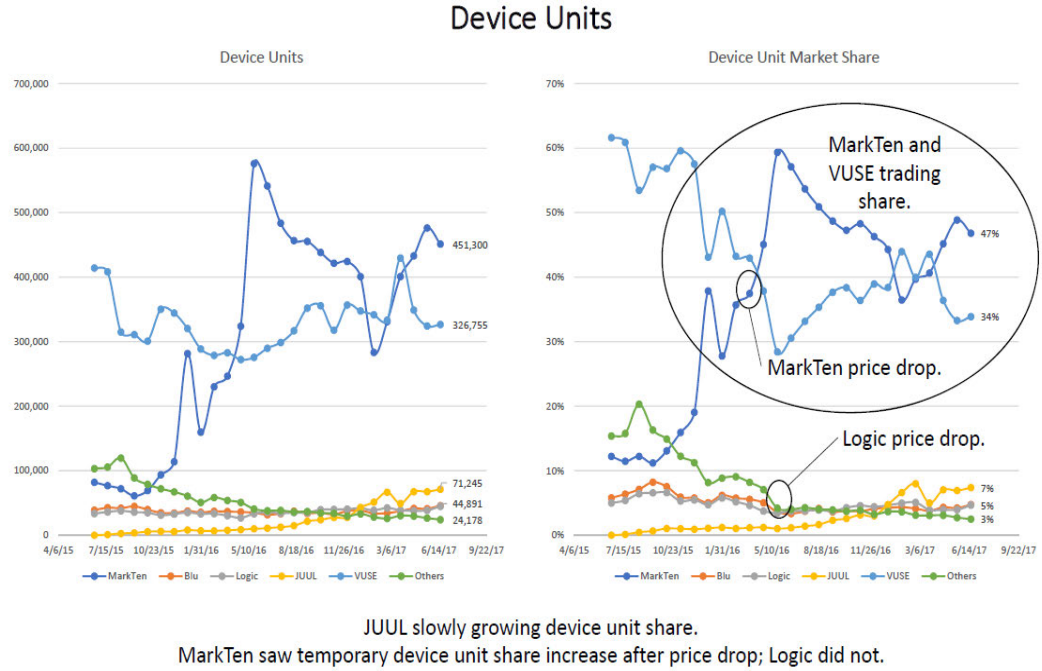
Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

301. A June 2017 McKinsey slide deck on pricing strategy prepared for JLI includes a slide comparing prices for a number of e-vapor products, including JUUL's pod product as well as cigalike products MarkTen XL, Vuse Solo, and Blu Plus. (PX2579 (JLI) at 007 (listing in footnote specific products used for comparison)).

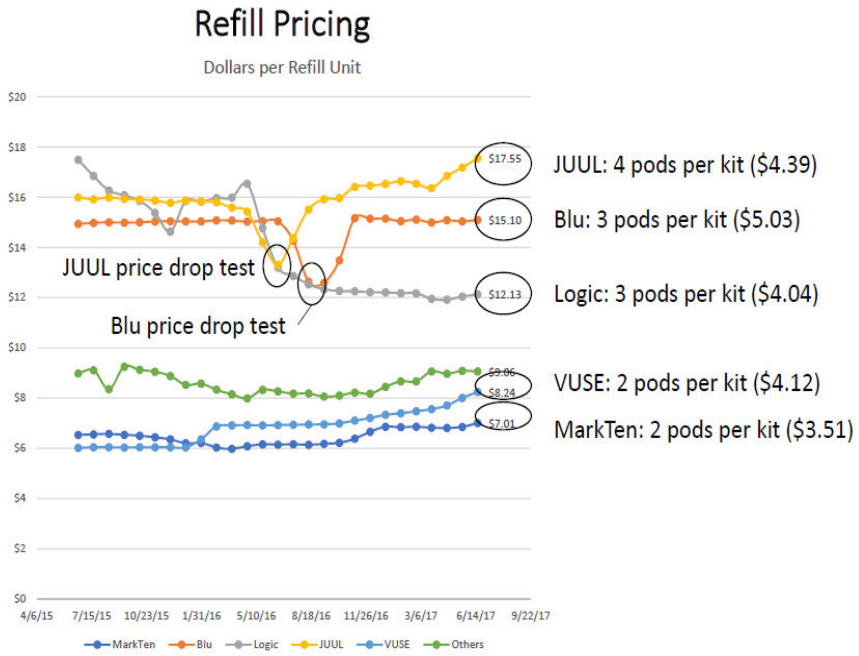
Response to Proposed Finding No. 301:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

302. An internal JLI slide deck from July 2017, before Elite and Alto were introduced, summarizes Nielsen data and compares Juul to MarkTen, Vuse, Blu, and Logic across a range of metrics, including device pricing, device units, refill pricing, and refill dollars. (PX2333 (JLI) at 005-08).



(PX2333 (JLI) at 006).



Refill pricing is about $4-5 per pod except for MarkTen, which is employing a low-cost strategy.

(PX2333 (JLI) at 007).

Response to Proposed Finding No. 302:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

303. An internal JLI Email from September 2017, before MarkTen Elite and Vuse Alto were introduced, forwards a slide deck that includes the results from brand survey on Juul and four competitors, including MarkTen, Vuse, Blu, and Logic. (PX2580 (JLI) at 003).

Response to Proposed Finding No. 303:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

304. In a Board update dated September 2017, before MarkTen Elite and Vuse Alto were introduced, JLI tracked starter kit unit shares over time for competitors, including Vuse and MarkTen. (PX2588 (JLI) at 003). The same update contains a "Competitive Analysis" slide on brand marketing and includes Vuse, Blu, Logic, MarkTen, and IQOS. (PX2588 (JLI) at 017).

Response to Proposed Finding No. 304:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405). In addition, Complaint Counsel fails to note that the "Competitive Analysis" slide focuses on advertising strategy and, because it includes IQOS, a heat-not-burn product, (PX2588 (JLI) at 017), could equally support a contention of a broader market of products containing nicotine.

305. In internal email chains from October 2017 and January 2018, before MarkTen Elite and Vuse Alto were introduced, JLI reported on market shares for MarkTen, Vuse, Blu, Logic, and Juul. (PX2488 (JLI) at 002; PX2487 (JLI) at 001 (January 2018 email) (noting change in MarkTen's share); PX2483 (JLI) at 002 (January 2018 email) (noting efficient MarkTen distribution)).

Response to Proposed Finding No. 305:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

306. A JLI business overview from December 2017 includes a slide titled "JUUL competes within an ecosystem with a range of vaporizer products" that identifies cigalikes, pod products, and open systems, but notes that cigalikes and pod products both "target[] smokers," whereas open systems "target[] 'hard core' vapers." (PX2597 (JLI) at 039). The deck also includes a slide that identifies competitors as including Blu, MarkTen, and Vuse. (PX2597 (JLI) at 037).

Response to Proposed Finding No. 306:

The Proposed Finding is incomplete and misleading without additional context. The same document describes standard e-cigarettes, like MarkTen, as "1st and 2nd generation competitors" who "[cannot] truly match" JUUL's "superior nicotine delivery." (PX2597 (JLI) at 041). The document goes on to identify a differentiated set of emerging "3rd generation vapor products . . . cloning JUUL and potentially employing better nicotine delivery tech," including Von Erl, Phix, XFIRE, Rubi, Boulder, bo, myJet, and baton. (PX2597 (JLI) at 042-43). The slides also reference other products, like IQOS, a heat-not-burn product, (PX2597 (JLI) at 045), and could therefore

equally support a contention of a broader market of products containing nicotine. Moreover, the evidence shows that that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

307. An internal JLI Email from January 2018, before Elite and Alto were introduced, attaches a document with topic heading "Product Team Competitive Intel Overview" that identifies MarkTen, Vuse, and Blu as among JLI's competitors. (PX2080 (JLI) at 003).

Response to Proposed Finding No. 307:

The Proposed Finding is incomplete and misleading without additional context. The same "Product Team Competitive Intel Overview" states that JUUL competes with cigarettes, cigars, smokeless tobacco, open-tank vapor, closed-tank vapor, and heat-not-burn. (PX2080 (JLI) at 003). This overview also identifies the changing market landscape and predicts the market will see a "[h]igher prevalence of nic salts in products" in 2018/19 product pipelines. (PX2080 (JLI) at 004). Looking forward at "key players / innovators" for JLI "to keep [their] eye on," JLI lists no cig-a-like product. (PX2080 (JLI) at 004-05). Indeed, the evidence shows that that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

308. An internal JLI Email from January 2018 attaches information on "some baseline competitive offerings and price positioning info," including price information on MarkTen, Blu Plus, and Vuse Solo cigalikes. (PX2350 (JLI) at 001, 003, 005, 007).

Response to Proposed Finding No. 308:

The Proposed Finding is incomplete and misleading without additional context. The same attachment cited by Complaint Counsel also includes price information on various other types of closed and open e-cigarettes, as well as heat-not-burn systems. (PX2350 (JLI) at 003-08 (listing prices for the hybrid systems Logic Pro and Boulder Rock; the disposable system blu; and the heat-not-burn product Logic Vapeleaf)). Moreover, the evidence shows that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405).

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

309. An internal JLI Email from February 2018, before Vuse Alto was introduced, includes a summary of Nielsen data including sales trends in the vapor category, specifically calling out Juul, Vuse, and MarkTen. (PX2482 (JLI) at 001).

Response to Proposed Finding No. 309:

The Proposed Finding is incomplete and misleading without additional context. The same email cited by Complaint Counsel also includes summaries of sales trends in combustible cigarettes and chewing tobacco. (PX2482 (JLI) at 001). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

310. An internal JLI Email from February 2018 notes that the MarkTen XL Bold was one of the "emerging players" and had been "driving overall MarkTen growth in Convenience." (PX2492 (JLI) at 003).

Response to Proposed Finding No. 310:

The Proposed Finding is incomplete and misleading without additional context. This email also discusses non-pod-based products, such as Logic's Vapeleaf, a "new [heat-not-burn]

product," which is also listed among the "[e]merging players." (PX2492 (JLI) at 003). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

311. An internal JLI Email from February 2018 attaches a slide deck that refers to JLI's "[c]ompetition from big companies" and in the case of Altria includes both the pod-based MarkTen Elite and the MarkTen XL cigalike. (PX2079 (JLI) at 014).

Response to Proposed Finding No. 311:

The Proposed Finding is incomplete and misleading without additional context. The slide deck also lists two of Philip Morris International's heat-not-burn products, IQOS and TEEPS, and thus this slide deck could also support a contention of a broader market of products containing nicotine. (PX2079 (JLI) at 014). In fact, the slide deck alludes to the changing market landscape. JLI describes JUUL as a "[d]ifferentiated product" in the "[n]ew 'pod-mod' category" owing to its "[n]ic salts formulation" and "form factor." (PX2079 (JLI) at 010-11). Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

312. In a March 2018 investor presentation, JLI compared its Juul product with both MarkTen and Elite in terms of nicotine satisfaction and consumer experience. (PX2067 (JLI) at 014).

Response to Proposed Finding No. 312:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel could have used this very same presentation to support a contention that heat-not-burn and pod-based products compete in the same market. In fact, the graph cited by Complaint Counsel also compares the JUUL product to the heat-not-burn products IQOS and glo in terms of nicotine satisfaction and consumer experience. (PX2067 (JLI) at 014). In other slides, JLI compares JUUL

with combustible cigarettes and heat-not-burn in terms of nicotine delivery, market share, and Google search volumes. (PX2067 (JLI) at 013, 015).

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

313. In a series of confidential information memoranda from 2018, JLI compared its Juul product with both MarkTen and Elite, as well as Vuse, Blu, Logic, and NJOY, in terms of nicotine satisfaction and consumer experience. (PX2590 (JLI) at 029 (March 2018 CIM); PX2158 (JLI) at 047 (May 2018 CIM); PX2531 (JLI) at 033 (November 2018 CIM)).

Response to Proposed Finding No. 313:

The Proposed Finding is incomplete and misleading without additional context. In the same series of confidential information memoranda, JLI describes "original electronic nicotine delivery products, including Blu, Vuse, MarkTen, Logic, and NJOY" as "fail[ing] to provide effective nicotine delivery" and notes that "[a]doption of these products have been largely limited to the casual nicotine consumer segment." (PX2590 (JLI) at 029; PX2158 (JLI) at 047; PX2531 (JLI) at 033). JLI distinguishes such products from "next-generation" products like JUUL that "have demonstrated rapid conversion of the cigarette market." (PX2590 (JLI) at 029; PX2158 (JLI) at 047; PX2531 (JLI) at 033).

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

314. In an April 2018 competitor benchmarking presentation, JLI compared flavor and nicotine attributes of closed-system products, including cigalike products such as MarkTen, Vuse Solo, and Blu Plus. (PX2344 (JLI) at 004, 007).

Response to Proposed Finding No. 314:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

315. A 2018 Q1 investor update for JLI includes a slide comparing JUUL's change in share at retail from April 2017 to April 2018, before Alto was introduced, to those of Vuse, Blu, MarkTen, and Logic. (PX2345 (JLI) at 004).

Response to Proposed Finding No. 315:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

316. A May 2018 JLI slide deck titled "Flavor Competitive Landscape" includes a slide comparing JUUL's flavor offerings to those of "top competitors," including both Elite and MarkTen, as well as cigalikes Vuse Solo, Vuse Ciro, and Blu Plus. (PX2090 (JLI) at 009).

Response to Proposed Finding No. 316:

The Proposed Finding is incomplete and misleading without additional context. This same slide deck could support a contention of a broader market of products containing nicotine. On the same slide cited by Complaint Counsel, JLI also lists heat-not-burn product Logic Vapeleaf and blu disposables as "top competitors." (PX2090 (JLI) at 009). Later in the same slide deck, JLI discusses e-liquid flavors for open systems and nicotine gum. (PX2090 (JLI) at 012, 016, 018). This slide deck in fact alludes to the changing market landscape. Within a section titled "Key Competitor Product Launches" JLI lists only products that include nicotine salts, including *my*blu

nicotine salt pods and Naked Juice nicotine salt disposables. (PX2090 (JLI) at 016). Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

317. An internal JLI Email from May 2018 includes a table comparing flavor and nicotine range for a number of e-vapor products, including both Elite and MarkTen, as well as cigalikes Vuse Solo, Vuse Ciro, and Blu Plus. (PX2481 (JLI) at 002).

Response to Proposed Finding No. 317:

The Proposed Finding is incomplete and misleading without additional context. The explanation accompanying the table highlights the "JUUL like[]" pod-based products, MarkTen Elite and *my*blu. (PX2481 (JLI) at 001). Additionally, the email and table specifically call out the two brands that have, or are expected to have, nicotine salts: Naked Juice disposables and *my*blu. (PX2481 (JLI) at 001-02). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

318. In a draft pricing update performed for JLI from June 2018, before Vuse Alto was introduced, McKinsey [redacted] (PX2486 (JLI) at 013 (*in camera*)). [redacted] (PX2486 (JLI) at 042-43).

Response to Proposed Finding No. 318:

Respondents have no specific response except to note that JLI never changed its pricing or promotions in response to cig-a-like pricing. (RFF ¶ 1405). Complaint Counsel also fails to note that the [redacted] To the extent that the Proposed Finding implies that the relevant product market is all

closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

319. A JLI sales and marketing slide deck from November 2018 included a slide comparing market shares from October 2017 to November 2018 of Juul, Vuse, Blu, MarkTen, Logic, and NJOY, and includes both Altria's Elite and cigalike products. (PX2062 (JLI) at 007; Robbins (JLI) Tr. 3246).

Response to Proposed Finding No. 319:

The Proposed Finding is incomplete and misleading without additional context. This same slide deck also compares JUUL's performance to combustible cigarettes and thus could support a contention of a broader market of products containing nicotine. (PX2062 (JLI) at 006; Robbins (JLI) Tr. 3247-48). Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

320. An internal JLI Email from November 2018 attached a JLI investor presentation that tracked "competitive [product] launches," including cigalike products MarkTen Bold, Vuse Ciro, and Blu Plus. (PX2532 (JLI) at 016; PX7042 (Danaher (JLI), Dep. at 70-75)).

Response to Proposed Finding No. 320:

The Proposed Finding is incomplete and misleading without additional context. This same slide deck could be cited to support a contention of a broader market of products containing nicotine. (PX2532 (JLI) at 016 (listing IQOS, a heat-not-burn product, under "competitive launches")). It could also support a narrower pod-based e-cigarette market: The slide cited by Complaint Counsel points out the growing divide between cig-a-like products and JUUL, noting that MarkTen Bold sales constituted 2 percent of category growth; Vuse Ciro sales constituted -10 percent of category growth; and Blu Plus sales constituted -1 percent of category growth. (PX2532 (JLI) at 016). Finally, the cited testimony from JLI's former CFO, Timothy Danaher, concerns a different document and does not discuss PX2532. (PX7042 Danaher (JLI) Dep. at 70-75

(discussing PX2528)). Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

321. A JLI draft competitor product performance evaluation from December 2018 covered of a range of products, among which were the pod-based MarkTen Elite and NJOY disposable cigalike product Daily and cigalike product Loop, as well as products with and without nicotine salts. (PX2084 (JLI) at 005; O'Hara (JLI) Tr. 561-65); Farrell (NJOY) Tr. 212-23, 287 (identifying Daily as NJOY disposable e-cigarette and Loop as NJOY cigalike product)).

Response to Proposed Finding No. 321:

The Proposed Finding is incomplete and misleading without additional context. As JLI's O'Hara testified at trial, this slide deck also covered a range of heat-not-burn and open-system products, such as IQOS and Ziip. (O'Hara (JLI) Tr. 565). In fact, of the 21 products included in this draft slide deck, (PX2084 (JLI) at 005), Complaint Counsel singled out the only two cig-a-like products, NJOY Daily, which contained nicotine salts, and NJOY Loop, [redacted].

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

322. An internal JLI Email from January 2019 refers to a competitor product study that included Juul as well as cigalike products MarkTen, Vuse Solo, and NJOY Daily. (PX2460 (JLI) at 001; PX7033 (O'Hara (JLI), Dep. at 179-80)).

Response to Proposed Finding No. 322:

The Proposed Finding is incomplete and misleading without additional context. The study to which Complaint Counsel refers included a variety of products containing nicotine, such IQOS, a heat-not-burn product, and Marlboro, a combustible cigarette. (PX2460 (JLI) at 001).

323. JLI's Riaz Valani testified that, during Respondents' transaction negotiations, JLI sought a commitment from Altria not to develop or sell its own products that would compete with JLI, including both pod-based products and, broadly, cigalikes. (PX7032 (Valani (JLI), Dep. at 54-55)).

Response to Proposed Finding No. 323:

The Proposed Finding is incomplete and misleading without additional context. Numerous JLI and Altria witnesses involved in negotiations testified that JLI was not concerned about competition from any of Altria's existing e-cigarette products. (RFF ¶¶ 1189-202). Instead, Valani testified that it would put JLI in a "precarious position" if Altria "[was] developing products" while it had access to the JLI product and technology roadmap and while JLI is "even slightly reliant on [Altria] for provision of services." (PX7032 Valani (JLI) Dep. at 54). Valani went on to explain that "if Altria was developing . . . vapor products and they were privy to all of JLI's product plan and technology plan, that . . . proprietary information . . . may find its way into products that Altria developed." (PX7032 Valani (JLI) Dep. at 77-78).

324. The non-compete provision of the Relationship Agreement to which Altria agreed as part of the transaction applies to Altria's MarkTen cigalike product: The non-compete section prohibits Altria from competing in the "e-Vapor business" for an initial term of six years, with very limited exceptions. (PX1276 (Altria/JLI) at 025-027, 064 (Relationship Agreement, Dec. 20, 2018) (Altria "shall not . . . (1) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business")). As defined in the Relationship Agreement, the "e-Vapor business" includes both cigalike and pod products. (PX1276 (Altria/JLI) at 009 ("'e-Vapor Business' means business activities and operations relating to vapor-based electronic nicotine delivery systems (including vaporizers and e-cigarettes that create an aerosol, vapor or other gaseous form that the user inhales) other than Heat-not-Burn Nicotine Delivery Systems"); *see also* CCFF ¶¶ 914-24, below [redacted]).

Response to Proposed Finding No. 324:

The Proposed Finding is incomplete and misleading without additional context. *First,* the noncompete section of the Relationship Agreement prohibits Altria from competing in the "e-Vapor business" with the very significant exception for Altria's "Green Smoke, MarkTen (or

Solaris, which is the non-U.S. equivalent brand of MarkTen) and MarkTen Elite brands, in each case, as such business is presently conducted." (PX1276 (JLI) at 026 § 3.1). The language exempting Altria's existing products from the noncompete appears in draft deal documents exchanged between parties dating back to mid-November 2018, when Altria was still operating its e-cigarette business. (RFF ¶¶ 1107, 1109). As Pritzker testified, JLI understood the noncompete to exempt Altria's existing e-cigarette products. (RFF ¶ 1109; Pritzker (JLI) Tr. 879).

Second, the noncompete runs for an initial six-year term concurrent with the Services Agreement, as providing services granted Altria employees access to JLI's confidential information. (RFF ¶¶ 1129, 1243-46). As Valani testified, that it would put JLI in a "precarious position" if Altria "[was] developing products" while it had access to the JLI product and technology roadmap and while JLI is "even slightly reliant on [Altria] for provision of services." (PX7032 Valani (JLI) Dep. at 54). Numerous JLI and Altria witnesses involved in transaction negotiations have testified that JLI was not concerned about competition from any of Altria's existing e-cigarette products post-transaction. (RFF ¶¶ 1189-202).

Third, the definition of "e-Vapor Business" in the Relationship Agreement just as readily could be used to support the contention of a broader market of products containing nicotine or a broader e-cigarette market, including open systems. (PX1276 (JLI) at 009). Complaint Counsel has the burden to prove that the relevant product market should be defined as all closed-system products, (RCoL ¶ 55), and has not carried this burden, (RFF ¶¶ 1383-426).

Fourth, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 914-24, Respondents incorporate their responses to those Proposed Findings herein.

325. In his competitive intelligence role at JLI, Joseph O'Hara tracked the MarkTen cigalike products, including MarkTen, MarkTen XL, and MarkTen Bold. (O'Hara (JLI) Tr. 506-07; PX7033 (O'Hara (JLI), Dep. at 48-49)).

Response to Proposed Finding No. 325:

The Proposed Finding is incomplete and misleading without additional context. In his competitive intelligence role at JLI, O'Hara tracked a variety of products containing nicotine including cigarettes, nicotine gum, nicotine patches, pod-based e-cigarettes, cig-a-likes, and open systems. (O'Hara (JLI) Tr. 506 ("I tracked everything from cigarettes to nicotine gum to nicotine patches, as well as all kinds of vapor products, including pod-based, cigalikes, open-pod systems where you could use separate e-liquids to refill a pod. It was a very dynamic marketplace, and I -- I tracked the market."); PX7033 O'Hara (JLI) Dep. at 48 ("I certainly tracked [Altria's] large combustible portfolio, including Marlboro and other brands, as well as other MarkTen products other than the MarkTen Elite.")). In addition, O'Hara testified that he did "not track [Nu Mark] closely," because it was not "a competitive entity in the market." (PX7033 O'Hara (JLI) Dep. at 176).

326. In terms of whether JLI competed with MarkTen cigalikes on price, Danaher testified that "price is certainly part of that decisionmaking process that a consumer would go through." (PX7005 (Danaher (JLI), IHT at 114-15)).

Response to Proposed Finding No. 326:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel cannot point to any pricing actions taken by JLI in response to MarkTen or any cig-a-like product. To the contrary, Robbins, the Chief Growth Officer at JLI, agreed at trial that JLI never "change[d] its pricing" or "promotions" of JUUL "as a result of cig-a-like competition." (Robbins (JLI) Tr. 3245; RFF ¶ 1405).

In the cited testimony, Danaher merely testified that in the entire ENDS category—which includes open systems—consumers consider price, although it is subordinate to other factors. (PX7005 Danaher (JLI) IHT at 114-15 ("[W]hen you think about competition in the ENDS category, the e-cigarette category, consumers are looking at various features and functionality of

those products, and those various features and functionality . . . I believe . . . our consumer insights has shown . . . those are a larger part of the decisionmaking criteria that a consumer will go through before you get to price. But price is certainly part of that decisionmaking process that a consumer would go through.")).

(2) Altria Viewed Cigalikes and Pod-Based Products as Competing in the Same Market

327. Nu Mark's 2016-2018 strategic plan, which Begley presented to the Altria Board in February 2016, discussed pod-based products. (PX4040 (Altria) at 046). As of February 2016, there were closed-system products on the market apart from cigalikes. (Begley (Altria) Tr. 1116-17). For example, at that time pod-based products were being sold commercially in the United States. (Begley (Altria) Tr. 1117-19).

Response to Proposed Finding No. 327:

Respondents have no specific response except to note that the cited document was prepared in February 2016, (PX4040 (Altria) at 001), when the e-vapor market was very different than it was at the time of the transaction or is today. In February 2016, JUUL had not yet experienced its explosive growth and created the market for pod-based products. (RFF ¶¶ 296-400). Indeed, Altria did not even launch its pod-based product, Elite, until two years later. (Schwartz (Altria) Tr. 1871). Moreover, the fact that the February 2016 Board presentation specifically discusses pod-based systems as a separate type of e-vapor product, (PX4040 (Altria) at 045-46), is inconsistent with Complaint Counsel's assertion that the market should be defined as all closed systems. To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

328. Altria's Michelle Baculis testified that "all of the vapor products in closed systems sold in MOC were part of the competitive set for Nu Mark." (PX7014 (Baculis (Altria), Dep. at 75)).

Response to Proposed Finding No. 328:

The Proposed Finding is incomplete and misleading without additional context. Nu Mark, over time, marketed both pod-based products and cig-a-likes, which is what the quoted testimony reflects. In addition, Baculis testified that the lack of a pod-based product (prior to acquiring Elite in 2017) was a "significant gap in [Nu Mark's] portfolio" and that "people [at Nu Mark] wanted to have a product that was not a cig-a-like [and] that could compete in the growing category of pods." (PX7014 Baculis (Altria) Dep. at 145). Complaint Counsel attempts to stretch Baculis's use of the phrase "competitive set" to imply that Nu Mark viewed its cig-a-like and pod products as competing directly against each other, when the above context makes clear that is not what Baculis meant.

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

329. Bill Gardner testified that "[e]veryone that sold an e-vapor product was a competitor to Nu Mark," and identified among Altria's big tobacco competitors Vuse, which "had a cigalike, as well as a pod-based product," Blu, and Logic. (PX7026 (Gardner (Altria), Dep. at 65-66)).

Response to Proposed Finding No. 329:

The Proposed Finding is incomplete and misleading without additional context. Gardner recognized that cig-a-likes and pod products had distinct characteristics from one another. For example, he testified that cig-a-likes carried the stigma of looking like a cigarette: "[A]dult smokers no longer wanted . . . to look like they were smoking a cigarette and the stigma associated with that." (Gardner (Altria) Tr. 2604; *see also* RFF ¶ 16). In addition, Gardner was a scientist, who did not have any operational responsibility within Nu Mark. (PX7026 Gardner (Altria) Dep. at 13-18 (describing job responsibilities)).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

330. Pascal Fernandez testified that the cigalike form factor "was one of the forms that provided an e-vapor experience for smokers interested by e-vapor," so "it would have been part of our tracking and looking at the e-vapor space." (PX7023 (Fernandez (Altria), Dep. at 73)).

Response to Proposed Finding No. 330:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

331. The market share figures presented to Altria's Board in February 2017, long before MarkTen Elite or Vuse Alto were introduced, included JUUL's pod-based products and Vuse and MarkTen cigalikes. (RX0746 (Altria) at 014).

Response to Proposed Finding No. 331:

Respondents have no specific response except to note that (1) it is not surprising that an e-vapor company with only cig-a-like products (like Nu Mark at the time), (RFF ¶ 277), would be tracking the performance of products in other formats; and (2) at the time, pod-based products were just beginning to emerge, as evidenced by the fact that JUUL only had a 3 percent share and had not yet experienced its explosive growth and created the market for pod-based products, (RX0746 (Altria) at 014; RFF ¶¶ 562-64). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

332. Altria's Mountjoy testified that "[a]s JUUL picked up presence in the market, I'm sure they were included in [Altria's consumer] research more frequently," and confirmed that Altria would perform research comparing consumer reactions to different products that included JUUL and Altria products. (PX7034 (Mountjoy (Altria), Dep. at 54-58)).

Response to Proposed Finding No. 332:

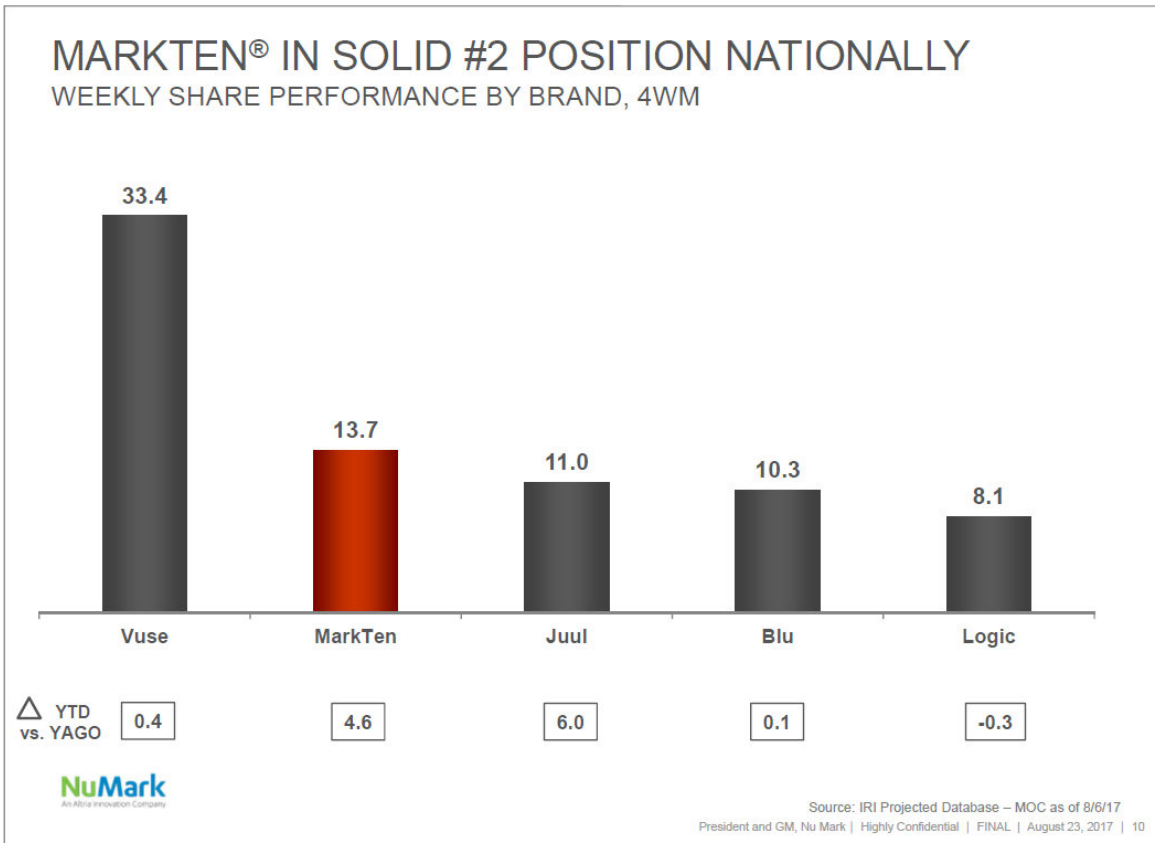
Respondents have no specific response except to note it is not surprising that an e-vapor company with only cig-a-like products (like Nu Mark at the time), (RFF ¶ 277), would be tracking the performance of products in other formats. To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

333. Draft slides from May 2017, before MarkTen Elite was introduced, note that "Juul has momentum and positive word of mouth, but (based on limited trial) ATCs are open to other products that give them a 'reason to believe.'" (PX4248 (Altria) at 004).

Response to Proposed Finding No. 333:

Respondents have no specific response except to note that there is no evidence that this presentation meant that JUUL users would be open to cig-a-like products. To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

334. An August 2017 Nu Mark update to the Altria Board of Directors included a slide showing MarkTen's weekly share performance as compared to Vuse, Juul, Blu, and Logic. (PX4028 (Altria) at 011). As Begley confirmed, these share figures take into account both cigalike and pod products. (Begley (Altria) Tr. 976). The update also presents retail volume share by brand, including Vuse Vibe, Vuse Solo, MarkTen XL, MarkTen KS, NJOY, Blu, Vapin Plus, Logic, and Juul. (PX4028 (Altria) at 012).



(PX4028 (Altria) at 011).

Response to Proposed Finding No. 334:

The Proposed Finding is incomplete and misleading without additional context. It is not surprising that an e-vapor company with only cig-a-like products (like Nu Mark at the time), (RFF ¶ 277), would be tracking the market share performance of products in other formats, particularly when the presentation is explicit that Altria was "explor[ing]" acquiring a "pod based product," (PX4028 (Altria) at 030). Indeed, elsewhere in the presentation, Nu Mark separately tracks the volume sales of cig-a-likes (which were growing volume by only 3.3 percent) from "POD Based Closed Tank" products (which were growing volume by 516 percent). (PX4028 (Altria) at 009; *see also* PX4028 (Altria) at 029 (similarly distinguishing between market results "by form")). At the time, pod-based products were just beginning to emerge, as evidenced by the fact that JUUL

only had a 3 percent share and had not yet experienced its explosive growth and created the market for pod-based products. (RX0746 (Altria) at 014; RFF ¶¶ 562-64).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

335. A January 2018 update to the Altria Board of Directors includes a slide estimating a potential combined Altria-JUUL e-vapor share that includes both cigalikes and JUUL's pod product. (PX1280 (Altria) at 015).

Response to Proposed Finding No. 335:

The Proposed Finding is incomplete and misleading without additional context. The cited presentation distinguishes between "cig-a-like" and "closed tank (pods)," (PX1280 (Altria) at 003), and reports separately on the results of cig-a-likes as compared to other products such as pod-based products, (PX1280 (Altria) at 007). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

336. Nu Mark's 2018 three-year strategic plan from February 2018, before Vuse Alto was introduced, includes a slide showing 2017 market shares for Vuse, MarkTen, Juul, Logic, and Blu. (PX4012 (Altria) 012).

Response to Proposed Finding No. 336:

The Proposed Finding is incomplete and misleading without additional context. Elsewhere, the cited presentation separately tracks the data for cig-a-likes as compared to pod-based products, (PX4012 (Altria) at 006-07, 009), and estimates that by 2020 the pod-based format will overwhelmingly dominate the e-vapor market, (PX4012 (Altria) at 007, 009).

Moreover, to the extent that the Proposed Finding implies that the relevant product market

is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

337. In a February 2018 draft of its 2018-2020 3-year strategic plan, Nu Mark compared the pricing for its Elite product against both pod-based products (Juul) and cigalikes (Vuse Solo and MarkTen cigalike). (PX1298 (Altria) at 030).

Response to Proposed Finding No. 337:

The Proposed Finding is incomplete and misleading without additional context. Elsewhere, the cited presentation specifically distinguishes between "Cig-alike" and "Pod/Hybrid" as different "product segment[s]." (PX1298 (Altria) at 044).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

338. An internal slide deck for an Altria long-term strategic planning meeting in February 2018, before Vuse Alto was introduced, included a "Juul development process comparison" in the context of discussing Altria's product pipeline aspirations, as well as an innovation scorecard that compared Altria to Juul and Vuse across a range of factors, including market share, effective price, and OCI margin. (PX1000 (Altria) at 003, 008; *see also* PX7023 (Fernandez (Altria), Dep. at 124-26)).

Response to Proposed Finding No. 338:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the presentation cited in the Proposed Finding, Nu Mark was planning on launching its own pod-based product, Elite. (RFF ¶¶ 368-72). In addition, the presentation specifically distinguishes between "[c]ig-alike" and "[c]losed [t]ank" (sometimes used as another name for pod-based products) as different "[p]roduct [s]egment[s]." (PX1000 (Altria) at 010; RFF ¶ 35 (pod-based products sometimes referred to as "closed-tank" devices)).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

339. In a Board orientation from April 2018, before Vuse Alto was introduced, Nu Mark presented a slide showing top e-vapor brands from 2017 by share position in the MOC channel, including Vuse, MarkTen, Juul, Logic, and Blu. (PX4029 (Altria) at 013).

Response to Proposed Finding No. 339:

The Proposed Finding is incomplete and misleading without additional context. Elsewhere, the cited presentation separately tracks the data for cig-a-likes as compared to pod-based products, (PX4029 (Altria) at 004, 015), and separates out cig-a-likes and pod-based products in describing the different types of closed-system e-vapor products, (PX4029 (Altria) at 007, 021). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

340. A July 2018 assessment of Altria's operating segments [redacted] (PX4534 (Altria) at 004 (*in camera*)).

Response to Proposed Finding No. 340:

Respondents have no specific response except to note that the quoted language in the Proposed Finding explicitly distinguishes between "cig-a-likes" and "closed tank" (*i.e.*, pod-based) products as different types of e-vapor products. (RFF ¶ 35 (pod-based products sometimes referred to as "closed-tank" devices)). To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

d) Other Market Participants View Cigalikes and Pod-Based Products As Competing in the Same Market

341. Reynolds considers the competitive set for its Vuse cigalike products as including both "[p]ods and cigalike products" primarily in the convenience store channel. (Huckabee (Reynolds) Tr. 388).

Response to Proposed Finding No. 341:

The Proposed Finding is incomplete and misleading without additional context. Huckabee explained at trial that [redacted]. Reynolds has kept the price of its cig-a-like products relatively stable over time, (RFF ¶ 1406(b)), notwithstanding aggressive discounting by numerous manufacturers in the pod-based category, (RFF ¶¶ 1345-51).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

342. Reynolds considers its Vuse pod-based products as competing with "the other pod-based and cigalike products that are on the market . . . in those same channels." (Huckabee (Reynolds) Tr. 388-89).

Response to Proposed Finding No. 342:

The Proposed Finding is incomplete and misleading without additional context. Huckabee explained at trial that [redacted]. Reynolds has kept the price of its

cig-a-like products relatively stable over time, (RFF ¶ 1406(b)), notwithstanding aggressive discounting by numerous manufacturers in the pod-based category, (RFF ¶¶ 1345-51).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

343. In pricing its closed-system vapor products, Reynolds "take[s] into account the pricing of competitor pod-based and cigalike product, as well as promotional effectiveness in the market." (Huckabee (Reynolds) Tr. 389).

Response to Proposed Finding No. 343:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. There is no evidence that Reynolds takes into account the pricing of pod-based products in pricing cig-a-like products and vice versa. To the contrary, Huckabee explained at trial that [redacted]. Reynolds has kept the price of its cig-a-like products relatively stable over time, (RFF ¶ 1406(b)), notwithstanding aggressive discounting by numerous manufacturers in the pod-based category, (RFF ¶¶ 1345-51).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

344. Prior to December 2018, the competitors that Reynolds considered when setting prices for its Vuse closed-system vapor products were Juul, NJOY, Logic, and MarkTen, including both "a cigalike product, MarkTen, and a pod-based product, MarkTen Elite." (Huckabee (Reynolds) Tr. 390).

Response to Proposed Finding No. 344:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In the cited testimony, Huckabee was referring to the pricing of Vuse generally, which includes both the cig-a-likes and the pod-based products marketed under the Vuse trademark. (*See* RFF ¶ 243). There is no evidence that Reynolds takes into account the pricing of pod-based products in pricing cig-a-like products and vice versa. To the contrary, Huckabee explained at trial that [redacted]. Reynolds has kept the price of its cig-a-like products relatively stable over time, (RFF ¶ 1406(b)), notwithstanding aggressive discounting by numerous manufacturers in the pod-based category, (RFF ¶¶ 1345-51).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

345. Prior to December 2018, the primary competitors to the Vuse brand were Juul, NJOY, and MarkTen, including both the cigalike and pod products. (Huckabee (Reynolds) Tr. 391-92).

Response to Proposed Finding No. 345:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In the cited testimony, Huckabee was referring to Vuse generally, which includes both the cig-a-likes and the pod-based products marketed under the Vuse trademark. (*See* RFF ¶ 243). Notably, Huckabee explained at trial that [redacted]

[redacted]. Reynolds has kept the price of its cig-a-like products relatively stable over time, (RFF ¶ 1406(b)), notwithstanding aggressive discounting by numerous manufacturers in the pod-based category, (RFF ¶¶ 1345-51).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

346. [redacted]

Response to Proposed Finding No. 346:

The Proposed Finding misstates the cited testimony. [redacted]

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

347. [redacted] (PX3218 (Reynolds) at 006 (*in camera*)). The same presentation includes a slide that [redacted] (PX3218 (Reynolds) at 023 (*in camera*)).

Response to Proposed Finding No. 347:

The Proposed Finding is incomplete and misleading without additional context. Elsewhere, the presentation specifically [redacted] To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

348. [redacted]

Response to Proposed Finding No. 348:

Respondents have no specific response except to note that the slide is ambiguous with respect to whether [redacted]. In addition, Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

349. [redacted]

Response to Proposed Finding No. 349:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

350. [redacted]

Response to Proposed Finding No. 350:

The Proposed Finding is incomplete and misleading without additional context. At trial, Farrell testified to differences between cig-a-like and pod-based products. Farrell testified, for example, that while cig-a-likes are cylindrical, "like a combustible cigarette," pod-based devices are larger and more varied in shape. (Farrell (NJOY) Tr. 210-11, 213-14; *see also* RFF ¶ 30). Farrell testified further that a competitor offering a promotion on a cig-a-like would not be a "primary driver" of whether to offer a promotion on a pod-based device. (PX7029 Farrell (NJOY) Dep. at 118-19; *see also* RFF ¶1406(a)). [redacted]. Moreover, other witnesses at trial elaborated that cig-a-likes and pod products appealed to distinct customers. (RFF ¶¶ 1398-403).

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

6. Open-System E-Cigarettes Are Properly Excluded from the Relevant Product Market

351. Open-tank systems are distinct from closed-system e-cigarettes due to their very different product attributes, user experiences, and retail sales channels. For those reasons, and the testimony and evidence from market participants, Dr. Rothman concluded that open-tank e-cigarettes are not close substitutes with closed-system e-cigarettes. (PX5000 at 032-39 (¶¶ 68-77) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 16-18)).

Response to Proposed Finding No. 351:

Respondents have no specific response except to note that Complaint Counsel's justifications for excluding open-tank systems from its market definition also justify separating cig-a-likes and pod-products into separate markets. Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

a) Open-System E-Cigarettes and Closed-System E-Cigarettes Have Distinct Product Attributes

352. Open-tank users source their e-liquids from a range of suppliers. (Huckabee (Reynolds) Tr. 386-87 ("you have to purchase the liquid… [T]here is a very wide range of liquid products in the market"); Farrell (NJOY) Tr. 208 ("the main distinguishing factor of open systems is that the container that will hold nicotine, the liquid that contains nicotine, is open and can be refilled by a variety of different e-liquids that customers have access to and are manufactured by a variety of entities. So the containers don't come prefilled."); Farrell (NJOY) Tr. 209; King (PMI) Tr. 2342-43; PX7035 (Masoudi (JLI), Dep. at 107)).

Response to Proposed Finding No. 352:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

353. Open tank users can refill their cartridge or tank with e-liquid. (Huckabee (Reynolds) Tr. 383 ("open system describes the ability of a consumer to refill a cartridge or tank in the device with a fluid"); Farrell (NJOY) Tr. 208-209; King (PMI) Tr. 2342-43, Garnick (Altria) Tr. 1693; PX7035 (Masoudi (JLI), Dep. at 107)).

Response to Proposed Finding No. 353:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

354. Open-tank devices can be customized by users. (Farrell (NJOY) Tr. 207-09 ("There are varying degrees of complexity in any open system, but the components can include a battery, a tank. The consumer can switch out the mouthpiece. I have had direct experience

with some products where a consumer can purchase a different type of coil and insert that coil into the system. And so in doing that, you know, the user has to maintain the different parts."); Begley (Altria) Tr. 969-70 (Q. Open systems allow consumers to adjust the product's device settings? A. They do."); Garnick (Altria) Tr. 1693; PX2579 (JLI) at 180-81; PX7004 (Willard (Altria), IHT at 057-58)).

Response to Proposed Finding No. 354:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

355. Open-tank users can select from a variety of e-liquids and can mix them. (Begley (Altria) Tr. 970 ("Q. Open systems also allow consumers to adjust e-liquid formulations to their own liking? A. That's correct."); Begley (Altria) Tr. 1043 (*in camera*); Farrell (NJOY) Tr. 208 ("[T]he main distinguishing factor of open systems is that the container that will hold nicotine, the liquid that contains nicotine, is open and can be refilled by a variety of different e-liquids that customers have access to and are manufactured by a variety of entities."); Garnick (Altria) Tr. 1693; PX7004 (Willard (Altria), IHT at 057-58)).

Response to Proposed Finding No. 355:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

356. There are more available flavors for open-tank systems compared to closed-systems. (PX7025 (Burns (JLI), Dep. at 55) (describing the "range of flavors" that are different from closed-systems); PX7009 (Burns (JLI), IHT at 052-53) ("If you look at an open system and you go to a vape shop, there are literally hundreds of flavors available of different manufacturers and type," including "dragon's blood and bubble gum"); *see also* Crozier (Sheetz) Tr. 1492 (describing "different flavors" and strengths consumers of open-tank systems can buy); Garnick (Altria) Tr. 1692-1693 (comparing closed systems and open-tank, that in open-tank systems, "you mixed flavors, you mixed chemicals with different devices."); Huckabee (Reynolds) Tr. 386-87 ("there is a very wide range of liquid products in the market, typically sold in vape shops")).

Response to Proposed Finding No. 356:

Respondents have no specific response except to note that the availability of flavors has changed significantly over time as FDA has restricted the flavors that can be sold without first

obtaining market authorization. (PX9016 (FDA) at 002). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

357. Open-tank e-cigarettes are "typically much larger" than closed-system e-cigarettes. (Gifford (Altria) Tr. 2722, 2793; Jupe (Altria) Tr. 2241).

Response to Proposed Finding No. 357:

Respondents have no specific response except to note that cig-a-likes and pod products may also be distinguished on the basis of size, as pod products are generally larger in size and have larger, "more effective" batteries that enhance the consumer experience. (Willard (Altria) Tr. 1348; PX7030 Wexler (Turning Point Brands) Dep. at 42; RFF ¶ 1394). Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

358. Open-tank e-cigarettes are require maintenance and cleaning, and accordingly are more "complex" than closed system e-cigarettes. (Farrell (NJOY) Tr. 207-09; Huckabee (Reynolds) Tr. 386 ("a great deal more time and effort is required … to engage" open-tank e-cigarettes); PX8001 at 003 (¶ 13) (Stout (7-Eleven), Decl.) (Open-tank systems "are more complicated to use than closed vaping systems."); PX9000 (Altria) at 019 (Nov. 2017 Investor Day remarks) (addressing the "complexity" of open-tank e-cigarettes compared to closed-systems)).

Response to Proposed Finding No. 358:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

359. Closed system e-cigarettes have pods or cartridges that are prefilled with nicotine liquids. The pods or cartridges are not meant to be refilled by users. (Huckabee (Reynolds) Tr. 384 ("closed-system terminology refers specifically to the cartridge or pod or tank which is not meant to be refillable."); Farrell (NJOY) Tr. 207, 210 ("Closed systems are comprised of a battery and a container that is referenced in a variety of ways, either called pods, cartridges, capsules, tanks, but suffice it to say there is a battery and then a container that

comes prefilled with liquid, contains nicotine."); King (PMI) Tr. 2341-42; PX7035 (Masoudi (JLI), Dep. at 107); PX7022 (Begley (Altria), Dep. at 74)).

Response to Proposed Finding No. 359:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

360. Consumers do not have the ability to adjust the performance of the device when using closed system e-cigarettes. (Begley (Altria) Tr. 970). ("Q. With closed-system e-vapor products, consumers don't have the ability to adjust the performance of the device, correct? A. That's correct.")).

Response to Proposed Finding No. 360:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

361. Closed system e-cigarettes are not designed to allow devices and cartridges or pods to be mixed-and-matched among brands; a closed system "is a single system built to work as a single system." (Schwartz (Altria) Tr. 1852; Farrell (NJOY) Tr. 210 ("They're not designed to be tampered with and emptied and have another e-liquid inserted in them. So when a customer buys an NJOY product, they are using a product that is intended solely for use with NJOY's e-liquids."); King (PMI) Tr. 2341-42; PX7035 (Masoudi (JLI), Dep. at 107)).

Response to Proposed Finding No. 361:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

362. Convenience stores have expressed concern about the lack of quality assurance controls and recent health issues with open-tank products. (PX8006 at 003 (¶ 12) (Kloss (Wawa), Decl.) ("Open tank systems were also responsible for health issues associated with vaping that were widely reported in the press in 2019.").

Response to Proposed Finding No. 362:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

b) Open-System E-Cigarettes and Closed-System E-Cigarettes Do Not Provide the Same User Experience

363. Open-tank e-cigarette users tend to be used by "hobbyists or vapor enthusiasts." (Huckabee (Reynolds) Tr. 386-87). Open-tank e-cigarette users typically enjoy customization and possess "a more intimate knowledge of the various ways" to have an e-vapor experience. (Farrell (NJOY) Tr. 221-22; PX7025 (Burns (JLI), Dep. at 55); PX7004 (Willard (Altria), IHT at 057-058)). Open-tank e-cigarette users "interested in sampling different or unusual flavors" of e-liquids. (PX8008 at 005-06 (¶ 12) (Huckabee (Reynolds), Decl.)).

Response to Proposed Finding No. 363:

Respondents have no specific response except to note that cig-a-likes and pod products also appeal to different users because cig-a-likes carry the stigma of traditional cigarettes while pod products do not evoke cigarettes at all, which "really solves a problem" for the adult cigarette smoker, by offering "an emotional benefit" that comes with not being "viewed as a smoker." (Begley (Altria) Tr. 1079). In addition, Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

364. E-cigarette suppliers have no control over the open-tank user experience in terms of "ingredients and the impacts, the toxicology, all of the other aspects" that closed-system e-cigarette suppliers would otherwise verify and submit through the regulatory process. (King (PMI) Tr. 2343).

Response to Proposed Finding No. 364:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

365. According to Paul Crozier, Category Manager for Cigarettes and Tobacco at Sheetz, open-tank users are a "completely different type of customer segment." (PX7019 (Crozier (Sheetz), Dep. at 124)).

Response to Proposed Finding No. 365:

Respondents have no specific response except to note that evidence at trial also demonstrated that cig-a-likes and pods were not "comparable," and that cig-a-likes appeal to "a different consumer," one who is "looking for different things than a person who is looking for a pod." (Quigley (Altria) Tr. 2034, 2038; RFF ¶ 1399). In addition, Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

366. Closed systems are convenient to use. For example, customers can use closed-system e-cigarettes while driving to work or when moving around. (Huckabee (Reynolds) Tr. 386 ("[A] closed system and convenient product that is also typically very discreet in nature, meaning its vapor cloud is relatively low, consumers find those combinations of factors appealing. In occasions where they are perhaps in their car, if they are -- if they are traveling, if they are driving to work, if they are in an area where they -- they may be moving or with a group of friends where discretion is more important, closed-system products can be very --very appealing."); Farrell (NJOY) Tr. 209-10 ("Closed-system e-cigarette products are a little bit more convenient. You know, there's less component parts, less maintenance. In order to create a vaping experience, a user will have bought a battery that connects to a container that's prefilled with liquid, and when the user sucks on the closed system, an atomizer, which is just a part of this whole system that turns the liquid into vapor, does so, and as the user is sucking in, they experience nicotine."); PX7004 (Willard (Altria), IHT at 57-58)).

Response to Proposed Finding No. 366:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

367. Closed system users "just bought the product, and even if you changed the pod, the product was -- was the same." (Garnick (Altria) Tr. 1693; Schwartz (Altria) Tr. 1852; Farrell (NJOY) Tr. 210).

Response to Proposed Finding No. 367:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

c) Open-System E-Cigarettes and Closed-System E-Cigarettes Are Sold in Different Retail Channels

368. Open-tank e-cigarettes are typically sold in vape stores or online, whereas the vast majority of and closed-system e-cigarettes are sold in mass/convenience store channels. (PX4029 (Altria) at 008 (Nu Mark BOD Orientation Presentation, April 11, 2018 – Jody Begley, President & General Manager, Nu Mark)).

(PX4029 (Altria) at 008).

Response to Proposed Finding No. 368:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

369. Market participants confirmed that open-tank e-cigarettes are "typically sold in vape shops." (Huckabee (Reynolds) Tr. 386-87; *see also* Farrell (NJOY) Tr. 208; Begley (Altria) Tr. 972-73; Gifford (Altria) Tr. 2756; Gifford (Altria) Tr. 2741; Crozier (Sheetz) Tr. 1494-95 ("Generally speaking, vape shops sell more of the open systems and C-stores sell more pod systems and cigalike-type products.").

Response to Proposed Finding No. 369:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

370. Sheetz's Paul Crozier testified that "A vape shop is a retailer that specializes in e-cigarettes, vapor sales. That's generally where you would find open-tank systems. They have the room, space, time where they can afford to talk with consumers and walk them through how to use devices and the appropriate liquids in each device, and offer a wide variety of flavors and strengths of products. And their -- generally their sole purpose is to sell e-cigarettes, vapor, e-liquids, accessories." (Crozier (Sheetz) Tr. 1494; *see also* Begley (Altria) Tr. 972).

Response to Proposed Finding No. 370:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

371. Altria's Jody Begley testified that vape shops are considered a distinct sales channel. (Begley (Altria) Tr. 972-73 ("Q. Vape stores are considered a distinct sales channel, correct? A. That's correct.")).

Response to Proposed Finding No. 371:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

372. Open-tank e-cigarettes and open tank e-liquids are also sold online or in smoke shops. (Farrell (NJOY) Tr. 208; Huckabee (Reynolds) Tr. 383).

Response to Proposed Finding No. 372:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

373. Closed system e-cigarettes are sold primarily in convenience stores. (PX4029 (Altria) at 008 (Nu Mark BOD Orientation Presentation, April 11, 2018); Huckabee (Reynolds) Tr. 387-88; Farrell (NJOY) Tr. 220-21, 235-36; Begley (Altria) Tr. 971-72, 1122-23; PX4029 (Altria) at 008; Quigley (Altria) Tr. 2088; Crozier (Sheetz) Tr. 1494-95).

Response to Proposed Finding No. 373:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

374. The MOC channel is the major sales channel for closed system products. (Begley (Altria) Tr. 971-72). Jody Begley testified that he agreed that the MOC channel is primarily a closed-system outlet. (Begley (Altria) Tr. 971-72)).

Response to Proposed Finding No. 374:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

375. Convenience stores typically sell only closed-system e-cigs and do not sell open-tank e-cigarettes. (Crozier (Sheetz) Tr. 1492-94; PX7019 (Crozier (Sheetz), Dep. at 121-22); PX8006 at 003 (¶¶ 11-12) (Kloss (Wawa), Decl.); PX8001 at 003 (¶ 13) (Stout (7-Eleven),

Decl.); PX7029 (Farrell (NJOY), Dep. at 145)). Jeff Eldridge of ITG testified that convenience stores selling open-tank e-cigarettes "tends to be [the] exception." (PX7012 (Eldridge (ITG), Dep. at 166-67)).

Response to Proposed Finding No. 375:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

376. Convenience stores do not offer the services needed to educate consumers on the use of open-tank products. (PX8000 at 004 (¶ 20) (Crozier (Sheetz), Decl.) ("Sheetz does not have the staff or the time to educate consumers on the use of open systems."); PX8001 at 003 (¶ 14) (Stout (7-Eleven), Decl.) ("Open vape systems are typically sold at vape shops rather than convenience stores because vape shops are more prepared to educate customers on the use of these complex products. Convenience stores are transaction-focused and typically do not provide the level of service that a true vape enthusiast would look for in a primary tobacco retailer."); PX8003 at 003 (¶ 17) (Wexler (Turning Point Brands), Decl.) ("A new customer who enters one of our vape shops will typically receive a high degree of attention from our staff. […] This interaction can take several minutes, as our goal is to ensure that we are matching the customer with the vaping experience that they are seeking. This contrasts with a convenience store interaction, which usually takes no more than 90 seconds.")).

Response to Proposed Finding No. 376:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

377. Convenience stores also have inventory constraints that make it difficult to stock open-tank components. (PX8006 at 003 (¶ 12) (Kloss (Wawa), Decl.) ("Wawa has chosen not to sell open tank vaping devices because of lack of quality assurance controls, greater risk of counterfeit products, and a large variety of customer devices and e-liquids that would be difficult to maintain at convenience stores that sell limited SKUs."); *see also* Farrell (NJOY) Tr. 221; Crozier (Sheetz) Tr. 1494).

Response to Proposed Finding No. 377:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

378. Based on testimony and evidence competitors and customers, Dr. Rothman concluded that because of these differences between open-tank and closed-system e-cigarette products, purchasers of closed-system e-cigarettes are unlikely to substitute to open-tank e-cigarettes in response to a small change in price. Dr. Rothman explained, that among other things, doing so would require purchasing from a different store and learning to use a different type of product. (PX5000 at 032-39 (¶¶ 67-77) (Rothman Expert Report)).

Response to Proposed Finding No. 378:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

d) Industry Participants Do Not View Open-System E-Cigarettes and Closed-System E-Cigarettes As Close Substitutes

379. Based on testimony from convenience stores that sell e-cigarettes, Dr. Rothman concluded that market participants do not view open-tank e-cigarettes and closed-system e-cigarettes as close substitutes. (PX7048 (Rothman, Trial Dep. at 18-19); (PX5000 at 035-39 (¶¶ 73-77) (Rothman Expert Report)).

Response to Proposed Finding No. 379:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

380. Paul Crozier (Sheetz) testified that he does not consider vape shops to be competitors to Sheetz for e-cigarette sales since Sheetz does not sell open-tank e-cigarettes. (Crozier (Sheetz) Tr. 1495).

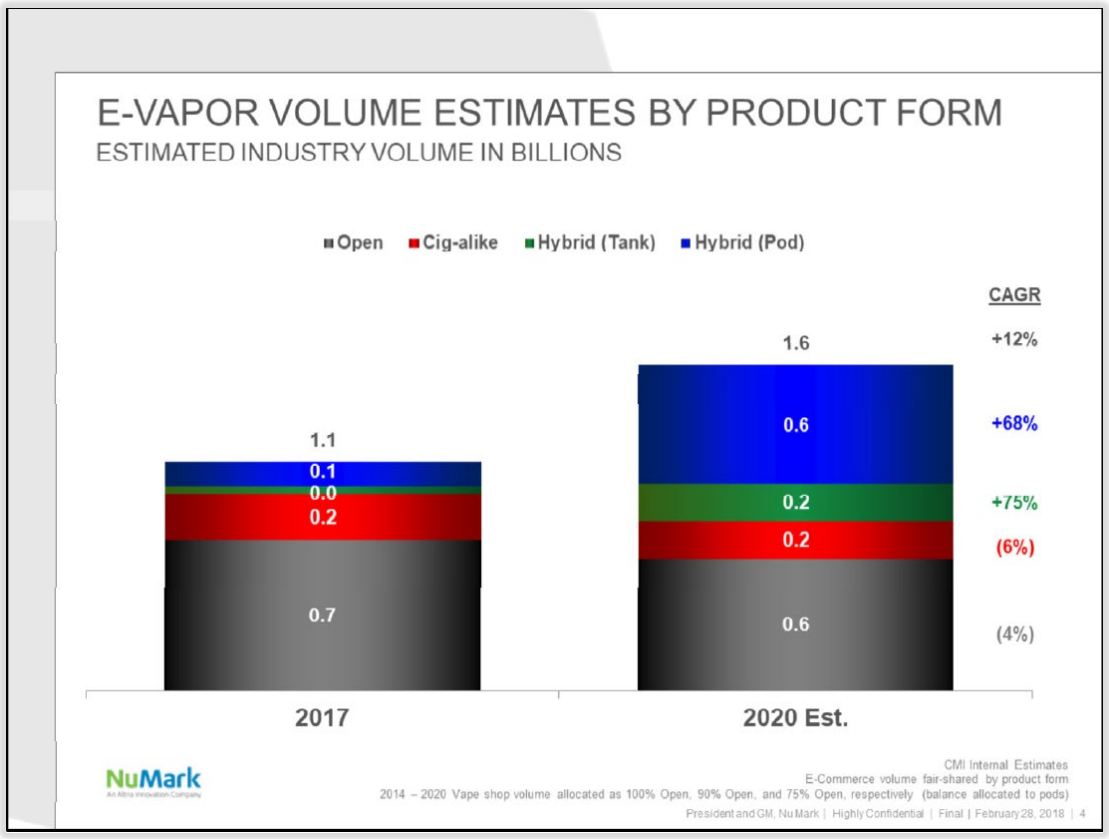
Response to Proposed Finding No. 380:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

381. Convenience stores do not consider open-tank e-cigarette prices when setting prices for closed system e-cigarettes. (PX8001 at 003 (¶ 14) (Stout (7-Eleven), Decl.) ("As a result, 7-Eleven does not track the prices of open vape products, or use the prices of open vape systems when making retail price recommendations for closed systems or traditional combustible cigarettes sold at 7-Eleven stores."); PX8000 at 003 (¶ 18) (Crozier (Sheetz), Decl.) ("Prices at vape stores are not a factor that Sheetz considers when deciding on how to price vapor products."); PX7019 (Crozier (Sheetz), Dep. at 124) ("Q. Can you help me understand why doesn't Sheetz consider prices at vape stores when deciding how to price vape products? A. A lot of the products sold at vapor -- vape shops are products we don't sell."); *compare* PX8003 at 004 (¶ 21) (Wexler (Turning Point Brands), Decl.) ("When we determine the pricing at which we sell our open systems in our vape shops, we primarily look to other vape shops for comparisons. We do not focus on the pricing of evapor products sold in the convenience store channel as benchmark for the pricing of our open systems.")).

Response to Proposed Finding No. 381:

Respondents have no specific response except to note that the evidence demonstrates that pod-based products and cig-a-likes are also priced separately. (RFF ¶¶ 1404-06). Moreover, to the extent that industry participants tracked both cig-a-likes and pod products in their "ordinary course" documents, those same documents often *included* open systems:



(PX4012 (Altria) at 006).

And, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

382. Closed-system e-cigarette producers do not consider prices of open-tank e-cigarettes when setting prices for closed system e-cigarettes. (Begley (Altria) Tr. 971 ("Q. NuMark did not price any of its closed-system products based on the price of open-tank products, correct? A. That's correct. We priced them consistent with the segment they competed in.")); Huckabee (Reynolds) Tr. 390-91 (public), 408 (*in camera*) (identifying JUUL, MarkTen, NJOY, Logic, and [redacted] as the competitors that Reynolds considered when setting prices for its Vuse closed-system e-cigarette products); PX7012 (Eldridge (ITG), Dep. at 171 ("Q. Did ITG track prices for JUUL and NJOY products? A. Yes. Q. Does ITG track prices for any open systems brands? A. Not that I know of."), 182; PX8008 at 021 (¶ 41) (Huckabee (Reynolds), Decl.) ("RJR Vapor does not consider the pricing of open systems when setting the prices of its VUSE products.")).

Response to Proposed Finding No. 382:

Respondents have no specific response except to note that the evidence demonstrates that pod-based products and cig-a-likes are also priced separately. (RFF ¶¶ 1404-06). Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

383. Wade Huckabee (Reynolds) testified that open-tank and closed–system e-cigarettes are not substitutes. (Huckabee (Reynolds) Tr. 387) (Q. Do you view open systems and closed systems as substitutes? A. No, I do not.")). Wade Huckabee testified that open-tank and closed systems are "highly complementary." (Huckabee (Reynolds) Tr. 387).

Response to Proposed Finding No. 383:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes, (RCoL ¶ 55; RFF ¶¶ 1383-426).

7. Other Reduced-Risk Products Are Properly Excluded from the Relevant Product Market

384. Based on his review of testimony and documents, Dr. Rothman concluded that alternative nicotine products, such as smokeless tobacco or nicotine gum, differ from closed-system e-cigarettes in that they do not offer the consumer the experience of inhaling vapor. (PX7048 (Rothman, Trial Dep. at 18); PX5000 at 035 (¶ 72) (Rothman Expert Report)). Accordingly, he concluded that market participants do not view alternative nicotine products as close substitutes for closed-system e-cigarettes. (PX7048 (Rothman, Trial Dep. at 18); PX5000 at 035-39 (¶¶ 73-77) (Rothman Expert Report)).

Response to Proposed Finding No. 384:

Respondents have no specific response except to note that Complaint Counsel omits Dr. Rothman's conclusion from the same paragraph it cites, which is that these alternative products containing nicotine are differentiated from closed-system e-cigarettes by their ability to "deliver the same 'nicotine satisfaction.'" (PX5000 Rothman Report at ¶ 72). In addition, market

participants distinguish cig-a-likes from pod-based products. (RFF ¶¶ 1394, 1396, 1405, 1406(c)-(d)).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

385. Altria's Begley does not consider IQOS to be an e-cigarette product; rather, it is a "heat-not-burn product, which "heats the tobacco up to the point prior to actual combustion. So it heats it, does not burn it, and that heat on the real tobacco creates and aerosol. So I view those as different from e-vapor." (Begley (Altria) Tr. 1051).

Response to Proposed Finding No. 385:

Respondents have no specific response except to note that Complaint Counsel cites to numerous internal documents from JLI describing IQOS and other heat-not-burn products as competitors. (*See e.g.,* RRFF ¶¶ 307-08, 310-12, 316, 320-22).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

386. PMI's Martin King testified that IQOS is not an e-cigarette product, but belongs to "a different category," and uses "a totally different way of creating the aerosol from a different source and a different means than an e-cigarette." (King (PMI) Tr. 2349-50).

Response to Proposed Finding No. 386:

Respondents have no specific response except to note that Complaint Counsel cites to numerous internal documents from JLI describing IQOS and other heat-not-burn products as competitors. (*See e.g.,* RRFF ¶¶ 307-08, 310-12, 316, 320-22).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

387. In an email from June 2017, JLI's James Monsees noted that "[h]eat-not-burn products are substantially safer than regular cigarettes but can't match the simple chemistry of e-cigarettes (particularly using some of JUUL's core technologies," adding, "we don't believe the [IQOS] product is any good." (PX2083 (JLI) at 001).

Response to Proposed Finding No. 387:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

388. The non-compete provision to which Altria agreed as part of the transaction did not apply to Altria's IQOS heat-not-burn product. (Willard (Altria) Tr. 1195).

Response to Proposed Finding No. 388:

Respondents have no specific response except to note that the purpose of the noncompete was to protect JLI's proprietary information from being used in the development of competing e-cigarette products by Altria. (*See* RFF ¶¶ 1178-88). IQOS, a heat-not-burn product, used different technology, (*see* CCFF ¶ 385; Begley (Altria) Tr. 1051), and therefore was not a subject of JLI's concern. Moreover, the noncompete provision cited by Complaint Counsel *did* encompass open-tank systems, (PX1276 (JLI) at 009, 025-26), which Complaint Counsel nonetheless argues should be excluded from its market definition.

In addition, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

389. Nicotine gum absorbs much more slowly into the bloodstream than nicotine absorbed through a user's lungs. (PX7009 (Burns (JLI), IHT at 116-17)).

Response to Proposed Finding No. 389:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

390. In Michelle Baculis's view, adult smokers looking for a reduced-harm product see inhalable products as "a ritual thing and it's a habitual experience" that they are looking to replicate. (PX7014 (Baculis (Altria), Dep. at 41-42)).

Response to Proposed Finding No. 390:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

391. During Begley's time as President and General Manager of Nu Mark, Nu Mark did not consider the price of oral tobacco products, nicotine pouches, or nicotine gum in setting the price of its closed-system e-cigarette products. (PX7022 (Begley (Altria), Dep. at 81)).

Response to Proposed Finding No. 391:

Respondents have no specific response except to note that the evidence demonstrates that pod-based products and cig-a-likes are also priced separately. (RFF ¶¶ 1404-06). In addition, Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

392. The non-compete provision to which Altria agreed as part of the transaction did not apply to Altria's moist tobacco business. (Willard (Altria) Tr. 1195).

Response to Proposed Finding No. 392:

Respondents have no specific response except to note that the purpose of the noncompete was to protect JLI's proprietary information from being used in the development of competing e-cigarette products by Altria. (*See* RFF ¶¶ 1178-88). Moist tobacco does not use e-cigarette technology and therefore was not a subject of JLI's concern. Moreover, the noncompete provision

cited by Complaint Counsel *did* encompass open-tank systems, (PX1276 (JLI) at 009, 025-26), which Complaint Counsel nonetheless argues should be excluded from its market definition.

In addition, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

393. To Jeff Eldridge's knowledge, ITG does not track the prices of any oral nicotine or nicotine gum products. (PX7012 (Eldridge (ITG), Dep. at 183)).

Response to Proposed Finding No. 393:

Respondents have no specific response except to note that Complaint Counsel has failed to carry its burden of establishing that the relevant product market should be defined as all closed-system e-cigarettes. (RCoL ¶ 55; RFF ¶¶ 1383-426).

394. To Jeff Eldridge's knowledge, in setting the prices for its Blu products, ITG does not consider the prices of smokeless tobacco, oral nicotine, or nicotine gum products. (PX7012 (Eldridge (ITG), Dep. at 183-85)).

Response to Proposed Finding No. 394:

The Proposed Finding is incomplete and misleading without additional context. In the same testimony cited by Complaint Counsel, Eldridge confirmed that "ITG track[s] information on IQOS's prices" and explained this is "because it would be considered competition for vapor products." (PX7012 Eldridge (ITG Brands) Dep. at 184). IQOS is a heat-not-burn product. (*See* CCFF ¶ 385; Begley (Altria) Tr. 1051).

Moreover, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

8. The Hypothetical Monopolist Test Confirms That the Sale of Closed-System E-Cigarettes Is a Relevant Product Market

395. Complaint Counsel's economic expert, Dr. Dov Rothman, concluded that the appropriate relevant product market in this matter is the sale of closed-system e-cigarettes. (PX7048 (Rothman, Trial Dep. at 13-14); PX5000 at 031-41 (¶¶ 62-82) (Rothman Expert Report)).

Response to Proposed Finding No. 395:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman's conclusion is correct that the appropriate relevant product market in this matter is the sale of closed-system e-cigarettes.

Dr. Rothman used the hypothetical monopolist test to define the relevant product market, but he failed to analyze whether pods and cig-a-likes could constitute distinct markets. (PX7048 Rothman Trial Dep. at 14, 128; RFF ¶¶ 1415-17). In so doing, he completely disregarded the "smallest market principle," (RX1217 Murphy Report ¶¶ 108-10), which reflects the customary practice that "when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test," (PX9098 Horizontal Merger Guidelines ("HMG") at 013 § 4.1.1). (RFF ¶¶ 1415-17). Dr. Rothman's report does not even acknowledge the existence of this principle. (PX5000 Rothman Report ¶¶ 63-66; *see also* RFF ¶ 1417).

Additionally, Dr. Rothman relied on outdated elasticity studies that did not accurately reflect the market conditions in 2018 and therefore are not probative of the extent to which consumers will substitute one e-vapor product for another, making his conclusions unreliable. (RFF ¶¶ 1418-26).

396. Dr. Rothman concluded that open-tank e-cigarettes and other alternative nicotine products are not close substitutes for closed-system e-cigarettes. (PX7048 (Rothman, Trial Dep. at 17); PX5000 at 040 (¶ 78) (Rothman Expert Report)). Dr. Rothman concluded that because open-tank e-cigarettes and other alternative nicotine products are not close substitutes for closed-system e-cigarettes, few consumers would substitute to other nicotine products in response to a small change in the price of closed-system e-cigarettes. (PX5000 at 040 (¶

78) (Rothman Expert Report)). Dr. Rothman also concluded that because few consumers would substitute to other nicotine products in response to a small change in the price of closed-system e-cigarettes, a hypothetical monopolist of closed system e-cigarettes would likely impose at least a small but significant nontransitory increase in price ("SSNIP"). (PX5000 at 040 (¶ 78) (Rothman Expert Report)). Dr. Rothman thus concluded that open-tank e-cigarettes and other alternative nicotine products not in the relevant market. (PX5000 at 040 (¶ 78) (Rothman Expert Report)).

Response to Proposed Finding No. 396:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman conducted no empirical analysis to support his exclusion of open systems and other alternative products containing nicotine from his relevant product definition. (RX1217 Murphy Report ¶ 109). Based on a review of documents and testimony, for which Dr. Rothman can offer no methodology, (*see* PX7046 Rothman Dep. at 154-56), he concluded that open systems and other alternative products containing nicotine were not close substitutes and therefore did not attempt further analysis, (PX7048 Rothman Trial Dep. at 17; PX5000 Rothman Report ¶ 78; RX1217 Murphy Report ¶ 109). Dr. Rothman's conclusions (1) that few consumers would substitute to other products containing nicotine in response to a small change in the price of closed-system e-cigarettes; (2) that because few consumers would substitute to other products containing nicotine in response to a small change in the price of closed-system e-cigarettes, a hypothetical monopolist of closed system e-cigarettes would likely impose at least a small but significant nontransitory increase in price ("SSNIP"); and (3) that open-tank e-cigarettes and other alternative products containing nicotine are not in the relevant product market, all flow from his decision to exclude open systems and other alternative products containing nicotine from his empirical analysis. (PX5000 Rothman Report¶ 78).

To the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

397. Dr. Rothman based his product market conclusions both on qualitative evidence (*see* CCFF ¶¶ 218-394, above), as well as the analytical framework in the Horizontal Merger Guidelines. (PX7048 (Rothman, Trial Dep. at 14); PX5000 at 040-41 (¶¶ 78-82) (Rothman Expert Report)).

Response to Proposed Finding No. 397:

The Proposed Finding is incomplete and misleading without additional context. At the outset, in order to support its contention that Dr. Rothman based his product market conclusions on qualitative evidence, Complaint Counsel does not cite to Dr. Rothman's analysis, but rather points to its own post-trial findings of fact, on which Dr. Rothman would not have based any of his conclusions.

Moreover, Dr. Rothman's reliance on the analytical framework in the Horizontal Merger Guidelines inappropriately disregarded its "smallest market principle," (RX1217 Murphy Report ¶¶ 108-10), which reflects the customary practice that "when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test," (PX9098 (HMG) at 013 § 4.1.1; RFF ¶¶ 1415-17). That principle guards against "overstat[ing]" the "relative competitive significance of more distant substitutes." (PX9098 (HMG) at 013 § 4.1.1).

In addition, Dr. Rothman's analysis is fundamentally flawed from the outset because he relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity. He did so even though elasticity is a critical input in the HMT analysis and even though he acknowledged that elasticity can "change over time . . . as the market evolves and matures" and that "JUUL's growth" could "imply changes in elasticity." (PX7048 Rothman Trial Dep. at 108-09; *see also* RFF ¶¶ 1324-26, 1419-22). Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market

conditions today, and is not probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 218-394, Respondents incorporate their responses to those Proposed Findings herein.

398. Dr. Rothman used the Hypothetical Monopolist Test described in the Horizontal Merger Guidelines to define the relevant product market. (PX7048 (Rothman, Trial Dep. at 14); PX9098 (Horizontal Merger Guidelines) § 4.1 at 011-16)).

Response to Proposed Finding No. 398:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman correctly applied the Hypothetical Monopolist Test described in the Horizontal Merger Guidelines to define the relevant product market. Dr. Rothman failed to analyze whether pods and cig-a-likes could constitute distinct markets. (PX7048 Rothman Trial Dep. at 14, 128; RFF ¶¶ 1415-17). In so doing, he completely disregarded the "smallest market principle," (RX1217 Murphy Report ¶¶ 108-10), which reflects the customary practice that "when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test," (PX9098 (HMG) at 013 § 4.1.1). (RFF ¶¶ 1415-17). Dr. Rothman's report does not even acknowledge the existence of this principle. (PX5000 Rothman Report ¶¶ 63-66; *see also* RFF ¶ 1417). In addition, Dr. Rothman's analysis is fundamentally flawed from the outset because it relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity. Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market conditions today, and is not remotely probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

399. The Hypothetical Monopolist Test asks if a hypothetical monopolist of a candidate market would impose a SSNIP on at least one of the products sold by one of the merging firms in the candidate market. (PX7048 (Rothman, Trial Dep. at 14); PX9098 (Horizontal Merger

Guidelines) § 4.1.1 at 011-13 (the Hypothetical Monopolist Test)). The hypothetical monopolist test starts by defining a candidate market around at least one of the products sold by one of the merging firms or relevant firms. (PX7048 (Rothman, Trial Dep. at 14-15); PX9098 (Horizontal Merger Guidelines) § 4.1.1 at 011-13). If the candidate market includes enough competitively significant products, the hypothetical monopolist of the candidate market would likely impose at least a SSNIP on at least one of the products over one of the merging or relevant firms. (PX7048 (Rothman, Trial Dep. at 15); PX9098 (Horizontal Merger Guidelines) § 4.1.1 at 011-13). If the hypothetical monopolist would likely impose at least a SSNIP, the candidate market is said to pass that hypothetical monopolist test. (PX7048 (Rothman, Trial Dep. at 15); PX9098 (Horizontal Merger Guidelines) § 4.1.1 at 011-13)).

Response to Proposed Finding No. 399:

Respondents have no specific response except to note that the Proposed Finding is improper because it consists entirely of a legal conclusion.

400. To define the relevant product market in this matter, Dr. Rothman started by defining a candidate market around Altria's closed-system e-cigarette products. (PX7048 (Rothman, Trial Dep. at 16)). He then evaluated if a hypothetical monopolist of closed-system e-cigarettes would likely impose at least a SSNIP. (PX7048 (Rothman, Trial Dep. at 16)).

Response to Proposed Finding No. 400:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman correctly evaluated whether a hypothetical monopolist of closed-system e-cigarettes would likely impose at least a SSNIP. Dr. Rothman failed to analyze whether pods and cig-a-likes could constitute distinct markets. (PX7048 Rothman Trial Dep. at 14, 128; RFF ¶¶ 1415-17). In so doing, he completely disregarded the "smallest market principle," (RX1217 Murphy Report ¶ 108), which reflects the customary practice that "when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test." (PX9098 (HMG) at 013 § 4.1.1). In addition, Dr. Rothman's analysis is fundamentally flawed from the outset because it relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity. Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less

market conditions today, and is not remotely probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

401. Dr. Rothman implemented the hypothetical monopolist test by using what is called a critical elasticity test. (PX7048 (Rothman, Trial Dep. at 19-20); PX5000 at 040 (¶ 79) (Rothman Expert Report)). The objective of a critical elasticity test is to calculate the extent to which consumers would substitute to other products in response to a SSNIP and compare that to the "critical" amount of substitution that would make a SSNIP just profitable for a hypothetical monopolist. (PX7048 (Rothman, Trial Dep. at 19-20); PX5000 at 040 (¶ 79) (Rothman Expert Report)). If the actual amount of substitution (as measured by the actual elasticity) is less than the critical amount of substitution (as measured by the critical elasticity), then the hypothetical monopolist test is satisfied and the market is properly defined. (PX7048 (Rothman, Trial Dep. at 19-20); PX5000 at 040 (¶ 79) (Rothman Expert Report)).

Response to Proposed Finding No. 401:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman correctly implemented the hypothetical monopolist test by using the critical elasticity test. Dr. Rothman failed to analyze whether pods and cig-a-likes could constitute distinct markets. (PX7048 Rothman Trial Dep. at 14, 128; RFF ¶¶ 1415-17). In so doing, he completely disregarded the "smallest market principle," (RX1217 Murphy Report ¶ 108), which reflects the customary practice that "when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test." (PX9098 (HMG) at 013 § 4.1.1). In addition, Dr. Rothman's analysis is fundamentally flawed from the outset because it relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity. Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market conditions today, and is not remotely probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

402. The critical elasticity depends on the size of the SSNIP and the hypothetical monopolist's variable margin at pre-SSNIP prices. (PX7048 (Rothman, Trial Dep. at 19); PX5000 at 040 (¶ 80) (Rothman Expert Report)). If a 10 percent price increase is profitable for a

hypothetical monopolist, then a 5 percent price increase would be approximately profit maximizing for the hypothetical monopolist. (PX5000 at 040 (¶ 80) (Rothman Expert Report)). Therefore, Dr. Rothman uses a 10 percent SSNIP to calculate the critical elasticity. (PX7048 (Rothman, Trial Dep. at 19-20); PX5000 at 040 (¶ 80) (Rothman Expert Report)).

Response to Proposed Finding No. 402:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman correctly implemented the critical elasticity analysis. He did not. Dr. Rothman's analysis is fundamentally flawed from the outset because it relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity. Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market conditions today, and is not remotely probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

403. Using financial information from Altria, JLI, JTI, Reynolds, and ITG, Dr. Rothman calculated variable margins for closed-system e-cigarettes. (PX5000 at 040 (¶ 80), 141-45 (Appendix D) (Rothman Expert Report)). Using variable margins from closed-system e-cigarette competitors, Dr. Rothman calculated that the share-weighted average variable margin is 28 percent. (PX5000 at 040 (¶ 80), 141-45 (Appendix D) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 19-20)).

Response to Proposed Finding No. 403:

Respondents have no specific response except to note that while Dr. Rothman did calculate a share-weighted average variable margin of 28 percent using data from four closed-system e-cigarette manufacturers, he also acknowledged during his trial deposition that Altria's actual margins were nowhere near 28 percent. (PX7048 Rothman Trial Dep. at 111). Altria's 2018 variable margin for its e-cigarette products was only 2 percent, and its variable margin on its pod-based product, MarkTen Elite, was minus 47 percent. (PX7048 Rothman Trial Dep. at 111-12).

404. Dr. Rothman calculated that, given a SSNIP of 10 percent and a variable margin of 28 percent, the critical elasticity is 2.6. (PX7048 (Rothman, Trial Dep. at 19-20); PX5000 at 040 (¶ 80), 138-140 (Appendix C) (Rothman Expert Report)).

Response to Proposed Finding No. 404:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman correctly implemented the critical elasticity analysis. As Dr. Rothman acknowledged, Altria's actual variable margins were no where near 28 percent. (PX7048 Rothman Trial Dep. at 111). Altria's 2018 variable margin for its e-cigarette products was only 2 percent, and its variable margin on its pod-based product, MarkTen Elite, was minus 47 percent. (PX7048 Rothman Trial Dep. at 111-12). Moreover, Dr. Rothman's analysis is fundamentally flawed from the outset because it relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity. Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market conditions today, and is not remotely probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

405. In his product market analysis, Dr. Rothman considered both academic literature and JLI's own estimates for the actual elasticity of demand for closed-system e-cigarettes. (PX7048 (Rothman, Trial Dep. at 22-23); PX5000 at 041 (¶ 81) (Rothman Expert Report)). Five academic studies report an estimate of the elasticity of demand for closed-system e-cigarettes among consumers in the United States that is less (in absolute value) than 2.6. (PX7048 (Rothman, Trial Dep. at 20); PX5000 at 041 (¶ 81) (Rothman Expert Report) (absolute values of estimate of elasticity of demand for closed-system e-cigarettes were less than 2.1)).

Response to Proposed Finding No. 405:

The Proposed Finding is incomplete and misleading. Dr. Rothman acknowledged that he did not perform any empirical analysis to estimate the actual elasticity of demand for closed-system e-cigarettes. (*See* PX7048 Rothman Trial Dep. at 20). The academic literature on which Dr. Rothman relied reflects outdated studies that do not accurately reflect the market conditions in

2018 and certainly do not reflect the market today. (RFF ¶¶ 1418-26; PX1217 Murphy Report ¶¶ 103-04 (explaining that "[e]ach of the studies analyze[d] data from a period that ends before Altria began marketing MarkTen Elite," and the "majority of the studies analyze data from periods that predate Altria's discontinuation of e-cigarette sales by at least four years," and predate the rapid growth in e-cigarettes that took place from 2016-2019)). As Dr. Rothman acknowledged, elasticity can change over time, especially in a dynamic market. (PX7048 Rothman Trial Dep. at 108). Additionally, Complaint Counsel omits that not all studies reported an estimate of elasticity of demand of less than 2.6. (PX5000 Rothman Report ¶ 81).

Finally, it is inaccurate to state that Dr. Rothman considered JLI's own estimates for the actual elasticity of demand for closed-system e-cigarettes. Dr. Rothman actually refers to product-level price elasticities found in a pricing presentation created by McKinsey for JLI. (PX5000 Rothman Report ¶ 81). Dr. Rothman acknowledged that the relevant figure for the critical elasticity analysis is "for the category" and not at the product level. (PX7048 Rothman Trial Dep. at 104). Dr. Rothman also acknowledged that he performed no empirical analysis of product-level elasticities. (PX7048 Rothman Trial Dep. at 129, 201-03).

406. [redacted] (PX2486 (JLI) at 013-15 (*in camera*)).

[redacted] (PX2486 (JLI) at 013-15 (*in camera*); (PX5000 at 041 (¶ 81) (Rothman Expert Report)). Because elasticities for individual products tend to be higher in absolute value than an aggregate elasticity for a group of products, the McKinsey analysis implies that 1.3 is an upper bound on the magnitude of the elasticity of demand for closed-system e-cigarettes. (PX5000 at 041 (¶ 81) (Rothman Expert Report)).

Response to Proposed Finding No. 406:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

[redacted]

[redacted] Moreover, McKinsey was a third party that provided discovery in this case, but Complaint Counsel did not otherwise seek discovery from McKinsey as to this information and there is no basis in the record to rely upon it.

407. Dr. Rothman concluded that because the estimates of the elasticity of demand for closed-system e-cigarettes from five academic studies and JLI's [redacted] are smaller than the critical elasticity of 2.6, a hypothetical monopolist of closed-system e-cigarettes would likely impose at least a SSNIP. (PX7048 (Rothman, Trial Dep. at 20); PX5000 at 041 (¶ 82) (Rothman Expert Report)). Thus, a market consisting of closed-system e-cigarettes is a relevant product market under the Horizontal Merger Guidelines. (PX7048 (Rothman, Trial Dep. at 14, 20); PX5000 at 040-41 (¶ 78-82) (Rothman Expert Report); PX9098 (Horizontal Merger Guidelines) § 4.1 at 011-16).

Response to Proposed Finding No. 407:

The Proposed Finding is incomplete and misleading to the extent it claims that Dr. Rothman correctly defined a relevant product market under the Horizontal Merger Guidelines. *First*, as described in RRFF ¶¶ 405 and 406 above, the academic studies and [redacted] on which Dr. Rothman relies for his estimates of elasticity of demand are unreliable. (*See also* RFF ¶¶ 1418-26.) Dr. Rothman did no empirical work himself to estimate elasticity of demand of closed-system e-cigarettes. (*See* PX7048 Rothman Trial Dep. at 20).

Second, as described in Respondents' response to CFF ¶ 1417 below, Dr. Rothman incorrectly applies the hypothetical monopolist test to conclude that closed-system e-cigarettes are the relevant product market. Dr. Rothman considers the possibility of a broader market than all closed-system e-cigarettes and concludes, without any empirical analysis, that open and closed systems are not sufficient substitutes. (RX1217 Murphy Report ¶ 109). Dr. Rothman, however,

fails to consider the possibility of a narrower pod-based e-cigarette only market, ignoring significant product differentiation between pod-based and cig-a-like products and completely disregarding the "smallest market principle." (RFF ¶ 1417; RX1217 Murphy Report ¶¶ 108-10; *see also* PX9098 (HMG) at 013 § 4.1.1 ("[W]hen the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.")). In addition, those studies dated to *before the rise of pod products*, in calculating elasticity. Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market conditions today, and is not remotely probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. (RX1217 Murphy Report ¶¶ 102-06).

Finally, to the extent that the Proposed Finding implies that the relevant product market is all closed-system products, Respondents object because Complaint Counsel has the burden to prove the relevant product market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

B. THE RELEVANT GEOGRAPHIC MARKET IS THE UNITED STATES

408. The United States is the relevant geographic market in which to assess the competitive effects of the transaction. (JX0004 at 001 (¶ 1) (Additional Joint Stipulations of Law and Fact)).

Response to Proposed Finding No. 408:

Respondents have no specific response.

VI. PRIOR TO THE TRANSACTION, ALTRIA COMMITTED SIGNIFICANT TIME, RESOURCES, AND MONEY TO ITS E-CIGARETTE BUSINESS, AND PUBLICLY STATED ITS INTENTION TO COMPETE IN THE CLOSED-SYSTEM E-CIGARETTE MARKET LONG-TERM

A. PRIOR TO THE TRANSACTION, ALTRIA COMMITTED SIGNIFICANT TIME, RESOURCES, AND MONEY TO ITS E-CIGARETTE BUSINESS

409. Testimony and ordinary course documents from Altria and JLI confirm that Altria committed as much as $1 billion dollars, over twenty years of work, and hundreds of

experts toward developing reduced harm products including e-cigarettes. (*See* CCFF ¶¶ 427-43, 447-54, 507-14, below).

Response to Proposed Finding No. 409:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 427-43, 447-54, and 507-14, Respondents incorporate their responses to those Proposed Findings herein.

410. "[Altria] spent over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341 ("Q. Did you want to achieve leadership in the e-vapor category? A. Yes, we did. Q. Did you put substantial resources into the e-vapor products sold by Nu Mark to try to achieve leadership in that category? A. Yes, we did. We spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category.")).

Response to Proposed Finding No. 410:

Respondents have no specific response.

B. ALTRIA WAS A SIGNIFICANT COMPETITOR IN CLOSED-SYSTEM E-CIGARETTES

1. Altria Recognized the Importance of E-Cigarettes to Its Future

411. For over a decade, Altria recognized the importance of reduced-risk products to its future, and pursued federal legislation to facilitate bringing such products to market. (PX9000 (Altria) at 004 (Nov. 2017 Investor Day remarks) (attributing Tobacco Control Act to "Altria's leadership - and only Altria, alone in the industry"); PX7004 (Willard (Altria), IHT at 55-57)).

Response to Proposed Finding No. 411:

Respondents have no specific response.

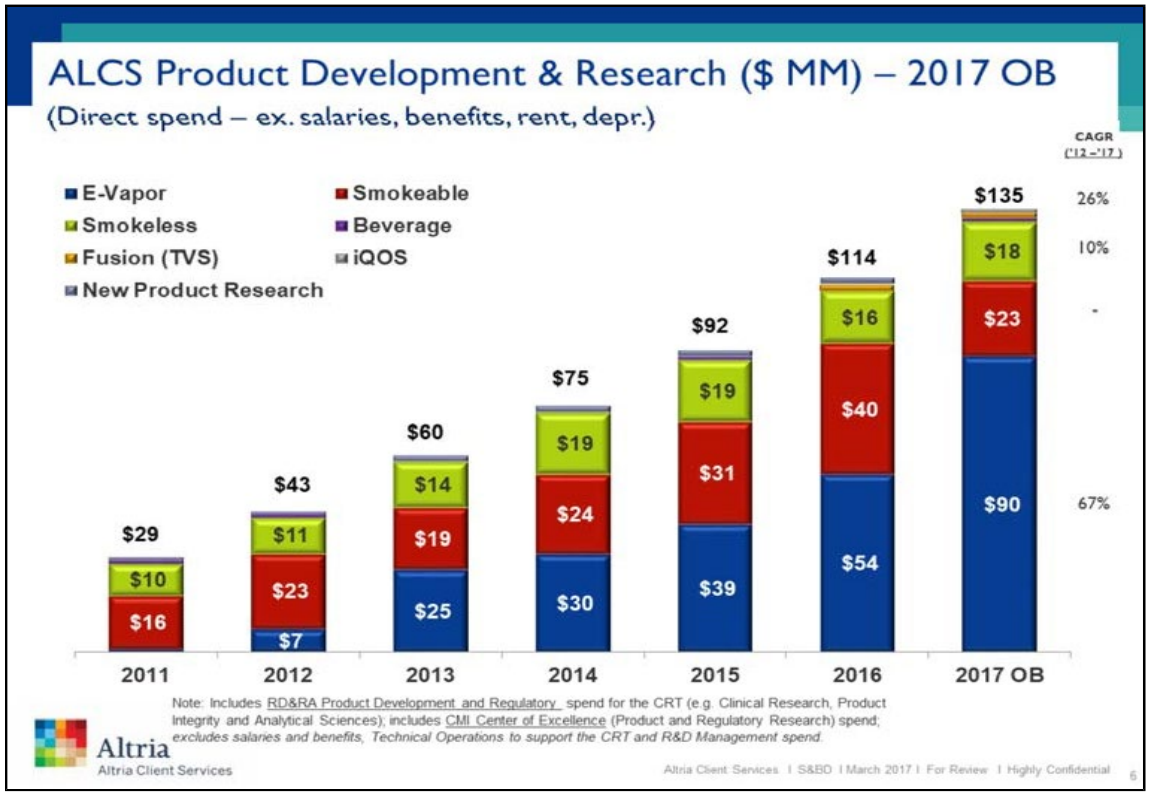
412. Altria increased spending on research and development (R&D) for reduced harm products, including e-vapor products, every year since 2011. (PX1633 (Altria) at 007 (Reduced Harm Products, Scorecard Summary, Mar. 2017)).

Response to Proposed Finding No. 412:

Respondents have no specific response.

413. A March 2017 Altria document titled "Reduced Harm Products, Scorecard Summary" shows that Altria's direct spend on e-vapor product development and research grew more

than tenfold over a five-year period: from $7 million in 2012 to a projected $90 million in 2017. (PX1633 (Altria) at 008).



(PX1633 (Altria) at 008).

Response to Proposed Finding No. 413:

Respondents have no specific response.

414. As early as 2016, Altria believed that e-cigarettes represented a "significant long-term opportunity." (PX7022 (Begley (Altria), Dep. at 92-94); PX4040 (Altria) at 018 ("Nu Mark 2016-2018 Strategic Plan") ("E-Vapor Category Represents a Significant Longer-Term Opportunity"); PX7023 (Fernandez (Altria), Dep. at 181-82)).

Response to Proposed Finding No. 414:

The Proposed Finding is incomplete and misleading without additional context. The cited sources demonstrate that Nu Mark believed the e-vapor category represented a "long-term opportunity . . . because there [was] a significant consumer base . . . interested in these products." (PX7022 Begley (Altria) Dep. at 93-94 (discussing PX4040 (Altria) at 018)). But even if Altria

was correct in its belief, that has no bearing on the company's ability to execute on that opportunity. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

415. JLI CEO Burns told JLI investors that Altria's rationale for the transaction was recognition that "we are heading toward a future where adult smokers overwhelmingly choose non-combustible alternatives over cigarettes." (PX2115 (JLI) at 001 (Email from Keven Burns, Dec. 2018)).

Response to Proposed Finding No. 415:

The Proposed Finding is incomplete and misleading without additional context. Burns told JLI stockholders that "Altria approached us as a result of our rapid expansion, strong innovation pipeline, and the realization that we are heading toward a future where adult smokers overwhelmingly choose non-combustible alternatives over cigarettes." (PX2115 (JLI) at 001). But Burns's understanding and/or recollection of Altria's reasons for approaching JLI is not the best evidence of what those reasons were.

Even taking Burns's understanding as true, if Altria believed that the tobacco industry was "heading toward a future where adult smokers overwhelmingly choose non-combustible alternatives over cigarettes," that has no bearing on whether that future would come to pass, nor on Altria's ability to compete for those future consumers. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

416. A 2017 Altria presentation to investors stated Nu Mark's goal was to "[l]ead the U.S. e-vapor category through a portfolio of superior reduced-risk products that adult smokers and vapers choose over cigarettes." (PX4014 (Altria) at 029 (2017 Investor Day slide deck); Begley (Altria) Tr. 978-79).

Response to Proposed Finding No. 416:

The Proposed Finding is incomplete and misleading without additional context. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

This forward-looking statement of Nu Mark's goal has no bearing on the company's likelihood of achieving that goal. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

417. In February 2018, Willard reiterated that "Nu Mark's goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products. . . ." (PX9045 (Altria) at 006 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 417:

The Proposed Finding is incomplete and misleading without additional context. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

This forward-looking statement of Nu Mark's goal has no bearing on the company's likelihood of achieving that goal. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

418. Willard confirmed that building a leading position in the U.S. e-vapor market through a portfolio of superior e-vapor products was a strategic initiative at Altria. (PX7004 (Willard (Altria), IHT at 89-90); *see also* PX4042 (Altria) at 006 [redacted] (*in camera*)).

Response to Proposed Finding No. 418:

The Proposed Finding is incomplete and misleading without additional context. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

This forward-looking statement of Nu Mark's goal has no bearing on the company's likelihood of achieving that goal. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

419. In late 2017, Altria fully expected Nu Mark to achieve its long-term goal of leading the U.S. e-vapor category through a portfolio of reduced risk products. (PX9000 (Altria) at 016 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 419:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, Nu Mark had not even launched its pod-based product, MarkTen Elite, and thus did not yet know how that product would perform on the market. (Schwartz (Altria) Tr. 1871). Knowing whether MarkTen Elite could be successful is a critical piece of information in assessing Nu Mark's portfolio, as pod-based products came to dominate the market by 2018 and were necessary for any company seeking to compete. (RFF ¶¶ 563-65, 1325). Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-

vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-77). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (RFF ¶¶ 898-916, 1604-11).

The Proposed Finding cites the remarks of Jody Begley, who expressed his personal view as to Nu Mark's goal: "I fully expect Nu Mark to achieve our long-term goal, which is to lead the U.S. e-vapor category through a portfolio of superior reduced risk products . . . ." (PX9000 (Altria) at 016). Begley's view of Nu Mark's prospects has no bearing on the company's likelihood of achieving its goal. Ultimately, Nu Mark was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not sell and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

420. In November 2017, Altria's then-CEO Barrington stated to investors, "We firmly believe that Altria has assembled the best talent, skills and capability in the industry, equipped them with the resources they need and set them in the right direction: to introduce new, FDA authorized, reduced-risk products as the next leg of our commercial success. So we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 420:

Respondents have no specific response except to note that Altria's aspirations with respect to e-vapor products often did not come true. (PX7013 Brace (Altria) Dep. at 175 (agreeing that "[m]any" of Nu Mark's "aspirations" failed to come true)).

421. In reference to the introduction of reduced-risk products, Altria's then-CEO Barrington also told investors that Altria had "helped make it possible" and that "to win in this new environment, we [Altria] immediately set out to acquire top talent for best-in class regulatory and product development capability." (PX9000 (Altria) at 004 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 421:

The Proposed Finding is incomplete and misleading without additional context. Barrington told investors that Altria had "helped make [the introduction of innovative, reduced-risk products] possible" through its support of the Tobacco Control Act. (PX9000 (Altria) at 004). But though Altria advocated for passage of the Tobacco Control Act, there were "others who supported this approach" too and the ultimate decision to pass the Act was made by the federal government. (PX9000 (Altria) at 004).

Moreover, Barrington's belief at that time that Altria had acquired top talent has no bearing on the ability of those employees to navigate FDA's regulatory requirements or develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611).

As a result, the company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult

smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

422. In February 2018, Altria's then-CEO Barrington noted that in order to prepare for the opportunity of reduced-harm alternatives, Altria had "spent years acquiring best-in-class regulatory and product development talent and building a compelling portfolio of non-combustible tobacco products with the potential to reduce risk." (PX9045 (Altria) at 002 (2018 CAGNY Conference Remarks by Marty Barrington, Feb. 21, 2018)).

Response to Proposed Finding No. 422:

The Proposed Finding is incomplete and misleading without additional context. Barrington's belief at the time that Altria had acquired best-in-class talent has no bearing on the ability of those employees to navigate FDA's regulatory requirements or develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611). As a result, the company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

423. In May 2018 Altria adopted a new organizational structure meant to accelerate its innovative product pipeline and facilitate long-term success. (Willard (Altria) Tr. 1162-63; PX1255 (Altria) at 002 (Altria Town Hall remarks)).

Response to Proposed Finding No. 423:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, that Altria had to adopt a new organizational structure demonstrates that its existing efforts with potential reduced risk products had failed. (RFF ¶¶ 579-95). Recognizing those failures, after becoming CEO in May 2018, Willard wanted Altria "to change [its] approach on innovation to have a better chance to fulfill [its] aspiration of being the U.S. authorized leader in noncombustible reduced-risk products." (Willard (Altria) Tr. 1372-73; *see also* RFF ¶¶ 579-80).

Willard accordingly restructured Altria into "two divisions—core tobacco and innovative products." (RX0836 (Altria) at 001; *see also* RFF ¶ 581). The goals of the overhaul were to "align" Altria's business units to the regulatory approach FDA recently had announced, namely the continuum of risk between "combustible and noncombustible products"; "to rapidly transform [Altria's] product development capability"; "to turn around [its] e-vapor business," (PX7003 Quigley (Altria) IHT at 25-26); and to overcome "the siloed nature of the way Altria did work," (PX7034 Mountjoy (Altria) Dep. at 93).

However, the fact that the company hoped the restructuring would help Altria achieve these goals has no bearing on whether it actually would do so. Ultimately, the company's restructuring was not enough to salvage its failed attempts to develop and compete with innovative e-vapor products. The company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

424. Altria's Willard testified that "… for well over twenty years Altria had been focused on developing these potentially reduced harm products and switching adult cigarette smokers to them." (Willard (Altria) Tr. 1336).

Response to Proposed Finding No. 424:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria had spent twenty years trying to develop reduced harm products that would convert adult smokers has no bearing on whether the company was able to do so. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

425. In a 2019 interview with the *Wall Street Journal*, Altria's Willard acknowledged the critical importance of Altria's participation in the e-vapor category in view of changing market dynamics: "At a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don't invest in the new areas you potentially put your ability to deliver that financial result at risk." (PX1172 (Altria) at 007).

Response to Proposed Finding No. 425:

The Proposed Finding is incomplete and misleading without additional context. These quotations are "edited excerpts," and are neither direct quotes nor provided in their full context. (PX1172 (Altria) at 002). Complaint Counsel did not ask Willard about these statements at trial or in either of his depositions. (*See* CC Exhibit Index at 7; PX7004 Willard (Altria) IHT; PX7013 Willard (Altria) Dep.). Willard's statement was made with regard to investing in new areas, not the "critical importance of Altria's participation in the e-vapor category" as Complaint Counsel contends. Moreover, Altria had stated separately that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

426. [redacted] (PX1268 (Altria) at 003 [redacted] (*in camera*)).

Response to Proposed Finding No. 426:

Respondents have no specific response except to note that this is further evidence that JUUL, the category leader in 2018, was converting adult smokers.

2. Altria Spent a Significant Amount of Money Toward Its Goal to Lead the Closed-System E-Cigarette Market

427. In November 2017, Altria's then-CEO Barrington told investors that Altria adapted its organization to win in the dynamic non-combustible environment and has "an

extraordinary financial engine to support these efforts." (PX9000 (Altria) at 008-09 (Nov. 2017 Investor Day remarks) ("And finally there's our enormous financial engine. We have maximized our core businesses that provide us with, among other things, significant free cash flow - an average of more than $4.5 billion per year for the past three years. We also have a strong balance sheet, which we've improved so as to be able to make the necessary investments for this next chapter of our success.")).

Response to Proposed Finding No. 427:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria may have adapted its organization and financially prepared to compete with non-combustible tobacco products has no bearing on the company's ability to do so. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

428. Willard testified that Altria wanted to lead the e-vapor category and "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341).

Response to Proposed Finding No. 428:

The Proposed Finding is incomplete and misleading without additional context. Just before the cited portion of Willard's testimony, he explained the difference between aspiring and achieving: "[A]spiring is a strongly held future goal, and achieving is when you've actually become the leader in that authorized, noncombustible, reduced-risk category." (Willard (Altria) Tr. 1341). Though Willard testified that Altria wanted to lead the e-vapor category and had "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category," in the portion of his testimony immediately prior that Complaint Counsel omits, Willard definitively stated that Altria had "[c]ertainly not" achieved leadership in e-vapor and was only "a distant player." (Willard (Altria) Tr. 1341). The fact that Altria wanted to lead the e-vapor category and had invested to achieve this desire has no bearing on the company's ability to do so.

Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

429. In his remarks during Altria's 2018 second-quarter earnings call, Willard told Altria investors, "Just as we lead in traditional tobacco products, we intend to lead in offering adult smokers more choices with innovative reduced-risk products. In May [2018], we announced a new corporate structure to . . . accelerate our innovation pipeline. We believe that our new structure will enhance our ability to drive the change necessary for us to continue our success in the future. (PX9047 (Altria) at 002). Willard confirmed that the referenced innovation pipeline included the suite of reduced-risk products that Altria was working on for the future. (Willard (Altria) Tr. 1162-63).

Response to Proposed Finding No. 429:

The Proposed Finding is incomplete and misleading without additional context. In an effort to emphasize the import of Altria's restructuring for e-vapor, Complaint Counsel obscures that an additional purpose of Altria's restructuring was improve its core tobacco businesses. Willard told investors: "[J]ust as we lead in traditional tobacco products, we intend to lead in offering adult smokers more choices with innovative reduced-risk products. In May [2018], we announced a new corporate structure to *maximize our core tobacco businesses and* accelerate our innovation pipeline. We believe that our new structure will enhance our ability to drive the change necessary for us to continue our success in the future." (PX9047 (Altria) at 002 (emphasis added to Complaint Counsel's omission)).

Moreover, the fact that the leadership hoped the restructuring would accelerate Altria's innovation pipeline has no bearing on whether it actually would do so. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

430. Altria made an investment it referred to as its Innovative Tobacco Products (ITP) program, an "investment that [Altria] made with trade partners to upgrade their merchandising infrastructure, essentially their back bar where they merchandise products, to establish visibility for innovative tobacco products in their stores." (PX7013 (Brace (Altria), Dep. at 81-82)).

Response to Proposed Finding No. 430:

Respondents have no specific response.

431. Over the course of 2018, Altria spent over $100 million on the Nu Mark ITP fixtures. (Quigley (Altria) Tr. 1982; PX7003 (Quigley (Altria), IHT at 48-49)). Nu Mark's 2019 budget anticipated an additional $57 million in expenditures for a second wave of ITP. (PX4232 (Altria) at 013).

Response to Proposed Finding No. 431:

Respondents have no specific response except to note that ITP space was created to display all innovative tobacco products, not just e-vapor. (PX1618 (Altria) at 004 (showing oral and heat-not-burn products next to e-vapor products); PX7019 Crozier (Sheetz) Dep. at 172-73 (agreeing that "the category that Altria initially set up was for more than just e-vapor products")). In addition, 50 percent of the offered ITP rebates were conditioned on retailers' successful completion of store resets, which would not be finished in 2018. (PX4304 (Altria) at 017 ("Funds to help offset reset costs[:] Initial 50% paid within 30 days of signing agreement . . . [and f]inal 50% paid upon reset validation[.]"); PX1232 (Altria) at 010 (estimating that approximately $17.5 million in reset and fixture payments would not be paid until 2019)).

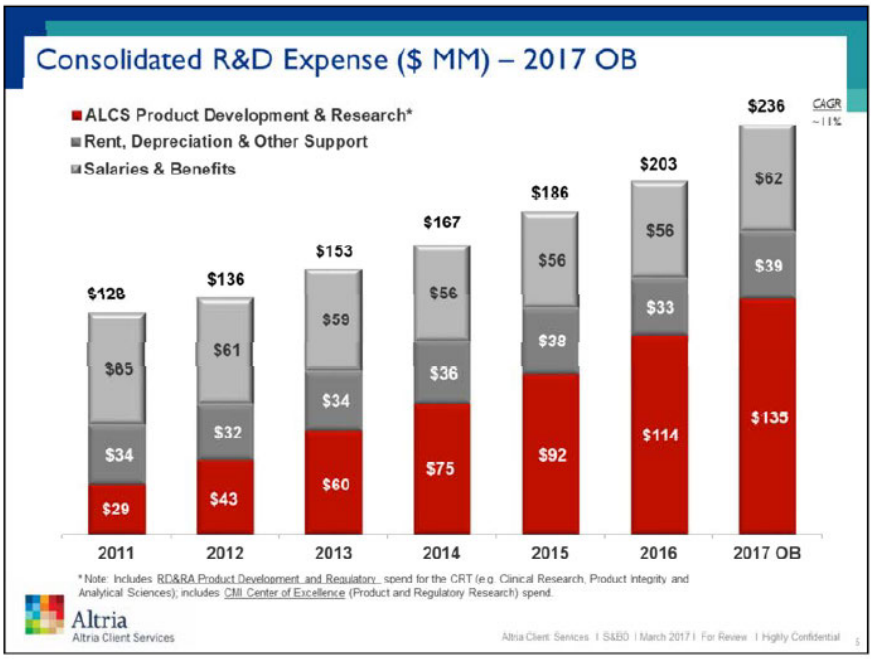
432. A Nu Mark slide deck from October 2018 indicated that Nu Mark would spend $76 million on marketing and sales expenditures in 2018 and anticipated spending a further $56 million in 2019. (PX1072 (Altria) at 010). The 2018 expenditures were in addition to the $100 million that Nu Mark spent on ITP that year. (Quigley (Altria) Tr. 1982; PX1194 (Altria) at 001).

Response to Proposed Finding No. 432:

The Proposed Finding is incomplete and misleading without additional context. The cited exhibit describes how much Altria had allocated for marketing and sales expenditures. As of

October 2018, Altria had spent millions *less* than it had anticipated on marketing and sales expenditures. (PX1127 (Altria) at 006; Gifford (Altria) Tr. 2819-20). That was because, even though Altria was "giving away" Elite devices for free based on its promotions, (Myers (Altria) Tr. 3253), there "there wasn't . . . uptake in [Nu Mark's] products in the marketplace" and low sales volume resulted in less spending on promotions than Altria had anticipated, (Gifford (Altria) Tr. 2819-21). As for the ITP funds, 50 percent of the offered ITP rebates were conditioned on retailers' successful completion of store resets, which would not be finished in 2018. (PX4304 (Altria) at 017 ("Funds to help offset reset costs[:] Initial 50% paid within 30 days of signing agreement . . . [and f]inal 50% paid upon reset validation[.]"); PX1232 (Altria) at 010 (estimating that approximately $17.5 million in reset and fixture payments would not be paid until 2019)).

433. Altria spent $236 million in consolidated research and development for reduced harm products in 2017. (PX1633 (Altria) at 007 (Reduced Harm Products, Scorecard Summary, Mar. 2017)).



(PX1633 (Altria) at 007).

Response to Proposed Finding No. 433:

The Proposed Finding is incomplete and inaccurate. The cited source shows only that ALCS's consolidated research and development expenses were *budgeted* to increase to $236 million in 2017. (PX1633 (Altria) at 007). But even if Altria did spend this amount on consolidated research and development in 2017, that amount of spending has no bearing on whether Altria could develop a competitive product. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

434. Altria spent approximately $90 million on e-vapor product development in 2017. (PX1633 (Altria) at 017 (Reduced Harm Products, Scorecard Summary, Mar. 2017)).

Response to Proposed Finding No. 434:

The Proposed Finding is incomplete and inaccurate. The cited source shows only that ALCS *budgeted* to spend approximately $90 million on e-vapor product development and research in 2017. (PX1633 (Altria) at 017). But even if Altria did spend this amount on e-vapor product development and research in 2017, that amount of spending has no bearing on whether Altria could develop a competitive product. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

435. An August 2018 presentation for Altria's Board of Directors pegged Mark Ten's PMTA/MRTPA research costs at approximately $100 million. (PX1247 (Altria) at 007 ("~$100 MM in MarkTen PMTA/MRTPA research costs ('16-18)")).

Response to Proposed Finding No. 435:

Respondents have no specific response.

436. In August 2018 Altria shared a "design brief" and engaged in "multiple conversations" with a product development firm named Bressler to assist Altria's development of e-vapor products in exchange for several hundred thousand dollars. (PX1051 (Altria) at 001, 004-05)).

Response to Proposed Finding No. 436:

The Proposed Finding is incomplete and misleading without additional context. This August 10, 2018 document attaches an updated proposal from Bressler in response to a design brief that is also attached and dated June 12, 2018. (PX1051 (Altria) at 001, 010). There is no date associated with the "multiple conversations" Complaint Counsel contends took place in August 2018. Nothing in the cited source indicates that Bressler is a "product development firm" as Complaint Counsel contends. At trial, Jupe explained that Bressler Group was a "design firm" tasked with "understand[ing] how an individual interacts with the product." (Jupe (Altria) Tr. 2123). Complaint Counsel did not ask Jupe about the cited document, nor was it introduced at trial. (CC Exhibit Index at 3).

437. As of October 2018, Altria planned to spend $39.6 million with third-party vendors to develop innovative products, including several e-vapor projects in 2019. (PX1741 (Altria) at 016 (Innovative Product Development Financial Discussion October 2018)).

Response to Proposed Finding No. 437:

The Proposed Finding is incomplete and misleading without additional context. By October 2018, Altria had launched the Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams had not come up with any concept yet, (RFF ¶¶ 1606-07), so it was not clear what third-party relationships were worth pursuing.

But even if Altria did spend this planned amount on third-party vendors, that amount of spending or fact of Altria's collaboration with third parties has no bearing on whether Altria could develop a competitive product. Ultimately, Altria was not able to develop or acquire an e-vapor

product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

In any event, the Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years – if everything went perfectly – for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)).

438. Had it not acquired an interest in JLI, Altria was prepared to "fully support" its e-vapor growth teams," (Garnick (Altria) Tr. 1657-58), even if it meant spending another $100 million (PX7000 (Garnick (Altria), IHT at 130 ("But if they came back and could justify a budget of $100 million and convince us that it was a legitimate need, we certainly would have done that.")).

Response to Proposed Finding No. 438:

The Proposed Finding is incomplete and misleading without additional context. The mere willingness to "fully support" the Growth Teams does not mean that the Growth Teams would have been able to develop a commercially viable product. Respondents agree that, having concluded that Nu Mark's on-market products were commercial failures, Altria pivoted to the Growth Teams to try to develop new e-vapor products for the distant future. (RFF ¶¶ 898-916, 962-70). But whether the Growth Teams would have ever been able to develop a competitive product is inherently speculative and, even if they had, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)).

The Growth Teams had not come up with any concept, let alone a leapfrog concept, at the time they were disbanded in December 2018. (RFF ¶¶ 1606-07). Moreover, staffing Growth Teams with Altria's top performers did not solve Altria's fundamental personnel issue, which is that Altria is not an innovative company and its employees did not have expertise in the area of innovative product development. (RFF ¶¶ 1610-11; *see also* PX7016 Jupe (Altria) Dep. at 184 (describing Altria's attempts to re-organize its structure to promote innovation as a "[b]and-aid on something that was more systemic" due to Altria's lack of personnel with the right skills)).

Moreover, even if a new e-vapor design came out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 86-93, 122-26).

439. Nu Mark was slated to receive an additional $9 million for marketing support for its cigalike products in response to competitive activity in 2018. (PX1606 (Altria) at 014 (Altria 2018 Original Budget Update)).

Response to Proposed Finding No. 439:

The Proposed Finding is incomplete and misleading without additional context. The cited [redacted] document indicates that the MarkTen cig-a-like "is under significant pressure." (PX1606 (Altria) at 001, 014). This is one of several reasons that Nu Mark was considering providing the product with additional marketing support. (PX1606 (Altria) at 014). The additional $9 million [redacted] *see also* RFF ¶ 1728dd (defining "LTM")). This document does not and cannot confirm whether this investment was made, or even whether it was "slated to be made," given that the proposal at this point still was subject to leadership team discussion. Complaint Counsel neither introduced this document at trial, (CC Exhibit Index at 20), nor asked any witness asked about it in a deposition.

But even if Altria did spend this amount on cig-a-like marketing support, that amount of spending has no bearing on Altria's ability to sell that product to adult smokers. The MarkTen cig-a-like lacked nicotine salts and so could not convert adult smokers. (RFF ¶¶ 596-627, 1504). Because it also looked "like a cigarette," its product format "unfortunately still carried some of the stigmas of smoking." (Begley (Altria) Tr. 1099-100; RFF ¶ 15). Along with the lack of nicotine satisfaction, this stigma arising from the cig-a-like's design impaired the product's ability to convert adult smokers to e-cigarettes: "[S]mokers who wanted to convert to non-combustible tobacco products did not want to appear to be smoking a cigarette, and so the form of the product was just wrong for conversion." (PX7036 Garnick (Altria) Dep. at 135; RFF ¶ 15; *see also* Willard (Altria) Tr. 1347 ("It turned out, people that are quitting cigarettes to pick up vapor don't want a vapor product that looks like a cigarette."); Jupe (Altria) Tr. 2228 (explaining that "gimmicky" looking cig-a-likes were the "wrong" format); Gardner (Altria) Tr. 2604 ("[A]dult smokers no longer wanted . . . to look like they were smoking a cigarette and the stigma associated with that.")).

And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

440. Nu Mark planned to triple its 2018 new product launch expenditures from $7 million to $23 million; $8 million of the increase was solely to accelerate the Mark Ten Elite launch. (PX1606 (Altria) at 015 (Altria 2018 Original Budget Update)).

Response to Proposed Finding No. 440:

The Proposed Finding is incomplete and misleading without additional context. The cited [redacted] document proposed investing $16 million "in addition to [the] 2018 base plan" of $7 million. (PX1606 (Altria) at 001, 015). The proposal detailed that approximately $8 million would be dedicated to accelerating Elite's launch. (PX1606 (Altria) at 015). [redacted]; *see also* RFF ¶ 1728dd (defining "LTM")). This document does not and cannot confirm

whether this investment was made, or even whether it was "planned," given that the proposal at this point still was subject to leadership team discussion. Complaint Counsel did not introduce this document at trial, (CC Exhibit Index at 20), nor ask any witness asked about it in a deposition.

Moreover, despite Altria's and Nu Mark's substantial financial and other investments in the MarkTen Elite product, and in its launch specifically, the evidence shows that the product failed commercially, (RFF ¶¶ 368-72, 407-59), and was pulled from the market in October 2018 as a result of Altria's independent regulatory evaluation and in response to FDA's concern about pod-based products, (RFF ¶¶ 917-59, 1001-07).

441. [redacted] (PX1606 (Altria) at 022 (Altria 2018 Original Budget Update)) (*in camera*).

Response to Proposed Finding No. 441:

The Proposed Finding is incomplete and misleading without additional context. The cited [redacted] *see also* RFF ¶ 1728dd (defining "LTM")). This document does not and cannot confirm whether this investment was made, or even whether it was "planned," given that the proposal at this point still was subject to leadership team discussion. Complaint Counsel did not introduce this document at trial, (CC Exhibit Index at 20), nor ask any witness asked about it in a deposition.

But even if the investment was made, that has no bearing on these products' prospects of success. Cync was never commercialized and its chances of ever reaching the market were "[s]lim to none." (Schwartz (Altria) Tr. 1914; RFF ¶ 1524). The product had temperature control problems, posed a risk of acute chronic nickel poisoning, and performed poorly in consumer

testing. (RFF ¶¶ 1525-27). VIM also was never commercialized and had a host of regulatory red flags, and it was unclear whether the product could even be sold on the market under the Deeming Rule. (RFF ¶¶ 1528-31). Elite did reach the market, but despite Altria's and Nu Mark's substantial financial and other investments in the product, and in its launch specifically, the evidence shows that the product failed commercially, (RFF ¶¶ 368-72, 407-59), and was pulled from the market in October 2018 as a result of Altria's independent regulatory evaluation and in response to FDA's concern about pod-based products, (RFF ¶¶ 917-59, 1001-07).

442. Willard stated in a 2019 interview with the *Wall Street Journal* that "we had put our best people to work on the e-vapor organic effort. They have developed very satisfying products that early on were converting adult cigarette smokers. It just so happened that in the end Juul came up with a more compelling product and started to grow more rapidly." (PX1172 (Altria) at 003).

Response to Proposed Finding No. 442:

The Proposed Finding is incomplete and misleading without additional context. These quotations are "edited excerpts," and are neither direct quotes nor provided in their full context. (PX1172 (Altria) at 002). Complaint Counsel did not ask Willard about these statements at trial or in his deposition. (*See* CC Exhibit Index at 7; PX7004 Willard (Altria) IHT; PX7013 Willard (Altria) Dep.). At trial, Willard and multiple other witnesses confirmed that any "early" results in the cig-a-like market were not relevant once consumers shifted to pod-based products with nicotine salts, which Nu Mark did not have. (*See, e.g.*, Begley (Altria) Tr. 1108; Willard (Altria) Tr. 1366 (noting cig-a-like category was in "free-fall"); RFF ¶¶ 562-78).

443. Altria had a "Product development Outpost" in Israel. (Garnick (Altria) Tr. 1666-67; PX1379 (Altria) at 001 (Email between Garnick and Crosthwaite)).

Response to Proposed Finding No. 443:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. When asked at trial whether the "innovation outpost" referenced in PX1379 "was the

group that was in Israel," Garnick answered "No," and indicated he did not understand the question. (Garnick (Altria) Tr. 1666-67). He went on to explain the concept of an innovation outpost—"a group to do innovation outside of Altria, outside the buildings, because we weren't being successful at Altria"—but he did not confirm, as Compliant Counsel contends, that Altria had such an outpost, or that it was in Israel. (Garnick (Altria) Tr. 1666-67).

3. Altria's Strategy Was to Build a Portfolio of E-Cigarette Products, and Prior to the Acquisition, Altria Was Working on a Pipeline of Products

444. On November 2, 2017, Altria's then-CEO Barrington stated to investors, "Indeed, we believe the breadth, quality and focus of our non-combustible product portfolio is second to none." (PX9000 (Altria) at 008 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 444:

The Proposed Finding is incomplete and misleading without additional context. Even if it were true as of November 2017 that Altria's breadth, quality, and focus were unmatched—which this optimistic statement of Altria's then-existing beliefs does not prove—this was insufficient to make Altria competitive in the e-vapor space. By early 2018, Altria had determined that success in e-vapor required a pod-based product, which Altria did not yet have on the market. (RFF ¶¶ 388-406). Altria launched Elite as quickly as it could, but, despite Altria's best marketing and distribution efforts, the product could not gain traction. (RFF ¶¶ 407-59). Ultimately, Altria realized that notwithstanding the "breadth, quality, and focus" of its portfolio, its products were fundamentally flawed, including because they lacked the nicotine satisfaction required to convert adult smokers. (RFF ¶¶ 596-747).

445. Altria had an initiative to invest $39 million to complete development and prepare a PMTA on a new discrete pod-based system referred to as project "Panama," and stated ." . . Panama is the next generation product for the fastest growing segment of the e-vapor category. . ." (PX1605 (Altria) at 013 (Altria 2018 Prelim. OB Business Case Details from November 2017)).

Response to Proposed Finding No. 445:

The Proposed Finding is incomplete and misleading without additional context. In the cited November 2017 document, to justify an investment in Panama, Altria expressed its hopes that Panama would be "the next generation product for the fastest growing segment of the e-vapor category." (PX1605 (Altria) at 013). But as the document also makes clear, both "development" and the "PMTA" for Panama were not complete. (PX1605 (Altria) at 013). In fact, Panama "never really got out of the idea stage," (PX7014 Baculis (Altria) Dep. at 111), and the project was put on hold in March 2018, (RFF ¶¶ 1578, 1581-84).

446. Altria offered as much as $10 million to acquire the U.S. license for a product like Elite, called Phix. (Schwartz (Altria) Tr. 1868 (". . . Smoore manufactured a similar product to Elite called Phix. . . Q. How much did Nu Mark offer for Phix? A. Last offer I made was for $10 million.")).

Response to Proposed Finding No. 446:

The Proposed Finding is incomplete and misleading without additional context. In a portion of his trial testimony that Complaint Counsel omits, Schwartz explained the reason for Phix's high price: "Phix was not a willing partner, if you will. I mean, they were not motivated to do anything with us. So the price was driven up." (Schwartz (Altria) Tr. 1869). Ultimately, Altria was unable to acquire the license to Phix. (PX7018 Schwartz (Altria) Dep. at 85-86). In contrast, Altria was able to obtain rights to market Elite for just $500,000, and Schwartz was not aware of any other e-vapor companies that were interested it. (RFF ¶¶ 328-29).

447. In February 2018, Altria's then-COO Willard stated to investors, "Preparing for this opportunity, we've spent years acquiring best-in-class regulatory and product development talent and building a compelling portfolio of non-combustible tobacco products with the potential to reduce risk." (PX9045 (Altria) at 002 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 447:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, the quoted language is attributed incorrectly to Altria's then-COO Willard; it should have been attributed to then-CEO Barrington. (PX9045 (Altria) at 001).

Moreover, Barrington's belief at the time that Altria had acquired best-in-class talent has no bearing on the ability of those employees to navigate FDA's regulatory requirements or develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611). As a result, the company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

448. On November 2, 2017, Barrington stated to investors, "First, we began this journey more than 15 years ago when we made the bold decision to pursue federal legislation to grant the FDA jurisdiction over tobacco, legislation that was required to establish the possibility of bringing innovative, reduced-risk products to market." (PX9000 (Altria) at 004 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 448:

Respondents have no specific response.

449. On November 2, 2017, Barrington stated to investors that nearly a decade of "investment and hard work" at Altria had resulted in a national framework providing the means to pursue innovative, reduced risk products via the Tobacco Control Act in 2009. (PX9000 (Altria) at 004 ("It was because of Altria's leadership - and only Altria, alone in the industry.") (Altria CEO Marty Barrington addressing investors at 2017 Altria Investor Day)).

Response to Proposed Finding No. 449:

The Proposed Finding is incomplete and misleading without additional context. The Tobacco Control Act "grant[ed] the FDA jurisdiction over tobacco," and so only indirectly

"establish[ed] the possibility"—but did not guarantee—that "innovative, reduced-risk products" could be brought to market. (PX9000 (Altria) at 004).

450. In February 2018, Altria's then-COO Willard stated to investors, "Nu Mark's goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products . . ." (PX9045 (Altria) at 006 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 450:

The Proposed Finding is incomplete and misleading without additional context. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

This forward-looking statement of Nu Mark's goal has no bearing on the company's likelihood of achieving that goal. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

451. As of June 2018, Altria spent an estimated $96.4 to $104.6 million on PMTA/MRPTA for the Mark Ten cigalike portfolio. (PX1094 (Altria) at 041 (Email attachment MarkTen PMTA MRTPA Update Final)).

Response to Proposed Finding No. 451:

The Proposed Finding is incomplete and misleading without additional context. The cited document is a "MarkTen PMTA & MRTPA Update" of Altria's "Current Cost Estimates." (PX1094 (Altria) at 040). The document indicates that Altria's cost estimates for the MarkTen PMTA/MRTPA, "revised 6/6/18," were $94.6 - $104.6 million. (PX1094 (Altria) at 041). The

document does not support Complaint Counsel's claim that these estimated total costs all had been realized by June 2018.

In any event, the precise amount of money that Altria spent or planned to spend on the MarkTen PMTA is not determinative of whether that application would be granted. As Paige Magness, who was responsible for the e-vapor PMTAs, explained, "[i]t's almost irrelevant how good we are as a regulatory team. If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway." (PX7017 Magness (Altria) Dep. at 279). Ultimately, Altria determined that Nu Mark's products could not obtain regulatory approval because they could not convert adult smokers, (*see* RFF ¶¶ 76, 81, 596-613, 743-47), and continued to have unresolved design problems, (RFF ¶¶ 725-36, 1085-89).

452. Altria's CEO addressed investors at Altria's November 2017 Investor Day, stating: "This year we're celebrating the 10th anniversary of our $350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 452:

The Proposed Finding is incomplete and misleading without additional context. Altria spent $350 million to create the Center for Research and Technology "to really focus on internal development of [] reduced-risk products," (Willard (Altria) Tr. 1332; RFF ¶ 170), and over time invested "billions of dollars" in the Center, (Jupe (Altria) Tr. 2212; RFF ¶ 172). But even fourteen years after the Center opened in 2007, Altria had still not successfully commercialized an internally developed, potentially reduced-risk product. (RFF ¶¶ 171, 173).

453. Altria created growth teams to develop "leap frog" products and compete in e-cigarettes beyond 2018 in the "long term." (Willard (Altria) Tr. 1436 ("Q. And at this point, were you restructuring the company so you could have these growth teams to do those leapfrog, you know, products, do the long-term innovation work that you had talked about earlier? A. Yes, that was the idea. . . and we concluded that giving these growth teams that challenge

was the best way to continue to compete in e-vapor. Q. And did you formulate the plan before October 5th when you were not in negotiations with JLI? A. Yeah. I mean, the plan had been in development for -- for quite some time.")).

Response to Proposed Finding No. 453:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, the fact that Altria had to launch the Growth Teams in October 2018 is a reflection that its existing e-vapor efforts were failures. If Nu Mark had been successful with its existing products, there would have been no reason to launch the Growth Teams.

Whether the Growth Teams would have ever been able to develop a competitive product is inherently speculative and, even if it had, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met); RFF ¶¶ 905, 970).

As Garnick explained at trial, "at the time of these growth teams, [Altria] didn't even have a product concept in mind, let alone a leapfrog concept. . . . The idea was to bring some of our best scientists together . . . and come up with a product concept." (Garnick (Altria) Tr. 1661-62; RFF ¶ 970, 1606-07; *see also* Jupe (Altria) Tr. 2309, 2313 (noting that autonomy was intended to facilitate product development by 2023, which was an "aggressive" schedule); PX7000 Garnick (Altria) IHT at 132 ("There was no concept of a product they were working on. It was a bunch of people in a room saying, okay, think of something."); [redacted])). That product would then require a PMTA before it could be sold. (RFF ¶¶ 45-71).

Moreover, staffing Growth Teams with Altria's top performers did not solve Altria's fundamental personnel issue, which is that Altria is not an innovative company and its employees did not have expertise in the area of innovative product development. (RFF ¶¶ 1610-11; *see also* PX7016 Jupe (Altria) Dep. at 184 (describing Altria's attempts to re-organize its structure to promote innovation as a "[b]and-aid on something that was more systemic" due to Altria's lack of personnel with the right skills).

Even if a new e-vapor design came out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 86-93, 122-26).

454. On November 2, 2017, Marty Barrington, Altria's then-CEO, stated to investors that Altria had been adapting its organization to win in the dynamic non-combustible environment and had "an extraordinary financial engine to support these efforts." (PX9000 (Altria) at 008-09 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 454:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria may have adapted its organization and prepared financially to compete with non-combustible tobacco products has no bearing on the company's ability to do so. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

4. The Formation of Nu Mark and the Launch of the MarkTen Brand Began with the Cigalike

455. Nu Mark entered the category in 2013 with the first generation MarkTen e-vapor product. We've been thoughtful and disciplined in building this business and have learned a lot over the past five years." (PX9000 (Altria) at 015 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 455:

The Proposed Finding is incomplete and misleading without additional context. That Nu Mark had learned a lot in its first five years is not determinative of its ability to compete in e-vapor. Ultimately, what Altria learned *after* 2017 was that its products were fundamentally flawed, including because they lacked the nicotine satisfaction required to convert adult smokers. (RFF ¶¶ 596-747). If a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

Moreover, the quotation is on page 016 of the cited document, not 015. (*See* PX9000 (Altria) at 016).

456. "Every new product that [Altria] designed was really informed by what we knew about already-marketed products." (PX7014 (Baculis (Altria), Dep. at 119)).

Response to Proposed Finding No. 456:

The Proposed Finding is incomplete and misleading without additional context. This quote is taken from Baculis's explanation for her belief that MarkTen Bold did not provide nicotine satisfaction. (PX7014 Baculis (Altria) Dep. at 118-19 ("Q. Did the MarkTen Bold product have a flavor design to give nicotine satisfaction? A. That was the desire of MarkTen Bold. I don't think it achieved it." (objection omitted)). Baculis explained that both Nu Mark's qualitative research and Bold's marketplace performance demonstrated that the product did not "do particularly well." (PX7014 Baculis (Altria) Dep. at 119). When asked whether there was "anything about the nicotine satisfaction associated with MarkTen Bold that [Nu Mark was] able to use to inform research and development work on nicotine satisfaction for other products," Baculis answered affirmatively, explaining that since "[e]very new product that [Nu Mark] designed was really informed by what [Nu Mark] knew about already-marketed products . . . there were certainly

things in the products that we had that helped inform how [Nu Mark] [could] do better in the products we were developing." (PX7014 Baculis (Altria) Dep. at 119).

However, the fact that Altria was learning from its mistakes as it went and working to develop fixes for its products' problems does not mean that Altria could have incorporated those learnings and fixes in a new product that could be brought to market. Even if Altria had finalized new designs incorporating these fixes, it would have to obtain FDA approval before the new products could be brought to market. (RFF ¶¶ 59-61). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 72-104, 122-26).

457. Altria invested heavily in e-vapor research as early as 2015 "Nu Mark will work with the ALCS Research, Development and Engineering (RD&E) Organization to align the differentiated brand portfolio strategy with the strategy for innovative product and technology development." "This enhanced program management strategy will be evidenced by: new e-vapor technologies to leapfrog the competition . . . acquisition of products, technologies and expertise to fill gaps in Nu Mark's product portfolio and capability. . ." (PX4508 (Altria) at 006 (2015 e-Vapor Leadership Product Technology 2015 Strategy Meeting)).

Response to Proposed Finding No. 457:

The Proposed Finding is incomplete and inaccurate. Nothing in the cited source nor quoted language therefrom supports Complaint Counsel's contention that Altria had "invested heavily in e-vapor research as early as 2015." The document confirms only that as of January 2015, Nu Mark planned to collaborate with "ALCS Research, Development and Engineering (RD&E) organization to align the differentiated brand portfolio strategy with the strategy for innovative product and technology development," and hoped that this collaboration would result in, among other things, "new e-vapor technologies to leapfrog the competition and deliver the preferred

vaping experience for adult smokers and vap[ers]" and the "acquisition of products, technologies and expertise to fill gaps in Nu Mark's product portfolio and capability." (PX4508 (Altria) at 006).

In any event, regardless of the extent of Altria's investment, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

458. Altria planned to spend an estimated $79 million on PMTA costs for the Mark Ten cigalike. PX1134 (Altria) at 043 (Nu Mark Three-Year Strategic Plan 2017)).

Response to Proposed Finding No. 458:

Respondents have no specific response except to note the costs of a PMTA are not determinative of whether the PMTA will be successful.

a) MarkTen Cigalike

459. Howard Willard informed investors at the February 2018 CAGNY conference that "[i]n cig-alikes, MarkTen is available in about 65,000 stores, representing roughly 70% of U.S. e-vapor volume in mainstream channels. In 2017, MarkTen grew volume by approximately 60%, far outpacing competitive cig-alike brands." (PX2176 (JLI) at 110 (February 2018 CAGNY Summary)).

Response to Proposed Finding No. 459:

The Proposed Finding is incomplete and misleading without additional context. MarkTen cig-a-like's comparative performance against other cig-a-likes in 2017 does not speak to whether Nu Mark ultimately would be a competitive threat. By the end of 2017, "the market dynamics clearly changed, and there appeared to be one format that was winning in the marketplace, which was a pod-based product with nicotine salts, which primarily was JUUL." (Begley (Altria) Tr. 1055; RFF ¶ 343). Data presented to Altria's Board in February 2018 showed that in 2017, pod-based sales volume had grown by 660 percent; by contrast, cig-a-like volume had declined by 3 percent. (RFF ¶ 390 (citing PX4012 (Altria) at 014); *see also* RFF ¶¶ 1325-29 (describing decline

of cig-a-likes)). Any growth within cig-a-likes was not significant, or likely to make a difference in Altria's bottom line, because "cigalike's [had] fallen off [a] cliff." (Gifford (Altria) Tr. 2739; RFF ¶ 406). The reality was that with only cig-a-like products and without a successful pod product, Nu Mark "had no chance of achieving [its financial projections]" and would continue to incur substantial losses, (Begley (Altria) Tr. 1087-88; RFF ¶ 1082), to the tune of hundreds of millions of dollars, (RFF ¶ 1083).

460. As of late September 2018 Altria was still planning to submit a PMTA for MarkTen cigalike and was continuing foundational science work to support future e-vapor applications. (PX1399 (Altria) at 001, 005 (September 2018 email from William Gardner to Maria Gogova regarding e-vapor product efforts)).

Response to Proposed Finding No. 460:

The Proposed Finding is incomplete and misleading without additional context. In the fall of 2018, Altria's plans with regard to the MarkTen cig-a-like PMTA and other e-vapor applications were in flux. (*See* RFF ¶¶ 908-13, 1085-89). In the course of its annual budget process in the fall of 2018, Altria had come to terms with the fact that both of its "two pathways" to success in the e-vapor industry—developing a leap frog product through the Growth Teams or the potential investment in JLI—would require a substantial financial commitment, (RFF ¶ 1074), and had undertaken a review of ongoing work to determine what work stopped and what would continue, (RFF ¶¶ 908-13). For a time Altria planned to continue with the MarkTen cig-a-like, but ultimately determined that with only cig-a-like products and without a successful pod product, Nu Mark "had no chance of achieving [its financial projections]" and would continue to incur substantial losses, (Begley (Altria) Tr. 1087-88); RFF ¶ 1082), to the tune of hundreds of millions of dollars, (RFF ¶ 1083). Moreover, new problems continued to emerge with the MarkTen cig-a-like. (RFF ¶¶ 1085-89). Faced with these financial losses and dire regulatory prospects, Altria "decided to go ahead and shut [Nu Mark] down. Without a pathway to profitability, [Altria] had already

funded the growth teams," and it decided, "let's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space." (Gifford (Altria) Tr. 2841; RFF ¶ 1090).

b) MarkTen Bold Cigalike

461. Altria was aware that nicotine salts could help consumers with nicotine satisfaction. With that in mind, Altria introduced the Mark Ten Bold formulation, which relied on nicotine salts, to better mimic the nicotine delivery of a cigarette. (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 461:

The Proposed Finding is incomplete and misleading without additional context. *First*, prior to 2018, Altria did not fully appreciate the importance of nicotine salts to nicotine satisfaction. The company's scientists had long understood that salts were important for "abating some of the irritation in the throat" caused by nicotine. (Jupe (Altria) Tr. 2139, 2229-30; RFF ¶ 615). But while the scientists hypothesized that salts also were important to nicotine satisfaction, they "didn't have the data" to support that hypothesis. (PX7015 Gogova (Altria) Dep. at 312; RFF ¶ 616). Up until 2018, Altria's scientists were not permitted to run consumer tests with nicotine salts in sufficient concentrations, which limited their ability to develop effective nicotine salt formulations. (RFF ¶ 616; PX7034 Mountjoy (Altria) Dep. at 65; PX7015 Gogova (Altria) Dep. at 133-37, 310-13). It was not until Altria's scientists finally were able to conduct this testing in 2018 that the results led to what the scientists have termed a "eureka moment." (Jupe (Altria) Tr. 2142; RFF ¶ 617). The scientists discovered then that, in addition to mitigating the harshness of nicotine in the throat, nicotine salts created nicotine absorption most similar to how the nicotine in a cigarette is absorbed. (RFF ¶ 618 (citing Jupe (Altria) Tr. 2137-39; PX4504 (Altria) at 009; RX0526 (Altria) at 006)). Therefore, it was not until the summer of 2018—long after the introduction of MarkTen Bold—that Altria's scientists reached a consensus that the "[u]se of nicotine salts or

addition of acids to achieve a certain pH is required for a satisfying and relaxing E-vapor experience." (Jupe (Altria) Tr. 2275; RFF ¶ 622; *see also* RX0796 (Altria) at 053 (same); PX4504 (Altria) at 024 (same); Gardner (Altria) Tr. 2585-86 ("[T]he consensus was that nicotine salts would be required for adult smoker conversion to e-vapor products."); RX0419 (Altria) at 001-02; RX0526 (Altria) at 006).

Second, MarkTen Bold had some nicotine salts, but by the summer of 2018 Altria realized it did not have the right salts formula. (RFF ¶ 638; Quigley (Altria) Tr. 2037-38; Jupe (Altria) Tr. 2232-33; PX7016 Jupe (Altria) Dep. at 107). As Jupe explained at trial, the "addition of nicotine salts" was just "part of" what was required for nicotine satisfaction. (Jupe (Altria) Tr. 2136-37; RFF ¶ 639). "The second part of it is having the right level of nicotine salts to the right level of nicotine." (Jupe (Altria) Tr. 2137). The salts ratio in Bold was "the best [Altria] knew" when the formulation was created, prior to 2016, "but it wasn't enough salt. It just was not satisfying." (Jupe (Altria) Tr. 2228-29; RFF ¶ 644).

Bold had a pH of 8, while the pH of a Marlboro cigarette is around 5.8. (RFF ¶ 640; RX2036 (Altria) at 005; RX0796 (Altria) at 037; RX0429 (Altria) at 004). pH is measured on "a logarithmic scale, so a one-unit difference in pH -- for example, from 7 to 8 -- is a tenfold difference in the acidity level or the acid level." (Gardner (Altria) Tr. 2601; RFF ¶ 640). "So between 5.6 and 8, that's 100 times less acidic with MarkTen Bold versus JUUL." (RFF ¶ 641; Gardner (Altria) Tr. 2601; PX1028 (Altria) at 009; *see also* RX0440 (Altria) at 006 (comparing the four percent acid of JUUL with the one percent acid of Bold)).

Bold's high pH meant that it was losing approximately half of its nicotine into the mouth and throat region. (RFF ¶ 642; Jupe (Altria) Tr. 2274 (discussing RX0796 (Altria) at 50)). Pharmacokinetic (or PK) studies confirmed that Bold was not delivering nicotine to the

bloodstream as quickly as combustible cigarettes. (RFF ¶ 645; Jupe (Altria) Tr. 2231-33; RX0176 (Altria) at 142). Bold "really wasn't [like] a cigarette," and thus its PK results were "not an indicator of conversion potential." (Jupe (Altria) Tr. 2234 (discussing RX0176 (Altria) at 142); RFF ¶ 649). In practical terms, the problem was that a smoker in the real world trying MarkTen Bold would have to take anywhere from "25 to 30 puffs to really get closer to the conventional cigarette" which is "too much additional work for adult smokers to do to even get closer to where they wanted to be." (PX7015 Gogova (Altria) Dep. at 144-46; RFF ¶ 650). In that situation, the smoker would just start "looking for potentially other alternatives" that do not require working as hard or using the product as much. (PX7015 Gogova (Altria) Dep. at 144-46; RFF ¶ 650).

462. MarkTen Bold nicotine satisfaction was used to inform research and development of nicotine salts for later potential products. (PX7014 (Baculis (Altria), Dep. at 119 ("Was there anything about the nicotine satisfaction associated with MarkTen Bold that you research and development work on nicotine satisfaction for other products? A. Every new product that we designed was really informed by what we knew about already-marketed products.")).

Response to Proposed Finding No. 462:

The Proposed Finding is incomplete and misleading without additional context. This quote is taken from Baculis's explanation for her belief that MarkTen Bold did not achieve nicotine satisfaction. (PX7014 Baculis (Altria) Dep. at 118-19 ("Q. Did the MarkTen Bold product have a flavor design to give nicotine satisfaction? A. That was the desire of MarkTen Bold. I don't think it achieved it." (objection omitted))). Baculis explained that both Nu Mark's qualitative research and Bold's marketplace performance demonstrated that the product did not "do particularly well." (PX7014 Baculis (Altria) Dep. at 119). When asked whether there was "anything about the nicotine satisfaction associated with MarkTen Bold that [Nu Mark was] able to use to inform research and development work on nicotine satisfaction for other products," Baculis answered affirmatively, explaining that since "[e]very new product that [Nu Mark] designed was really

informed by what [Nu Mark] knew about already-marketed products . . . there were certainly things in the products that we had that helped inform how [Nu Mark] [could] do better in the products we were developing." (PX7014 Baculis (Altria) Dep. at 119).

However, the fact that Altria was learning from its mistakes as it went and working to develop fixes for its products' problems does not mean that Altria could have incorporated those learnings and fixes in a new product that could be brought to market. Even if Altria had finalized new designs incorporating these fixes, it would have to obtain FDA approval before the new products could be brought to market. (RFF ¶¶ 63-71). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 72-104, 122-26).

463. "MarkTen Bold was Altria's attempt to improve upon the original MarkTen product and . . . to improve its satisfaction, for example, in an effort to convert adult smokers." (PX7028 (Wappler (PWP), Dep. at 45-46)).

Response to Proposed Finding No. 463:

The Proposed Finding is incomplete and misleading without additional context. James Wappler is a partner at Perella Weinberg Partners and Altria's financial advisor. (PX7028 Wappler (PWP) Dep. at 12-13). Complaint Counsel did not call him to testify at trial. Complaint Counsel has omitted the first part of Wappler's answer, where he himself disclaims his ability to describe the MarkTen Bold product: "Q. And what was the MarkTen Bold product? A. *Again, I'm not a product engineer, but my understanding is that* MarkTen Bold was Altria's attempt to improve upon the original MarkTen product and I – I know they had tried to improve its nicotine satisfaction, for example, in an effort to convert adult smokers." (PX7028 Wappler (PWP) Dep. at 45-46 (emphasis added to Complaint Counsel's omission)). Wappler's deposition testimony as to the nature of MarkTen Bold and reasons for its development therefore carries little weight.

Moreover, characterizing MarkTen Bold as Altria's "attempt" to improve upon the original MarkTen product does not mean that attempt was successful. It is true that MarkTen Bold had nicotine salts, but by the summer of 2018 Altria realized it did not have the right salts formula. (RFF ¶ 638; Quigley (Altria) Tr. 2037-38; Jupe (Altria) Tr. 2232-33; PX7016 Jupe (Altria) Dep. at 107)). As Jupe explained at trial, the "addition of nicotine salts" was just "part of" what was required for nicotine satisfaction. (Jupe (Altria) Tr. 2136-37; RFF ¶ 639). "The second part of it is having the right level of nicotine salts to the right level of nicotine." (Jupe (Altria) Tr. 2137). The salts ratio in Bold was "the best [Altria] knew" when the formulation was created, prior to 2016, "but it wasn't enough salt. It just was not satisfying." (Jupe (Altria) Tr. 2228-29; RFF ¶ 644).

Bold had a pH of 8, while the pH of a Marlboro cigarette is around 5.8. (RFF ¶ 640; RX2036 (Altria) at 005; RX0796 (Altria) at 037; RX0429 (Altria) at 004). pH is measured on "a logarithmic scale, so a one-unit difference in pH -- for example, from 7 to 8 -- is a tenfold difference in the acidity level or the acid level." (Gardner (Altria) Tr. 2601; RFF ¶ 640). "So between 5.6 and 8, that's 100 times less acidic with MarkTen Bold versus JUUL." (RFF ¶ 641; Gardner (Altria) Tr. 2601; PX1028 (Altria) at 009; *see also* RX0440 (Altria) at 006 (comparing the four percent acid of JUUL with the one percent acid of Bold)).

Bold's high pH meant that it was losing approximately half of its nicotine into the mouth and throat region. (RFF ¶ 642; Jupe (Altria) Tr. 2274 (discussing RX0796 (Altria) at 50)). Pharmacokinetic (or PK) studies confirmed that Bold was not delivering nicotine to the bloodstream as quickly as combustible cigarettes. (RFF ¶ 645; Jupe (Altria) Tr. 2231-33; RX0176 (Altria) at 142). Bold "really wasn't [like] a cigarette," and thus its PK results were "not an indicator of conversion potential." (Jupe (Altria) Tr. 2234 (discussing RX0176 (Altria) at 142);

RFF ¶ 649). In practical terms, the problem was that a smoker in the real world trying MarkTen Bold would have to take anywhere from "25 to 30 puffs to really get closer to the conventional cigarette" which is "too much additional work for adult smokers to do to even get closer to where they wanted to be." (PX7015 Gogova (Altria) Dep. at 144-46; RFF ¶ 650). In that situation, the smoker would just start "looking for potentially other alternatives" that do not require working as hard or using the product as much. (PX7015 Gogova (Altria) Dep. at 144-46; RFF ¶ 650).

464. According to a presentation Altria made to investors in November 2017" [t]he MarkTen Bold formulation, currently in a lead market, offers a better sensory experience and greater nicotine satisfaction for current smokers. It includes 4% nicotine by weight and uses a proprietary recipe for nicotine salts with ingredients commonly found in the tobacco leaf." (PX1129 (Altria) at 012 (November 2017 Nu Mark Investor Day presentation)).

Response to Proposed Finding No. 464:

The Proposed Finding is incomplete and misleading without additional context. MarkTen Bold had some nicotine salts, but as of November 2017, Altria did not understand that Bold did not have the right salts formula. (RFF ¶¶ 614-27). As Jupe explained at trial, the "addition of nicotine salts" was just "part of" what was required for nicotine satisfaction. (Jupe (Altria) Tr. 2136-37; RFF ¶ 639). "The second part of it is having the right level of nicotine salts to the right level of nicotine." (Jupe (Altria) Tr. 2137). The salts ratio in Bold was "the best [Altria] knew" when the formulation was created, prior to 2016, "but it wasn't enough salt. It just was not satisfying." (Jupe (Altria) Tr. 2228-29; *see also* RFF ¶¶ 638-51). Moreover, MarkTen Bold also was a cig-a-like, which was a dying format. (RFF ¶¶ 568, 1324-29).

465. According to Altria CEO Howard Willard while addressing investors in 2018, "MarkTen Bold, which is currently in about 25,000 retail stores, uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes." (PX2176 (JLI) at 110 (February 2018 CAGNY Summary)).

Response to Proposed Finding No. 465:

The Proposed Finding is incomplete and misleading without additional context. MarkTen Bold had some nicotine salts, but as of February 2018, Altria did not understand that Bold did not have the right salts formula. (RFF ¶¶ 614-27). As Jupe explained at trial, the "addition of nicotine salts" was just "part of" what was required for nicotine satisfaction. (Jupe (Altria) Tr. 2136-37; RFF ¶ 639). "The second part of it is having the right level of nicotine salts to the right level of nicotine." (Jupe (Altria) Tr. 2137). The salts ratio in Bold was "the best [Altria] knew" when the formulation was created, prior to 2016, "but it wasn't enough salt. It just was not satisfying." (Jupe (Altria) Tr. 2228-29; *see also* RFF ¶¶ 638-51). Moreover, MarkTen Bold also was a cig-a-like, which was a dying format. (RFF ¶¶ 568, 1324-29).

466. JLI considered MarkTen Bold and Elite to be "[c]ompetition from big companies." (PX2079 (JLI) at 014 (February 2018 Product Roadmap presentation)).

Response to Proposed Finding No. 466:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The inclusion of MarkTen Bold and Elite on a slide titled "Competition from big companies," (PX2079 (JLI) at 014), indicates only that Bold and Elite were products marketed by Altria, a big company. It does not prove as Complaint Counsel claims that JLI considered MarkTen Bold and Elite to be competitive threats.

Because Complaint Counsel did not introduce this document at trial or in any deposition, none of the several JLI witnesses who testified had the opportunity to explain it to the Court. (CC Exhibit Index at 35). But there is an abundance of other evidence, including trial testimony and contemporaneous documents, that confirms JLI did not consider either MarkTen Bold or Elite to be a competitive threat:

- JLI's data showed MarkTen Bold was "losing doors" at retailers, meaning that it was not selling in particular locations and those locations showed up in the sales data as lost or not counted "doors." (RX1524 (JLI) at 001; O'Hara (JLI) Tr. 625-27; RFF ¶ 756).

- O'Hara highlighted this MarkTen Bold data in a February 7, 2018 email, concluding "there are two possible reasons for this. Either 1) the product is sitting on the shelves and didn't sell at all over this period, or 2) the retailers are actively de-stocking them. Either way, this is a high-conviction data point that MarkTen Bold is not something we should be extremely concerned about . . . . This is especially true given how publicly they've discussed their efforts to drive distribution on that product." (RX1524 (JLI) at 001; RFF ¶ 757).

- JLI also internally circulated reports from industry analysts observing that Bold's sales never "materially spike[d] in the way that you might expect." (RX1425 (JLI) at 008; RFF ¶ 758).

- JLI's witnesses testified at trial that no one at the company believed that Altria's MarkTen cig-a-likes in general were a competitive threat. (O'Hara (JLI) Tr. 583-84, 624-28, 630; Robbins (JLI) Tr. 3245, 3248; RFF ¶¶ 651, 744-46, 759; *see also* PX7005 Danaher (JLI) IHT at 165 ("[W]e didn't think that MarkTen was a significant competitive threat to us.")).

- When JLI's O'Hara tried Bold, he found it so weak that he did "not think that it had nicotine salts" at all. (O'Hara (JLI) Tr. 503-04; RFF ¶ 651). "[I]f it did," he

testified at trial, then the salts it had were "a very poor quality" and "not effective." (O'Hara (JLI) Tr. 503-04, 627; RFF ¶ 651).

- O'Hara also believed Elite was not a viable product. (O'Hara (JLI) Tr. 641; RFF ¶ 746). It had "low nicotine strength" and it "was neither a salt-based nicotine nor a high-quality salt-based nicotine." (O'Hara (JLI) Tr. 521; RFF ¶ 746).

- JLI's cofounder, Adam Bowen, observed that Elite "do[es]n't provide cig-like nicotine satisfaction." (RX1420 (JLI) at 001; RFF ¶ 744). He also concluded, "Bold is a terrible product – they didn't get it right." (PX2269 (JLI) at 001; RFF ¶ 744).

- Bob Robbins, JLI's Chief Growth Officer, testified that Altria's cig-a-likes did not "deliver[] the nicotine satisfaction that a smoker would want to convert." (Robbins (JLI) Tr. 3244; RFF ¶ 745). And Elite "didn't seem to be effective at converting cigarette smokers." (Robbins (JLI) Tr. 3251; RFF ¶ 745). Elite "never caught on in market. It didn't seem to be effective at converting cigarette smokers to the product. And they sold -- I don't recall them selling many devices or pods, but when they sold devices, it did not appear that there was pod purchases afterwards, so -- and, you know, feedback from the market was negative on it, which is to say wholesalers and retailers did not see it selling well either." (Robbins (JLI) Tr. 3251; RFF ¶ 752).

- Contemporaneous documents reflect JLI's low opinion of Elite. (*See, e.g.*, PX2086 (JLI) at 001; PX2274 (JLI) at 001; RX1165 (JLI) at 004; RFF ¶¶ 478-80, 749).

- For example, the day Elite was launched, Joseph O'Hara, JLI's director of regulatory strategy, wrote: "Net takeaway is that we believe that the MarkTen Elite is a meaningful positive for us relative to expectations based on (1) low nicotine content pods, (2) no salts, and (3) lack of marketing roll-out." (PX2086 (JLI) at 001; RFF ¶ 479). O'Hara explained at trial that based on these shortcomings, from Elite's inception, he "did not expect that [it] would be a particularly strong competitor," "especially [because of] the first two points"—it had "low nicotine content" and "no salts." (O'Hara (JLI) Tr. 632; RFF ¶ 479).

- When Bowen, one of JLI's cofounders, realized Elite was not using salts, he too concluded that Elite could not "provide cig-like nicotine satisfaction" and thus was "not a threat." (RX1420 (JLI) at 001; *see also* RX1421 (JLI) at 001; RFF ¶ 480). This defect made Elite "an absolute nonstarter" in his view. (PX2269 (JLI) at 001; RFF ¶ 480).

- Though Elite was a pod-based product, JLI was not "ever too focused on how MarkTen Elite was performing." (PX7042 Danaher (JLI) Dep. at 23; RFF ¶ 751; *see also* PX7019 Crozier (Sheetz) Dep. at 77 (noting he did not recall JUUL seeming concerned about the introduction of Elite when he met with them to plan their promotions)). Elite did not show attachment to consumers; "retailers were not bullish on the product"; and the product attributes—low nicotine content and no salts—"would not have been attributes of a likely successful product." (Robbins (JLI) Tr. 3250-51; RFF ¶ 751).

467. In April of 2018, "MarkTen volume sales [were] increasing, primarily driven by Bold expansion." (PX1234 (Altria) at 005 (Nu Mark Business Update April 2018)).

Response to Proposed Finding No. 467:

The Proposed Finding is incomplete and misleading without additional context. It is true that initially, Nu Mark was "encouraged enough by the [early] results of [MarkTen Bold] to expand it to an additional 15,000 stores by the end of the year." (PX7022 Begley (Altria) Dep. at 126-27; RFF ¶ 568). Bold was "getting initial traction with consumers," "largely because of expanded distribution and promotional offers." (Willard (Altria) Tr. 1386; PX9047 (Altria) at 003, 009-10; RFF ¶ 568).

But Bold was a cig-a-like, with insufficient nicotine satisfaction and a form evocative of a cigarette; it was also in a declining category. (Jupe (Altria) Tr. 2228-29, 2232-34; Quigley (Altria) Tr. 2037; Myers (Altria) Tr. 3390; PX7016 Jupe (Altria) Dep. at 107; RFF ¶ 568). By May 2018, Altria had realized that "the bet [it] really needed to make was a satisfying product that didn't look like a cigarette," because "satisfaction and form or design really mattered." (Begley (Altria) Tr. 1108; RFF ¶ 569). And MarkTen Bold lacked both the satisfaction and form that smokers wanted.

As to satisfaction, Bold's high pH meant that it was losing approximately half of its nicotine into the mouth and throat region. (RFF ¶ 642; Jupe (Altria) Tr. 2274 (discussing RX0796 (Altria) at 50)). Pharmacokinetic (or PK) studies confirmed that Bold was not delivering nicotine to the bloodstream as quickly as combustible cigarettes. (RFF ¶ 645; Jupe (Altria) Tr. 2231-33; RX0176 (Altria) at 142). Bold "really wasn't [like] a cigarette," and thus its PK results were "not an indicator of conversion potential." (Jupe (Altria) Tr. 2234 (discussing RX0176 (Altria) at 142); RFF ¶ 649). In practical terms, the problem was that a smoker in the real world trying MarkTen Bold would have to take anywhere from "25 to 30 puffs to really get closer to the conventional cigarette" which is "too much additional work for adult smokers to do to even get closer to where they wanted to be." (PX7015 Gogova (Altria) Dep. at 144-46; RFF ¶ 650). In that situation, the

smoker would just start "looking for potentially other alternatives" that do not require working as hard or using the product as much. (PX7015 Gogova (Altria) Dep. at 144-46; RFF ¶ 650).

And as to form, MarkTen Bold was a cig-a-like and looked "like a cigarette"; its product format "unfortunately still carried some of the stigmas of smoking." (Begley (Altria) Tr. 1099-100; RFF ¶ 15). Along with the lack of nicotine satisfaction, this stigma arising from Bold's design impaired the ability of cig-a-likes to convert adult smokers to e-cigarettes: "[S]mokers who wanted to convert to non-combustible tobacco products did not want to appear to be smoking a cigarette, and so the form of the product was just wrong for conversion." (PX7036 Garnick (Altria) Dep. at 135; RFF ¶ 15; *see also* Willard (Altria) Tr. 1347 ("It turned out, people that are quitting cigarettes to pick up vapor don't want a vapor product that looks like a cigarette."); Jupe (Altria) Tr. 2228 (explaining that "gimmicky" looking cig-a-likes were the "wrong" format); Gardner (Altria) Tr. 2604 ("[A]dult smokers no longer wanted . . . to look like they were smoking a cigarette and the stigma associated with that.")).

5. Altria's Acquisition and Launch of the MarkTen Elite Pod Product

468. Nu Mark launched its first pod product, Elite, in February 2018. (Begley (Altria) Tr. 990 (Q. NuMark launched Elite in February of 2018. correct? A. I believe that's right, toward the end of February. Q. NuMark did not sell a pod product before it launched Elite, correct? A. We did not."); Jupe (Altria) Tr. 2244-45; Schwartz (Altria) Tr. 1871; Willard (Altria) Tr. 1308 (*in camera*), 1354; Begley (Altria) Tr. 984, 990, 1059 (*in camera*)).

Response to Proposed Finding No. 468:

Respondents have no specific response.

469. Altria acquired the right to MarkTen Elite in late 2017 from a Chinese manufacturer, Smoore. (Begley (Altria) Tr. 984-85; Jupe (Altria) Tr. 2244-45; Schwartz (Altria) Tr. 1862-64; Murillo (Altria/JLI) Tr. 2941-42; PX2084 (JLI) at 020). Nu Mark also entered into a partnership with a U.S. e-vapor company (Avail) that made e-liquids for Elite. (Begley (Altria) Tr. 984-85).

Response to Proposed Finding No. 469:

Respondents have no specific response.

470. Elite was sold on the market before the August 8, 2016 Deeming Rule by another company. (Begley (Altria) Tr. 984; Garnick (Altria) Tr. 1690; Jupe (Altria) Tr. 2134).

Response to Proposed Finding No. 470:

Respondents have no specific response.

471. Elite's launch was accelerated. (Begley (Altria) Tr. 989-91; Schwartz (Altria) Tr. 1871).

Response to Proposed Finding No. 471:

Respondents have no specific response except to note that the acceleration of Elite's launch reflected the recognition that Nu Mark had to have a pod-based product on the market to be competitive. (Schwartz (Altria) Tr. 1871 ("There was a lot of urgency for [Altria] to be able to play in that [pod-based] space."); RFF ¶ 368).

472. Nu Mark commercialized Elite within four months of acquiring its product rights. (Begley (Altria) Tr. 989 ("Q. . . NuMark commercialized Elite within four months of executing the exclusivity agreement through which it acquired its rights, correct? A. I believe that's the appropriate timing. It was quick.")).

Response to Proposed Finding No. 472:

Respondents have no specific response except to note that the acceleration of Elite's launch reflected the recognition that Nu Mark had to have a pod-based product on the market to be competitive. (Schwartz (Altria) Tr. 1871 ("There was a lot of urgency for [Altria] to be able to play in that [pod-based] space."); RFF ¶ 368).

473. Nu Mark had never launched a product more quickly than it launched Elite. (Begley (Altria) Tr. 1124 ("We certainly did it at a speed we had never done it before.")).

Response to Proposed Finding No. 473:

Respondents have no specific response except to note that the acceleration of Elite's launch reflected the recognition that Nu Mark had to have a pod-based product on the market to be competitive. (Schwartz (Altria) Tr. 1871 ("There was a lot of urgency for [Altria] to be able to play in that [pod-based] space."); RFF ¶ 368).

474. An August 2018 presentation for Altria's Board of Directors pegged MarkTen's PMTA/MRTPA research costs at approximately $100 million. (PX1247 (Altria) at 007 ("~$100 MM in MarkTen PMTA/MRTPA research costs ('16-18).")).

Response to Proposed Finding No. 474:

Respondents have no specific response.

475. Nu Mark planned to triple its 2018 new product launch from $7 million to $23 million; $8 million of the increase was solely to accelerate the Mark Ten Elite launch. (PX1606 (Altria) at 015 (Altria 2018 Original Budget Update)).

Response to Proposed Finding No. 475:

The Proposed Finding is incomplete and misleading without additional context. The cited [redacted] document proposed investing $16 million "in addition to [the] 2018 base plan" of $7 million. (PX1606 (Altria) at 001, 015). The proposal detailed that approximately $8 million would be dedicated to accelerating Elite's launch. (PX1606 (Altria) at 015). [redacted]; *see also* RFF ¶ 1728dd (defining "LTM")). This document does not and cannot confirm whether this investment was made, or even whether it was "planned," given that the proposal at this point still was subject to leadership team discussion. Complaint Counsel did not introduce this document at trial, (CC Exhibit Index at 20), nor was any witness asked about it in any deposition.

Moreover, despite Altria's and Nu Mark's substantial financial and other investments in the MarkTen Elite product, and in its launch specifically, the evidence shows that the product failed commercially, (RFF ¶¶ 368-72, 407-59), and was pulled from the market in October 2018 as a result of Altria's independent regulatory evaluation and in response to FDA's concern about pod-based products, (RFF ¶¶ 917-59, 1001-07).

476. Nu Mark had an August 2018 marketing budget variance "Primarily driven by $3.0MM of Elite promotions and $0.7MM coupon timing/reversals." (PX1092 (Altria) at 003 (Email attachment August Marketing & Sales Flash Package sent September 2018)).

Response to Proposed Finding No. 476:

The Proposed Finding is incomplete and misleading without additional context. It is true that throughout 2018, Altria heavily marketed and promoted Elite. (RFF ¶¶ 407-30). But even with significant investments in shelf space, promotions, and expanded distribution, Elite was not a success. (Gifford (Altria) Tr. 2717 ("[E]ven with the investment behind it -- [we just weren't able to] get the consumer to uptake it to any great extent."); *see also* RFF ¶¶ 431-59).

477. MarkTen Elite's volume increased by 450% in the multi-outlet convenience-store channel between May 2018 and July 2018. Average weekly volume in stores carrying Elite increased by 56% over this period. (PX1056 (Altria) at 033 (February 2019 email from Michael Brace to Brent Chambers with Nu Mark Brand ELT Update attached)).

Response to Proposed Finding No. 477:

The Proposed Finding is incomplete and misleading without additional context. Altria expanded Elite's distribution in 2018, but though expanded distribution could grow volume, it was not sustainable. (Quigley (Altria) Tr. 1945; PX7013 Brace (Altria) Dep. at 84; RFF ¶ 432). Over the course of 2018, Elite's sales "plateaued," (Willard (Altria) Tr. 1388), and despite the growth of the market for pod-based products, Elite's volume never took off, (Willard (Altria) Tr. 1368; RFF ¶ 432). Though Elite was able to "get[] initial traction with consumers[,] largely because of expanded distribution and promotional offers," this "limited success . . . was substantially less than [JUUL,] the leading product in the marketplace." (Willard (Altria) Tr. 1386-87; RFF ¶ 432). Consumers buying a two-pack of pods on a trial offer does not generate the volume needed to develop a sustainable business. (Willard (Altria) Tr. 1367; RFF ¶ 438). Altria was "hoping [consumers would] try it and they say this is great, and [then] go out and buy a pack a couple of times a week. That drives volume. [But Altria] never convinced the consumer, after their initial trial, to become a repeat purchaser." (Willard (Altria) Tr. 1367; RFF ¶ 438; *see also* Myers (Altria)

Tr. 3345, 3366 (explaining that Elite was "certainly not seeing repeat purchases on the pods" and that Elite was "[t]he worst" performing product Myers had ever seen at Altria)).

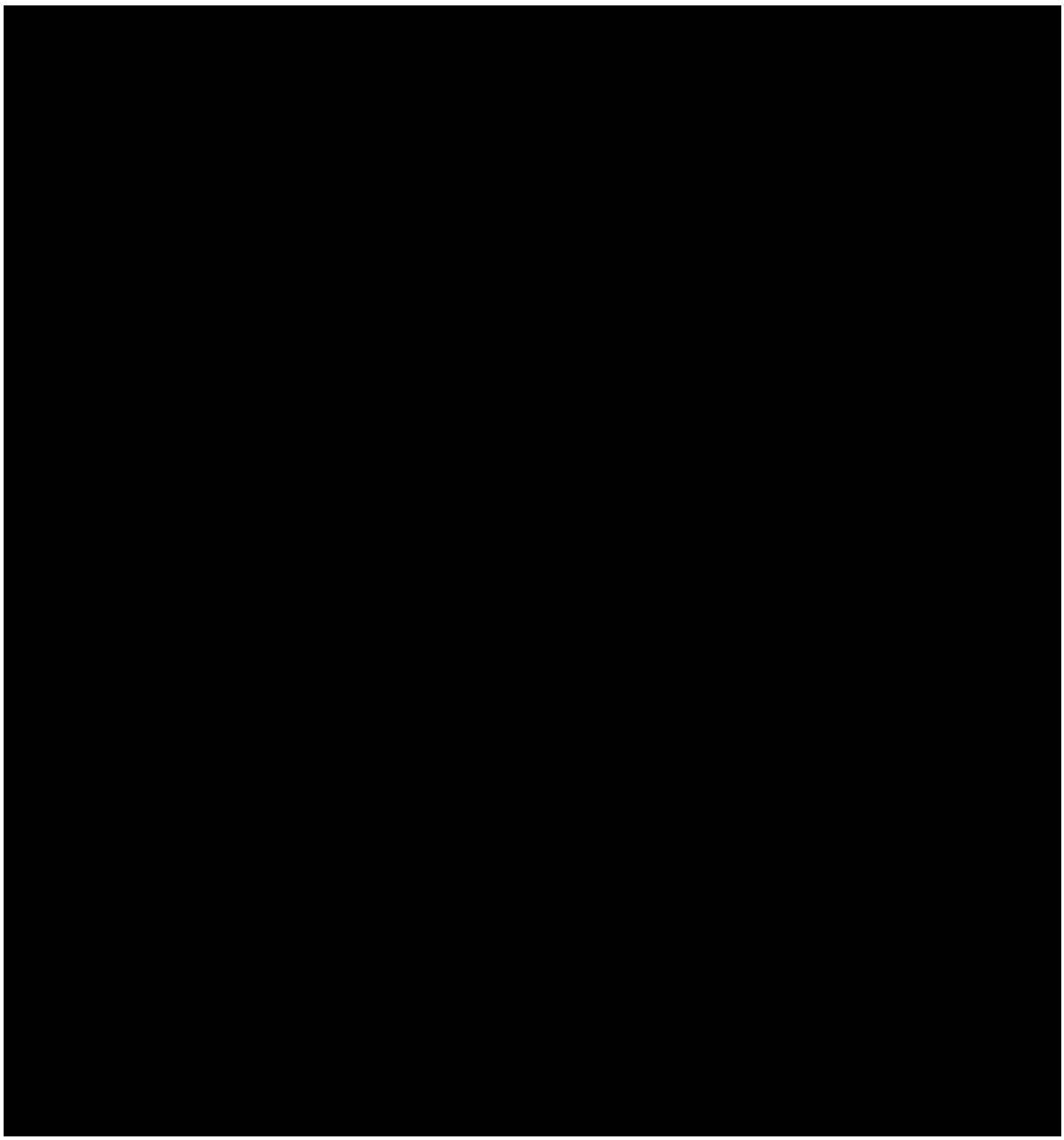
Ultimately, despite Altria's heavy promotional efforts, Elite never achieved more than a one percent share of e-vapor cartridge unit sales. (RX1217 Murphy Report ¶ 12; RFF ¶ 442). Elite's performance was "nothing compared to what you would expect when you're trying to disrupt the consumer and trying to get a consolidated group of consumers to engage with the brand." (Gifford (Altria) Tr. 2755; RFF ¶ 442). Measured by any metric, at any given point in time while Elite was on the market, the product's performance was terrible. (RFF ¶¶ 443-52).

478. [redacted] (PX3004 (ITG) at 059 (August 3018 ITG Portfolio Review and Rationalization document) (*in camera*)).

Response to Proposed Finding No. 478:

The Proposed Finding is incomplete and misleading without additional context. The cited document indicates that [redacted]. Neither the document nor Complaint Counsel defines "turn rate," and so it is not clear on what metric the two products are being compared. Jefferson Eldridge, Vice President of Area Central at ITG Brands, was asked about the term in his deposition, and indicated it meant "repurchase," though he could not say what it meant in the context of this chart. (PX7012 Eldridge (ITG) Dep. at 194-95). Without additional context, the cited document is of limited probative value.

[redacted]



This is consistent with the abundance of evidence showing that even with Altria's significant investments in shelf space, promotions, and expanded distribution throughout 2018, (RFF ¶¶ 407-30), Elite was not a success, (Gifford (Altria) Tr. 2717 ("[E]ven with the investment behind it -- [we just weren't able to] get the consumer to uptake it to any great extent."); *see also* RFF ¶¶ 431-59).

479. Nu Mark planned to triple its 2018 new product launch from $7 million to $23 million; $8 million of the increase was solely to accelerate the Mark Ten Elite launch. (PX1606 (Altria) at 015 (Altria 2018 Original Budget Update)).

Response to Proposed Finding No. 479:

The Proposed Finding is incomplete and misleading without additional context. The cited [redacted] document proposed investing $16 million "in addition to [the] 2018 base plan" of $7 million. (PX1606 (Altria) at 001, 015). The proposal detailed that approximately $8 million would be dedicated to accelerating Elite's launch. (PX1606 (Altria) at 015). [redacted]; *see also* RFF ¶ 1728dd (defining "LTM")). This document does not and cannot confirm whether this investment was made, or even whether it was "planned," given that the proposal at this point still was subject to leadership team discussion. Complaint Counsel did not introduce this document at trial, (CC Exhibit Index at 20), nor was any witness asked about it in a deposition.

Moreover, despite Altria's and Nu Mark's substantial financial and other investments in the MarkTen Elite product, and in its launch specifically, the evidence shows that the product failed commercially, (RFF ¶¶ 368-72, 407-59), and was pulled from the market in October 2018 as a result of Altria's independent regulatory evaluation and in response to FDA's concern about pod-based products, (RFF ¶¶ 917-59, 1001-07).

6. Altria's E-Cigarette Business Steadily Improved and Met Its Strategic and Financial Objectives

480. [redacted] (PX4073 (Altria) at 002 (*in camera*)).

Response to Proposed Finding No. 480:

The Proposed Finding is incomplete and misleading without additional context. That the fledgling operating company Nu Mark believed in 2016—at a time when it only had cig-a-likes

and before pod-based products with nicotine salts transformed the category—that it had [redacted] has no bearing on the company's likelihood of achieving that goal as of 2018. [redacted] Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

481. [redacted] (PX4073 (Altria) at 002 ([redacted]) (*in camera*)).

Response to Proposed Finding No. 481:

The Proposed Finding is incomplete and misleading without additional context. That the fledgling operating company Nu Mark believed in 2016—at a time when it only had cig-a-likes and before pod-based products with nicotine salts transformed the category—that it had [redacted] has no bearing on the company's likelihood of achieving that goal as of 2018. [redacted] Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

482. [redacted] (Begley (Altria) Tr. 1017 (*in camera*) [redacted]; (PX4073 (Altria) at 002 [redacted]) (*in camera*)).

Response to Proposed Finding No. 482:

The Proposed Finding is incomplete and misleading without additional context. "Margin positive" is an accounting term of art that does not mean that a product is profitable or a commercial success. As Quigley testified, marginal contribution is "only half the picture," because "marginal contribution doesn't account for all the sales and marketing spend." (Quigley (Altria) Tr. 1952; *see also* Gifford (Altria) Tr. 2785 (describing how he assumes that when someone is presenting him with marginal contribution, "[u]sually they are leaving out part of the story")). And for Elite, sales and marketing spend was substantial. (RFF ¶¶ 407-30).

In the case of Nu Mark, it was able to reduce its losses primarily because of "cost-cutting." (Begley (Altria) Tr. 1088). But, despite margin positivity, the company was not able to achieve overall profitability because it was not "getting the volume that was predicted in driving consumer uptick of the products," and therefore could not cover the company's fixed costs or marketing promotions. (Gifford (Altria) Tr. 2728). As a result, rather than making any profit, Nu Mark lost $600 million from 2014 to 2017. (PX4029 (Altria) at 10 (detailing $229 million in losses in 2014; $182 million in losses in 2015; $118 million in losses in 2016; $71 million in losses in 2017); RFF ¶ 1077). In the first nine months of 2018, Nu Mark lost another $101 million. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003; RFF ¶ 1081). And Altria projected that Nu Mark's losses would continue for the foreseeable future: Nu Mark expected to lose another $235 million over the next three years. (PX4232 (Altria) at 013; *see also* [redacted]; Willard (Altria) Tr. 1459 ("[Altria] always hoped that [Nu Mark] would launch a successful product and [it] could turn that into a profit, but there didn't seem to be any likelihood of that happening in the next few years for Nu Mark."); RFF ¶ 1083).

483. By the end of 2016, Nu Mark had met its OCI target, which had been set by Nu Mark and shared with Altria's board. (PX7022 (Begley (Altria) Dep. at 95-96 ("Q. By the end of 2016, NuMark had met its OCI target, correct? A. I believe that's correct, but the OCI target for 2016 was a loss of $115 million. Q. But that's the target that Nu Mark set, correct? A. That's correct. Q. And that target was shared and approved by the board, correct? . . . A. We certainly shared that with the board and those were the objectives that we had for the year.")).

Response to Proposed Finding No. 483:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Complaint Counsel cites to Begley's deposition, during which Complaint Counsel read aloud from PX4073 while denying that the questions related to any particular document and without showing Begley the document from which Complaint Counsel was reading. (*Compare* PX7022 Begley (Altria) Dep. at 94-97, *with* PX4073 (Altria) at 002; *see also* PX7022 Begley (Altria) Dep. at 101-04). This evidence has little probative value. Indeed, PX4073, the document from which Complaint Counsel read, establishes only that [redacted] not that it had done so. (PX4073 (Altria) at 002).

Trial testimony and contemporaneous documents establish that Nu Mark did *not* meet this OCI target. In 2016, Nu Mark lost $118 million. (Gifford (Altria) Tr. 2726 ("We lost $118 million in operating compan[y] income."); RX0746 (Altria) at 007 (same)).

484. [redacted] (Begley (Altria) Tr. 1022-23 [redacted]) (*in camera*)).

Response to Proposed Finding No. 484:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The fact that in 2017, Altria had made some progress toward preparing PMTA submissions in e-vapor says nothing about the degree of such prospects or the likelihood that the

company ultimately would be able to file high quality PMTAs in which it had confidence by FDA's deadline. To the contrary, Altria realized *after* late 2017 that its PMTA prospects were dim.

As Altria "made progress" on its e-vapor PMTAs, the company, to its dismay, uncovered new product problems that jeopardized the PMTAs' prospects, like dry puffing. (RFF ¶¶ 351-67). By the spring of 2018, "it felt like every day [Altria] had either a new product or a new product issue that [it was] contending with." (Murillo (Altria/JLI) Tr. 2932; RFF ¶ 486).

These emerging product issues required Altria to overhaul nearly all of its PMTA plans for its e-vapor products. (RFF ¶ 487; *see also* RFF ¶ 492-527). Joe Murillo, at the time Altria's Senior Vice President of Regulatory Affairs, testified at trial that by the end of this process he "couldn't think of one product and filing plan that still bore resemblance to the original plan." (Murillo (Altria/JLI) Tr. 2949; RFF ¶ 487). For example, by March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was "delayed—date TBD." (RX0630 (Altria) at 019; RFF ¶ 489). Garnick, Altria's General Counsel and Head of Regulatory Affairs, was concerned at the time that this pattern would continue to repeat itself: "[U]nless we changed the way we were scheduling and prioritized products, we [were] going to continue to miss schedules over and over again as each product [went] forward, and [that] was no way to operate regulatory affairs[.] . . . [W]e needed to prioritize and we needed to have a realistic schedule that we could meet." (Garnick (Altria) Tr. 1705; *see also* RX0716 (Altria) at 001 ("No way do I want to have a schedule that we miss each product deadline, one at a time, like a thousand cuts, or a schedule which does not reflect what could be our most important product."); RFF ¶ 488).

Indeed, once the MarkTen cig-a-like PMTA was delayed, the regulatory team was unsure "when [it was] going to be able to catch up." (Murillo (Altria/JLI) Tr. 2937-38; RFF ¶ 490). This was in part because each new issue that arose not only took time to fix, but also required Altria to

restart the one-year stability studies required for the MarkTen PMTA, which only could be performed on the final product, after resolution of the product issues. (Gardner (Altria) Tr. 2585; Murillo (Altria/JLI) Tr. 3072; RFF ¶ 491). And as for Elite, Nu Mark did not even decide to pursue a PMTA for Elite until March 15, 2018, (PX4318 (Altria) at 007; Quigley (Altria) Tr. 1977; RFF ¶ 511), and this PMTA was never more than a contingency plan, (RFF ¶¶ 512, 519-27).

Notwithstanding any "progress" that may have been made on PMTAs in 2017, Altria had determined in the summer of 2018 that Nu Mark did not have any products that were likely to obtain PMTA authorization. (RFF ¶¶ 612-13, 694, 698-700, 718-23, 728, 732-35, 741-43, 849, 861).

485. [redacted] (Gifford Altria) Tr. 2888 (*in camera*)). [redacted] (Gifford (Altria) Tr. 2888-89 (*in camera*)).

Response to Proposed Finding No. 485:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]; *see also* RX0746 (Altria) at 007; RFF ¶ 284). The company projected that in 2017, its OCI would be negative $75 million. (RX0746 (Altria) at 007). The company's actual loss in 2017 was negative $71 million. (Gifford (Altria) Tr. 2736-37; PX4012 (Altria) at 010; RFF ¶ 1078). [redacted]

It is not true that Nu Mark's OCI further improved in 2018 over 2017, nor that Gifford testified as such. [redacted] The actual loss for just the first nine months of 2018 was greater

than this both this estimate and Nu Mark's 2017 OCI by a significant margin: In just the first nine months of 2018, Nu Mark lost $101 million. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003; RFF ¶ 1081).

Nor was the trend toward improvement: Nu Mark expected to lose another $235 million over the next three years. (PX4232 (Altria) at 013; *see also* [redacted]; Willard (Altria) Tr. 1459 ("[Altria] always hoped that [Nu Mark] would launch a successful product and [it] could turn that into a profit, but there didn't seem to be any likelihood of that happening in the next few years for Nu Mark."); RFF ¶ 1083).

486. In November 2017, Begley, Nu Mark President and General Manager, told investors that "MarkTen is currently available in about 65,000 stores and has nearly tripled its market share since 2014. It is now one of the leading e-vapor brands, with a 13.5% retail share in mainstream channels, and 27% retail share in major chain accounts selling MarkTen for the full third quarter of 2017." (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 486:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, Nu Mark was competing at the time only in cig-a-likes, which the undisputed evidence shows were a declining category that were being overtaken by pod-based products. (RFF ¶¶ 276-300, 390, 1324-29). By November 2018, according to a JLI slide that Complaint Counsel presented during its opening statement, MarkTen brands accounted for just 4.7% of total e-vapor sales. (RFF ¶¶ 1442-43). By the end of 2018, cig-a-like cartridge volume had declined to less than 19 percent, and by September 2020, it had plummeted further to only five percent. (RFF ¶ 1325). In addition, by the end of 2018, Altria projected that Nu Mark would lose an additional $235 million over the next three years, not even including the millions in support that was not allocated specifically to Nu Mark. (RFF ¶¶ 1083-84).

Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-877). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-877). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (*See* RFF ¶¶ 898-916, 1604-611).

As a result, the performance of MarkTen as of November 2017 does not speak to whether Nu Mark had competitive e-vapor products.

487. By mid-2018, "Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution. Most recently, Nu Mark expanded MarkTen Elite from over 6,000 stores in the first quarter to more than 23,000 stores by the end of the second quarter." (PX4566 at 016 (July 30, 2018 Altria presentation: Communications Training Strategy, Message and Tactics)).

Response to Proposed Finding No. 487:

The Proposed Finding is incomplete and misleading without additional context. Altria expanded Elite's distribution in 2018, but though expanded distribution could grow volume, it was not sustainable. (Quigley (Altria) Tr. 1945; PX7013 Brace (Altria) Dep. at 84; RFF ¶ 432). Over the course of 2018, Elite's sales "plateaued," (Willard (Altria) Tr. 1388), and despite the growth of the market for pod-based products, Elite's volume never took off, (Willard (Altria) Tr. 1368; RFF ¶ 432). Though Elite was able to "get[] initial traction with consumers[,] largely because of expanded distribution and promotional offers," this "limited success . . . was substantially less than [JUUL,] the leading product in the marketplace." (Willard (Altria) Tr. 1386-87; RFF ¶ 432). Consumers buying a two-pack of pods on a trial offer does not generate the volume needed to develop a sustainable business. (Willard (Altria) Tr. 1367; RFF ¶ 438). Altria was "hoping [consumers would] try it and they say this is great, and [then] go out and buy a pack a couple of times a week. That drives volume. [But Altria] never convinced the consumer, after their initial trial, to become a repeat purchaser." (Willard (Altria) Tr. 1367; RFF ¶ 438).

Ultimately, despite Altria's heavy promotional efforts, Elite never achieved more than a one percent share of e-vapor cartridge unit sales. (RX1217 Murphy Report ¶ 12; RFF ¶ 442). Elite's performance was "nothing compared to what you would expect when you're trying to disrupt the consumer and trying to get a consolidated group of consumers to engage with the brand." (Gifford (Altria) Tr. 2755; RFF ¶ 442). Measured by any metric, at any given point in time while Elite was on the market, the product's performance was terrible. (RFF ¶¶ 443-51).

488. [redacted]." (Begley (Altria) Tr. 1021 (*in camera*)).

Response to Proposed Finding No. 488:

The Proposed Finding is incomplete and misleading without additional context.

489. (Begley (Altria) Tr. 1021-22) (*in camera*)).

Response to Proposed Finding No. 489:

The Proposed Finding is incomplete and misleading without additional context.

[redacted]

490. While Begley was President and General Manager of Nu Mark, he received a bonus annually that was tied to his job performance as well as the performance of Nu Mark. (PX7022 (Begley (Altria), Dep. at 51 ("Q. Okay. While you were president and general manager of NuMark, did you ever receive a bonus? A. Yes. . . Q. Was your bonus tied to the performance of NuMark? A. Yes.")).

Response to Proposed Finding No. 490:

Respondents have no specific response.

491. In a January 2018 email, Altria's Howard Willard referred to the launch of MarkTen Elite as "a big step forward for our plan to compete vigorously for closed tank volume." (PX1647 (Altria) at 003).

Response to Proposed Finding No. 491:

The Proposed Finding is incomplete and misleading without additional context. The cited statement was made before Elite was launched on the market, (Schwartz (Altria) Tr. 1871), and thus Willard did not have the benefit at the time of knowing how Elite would perform.

It did not take long after Elite's launch for Altria to realize that the product was a flop. By the summer of 2018, AGDC had concluded based on the product's sales that Elite "wasn't working. We were not winning in this space." (Myers (Altria) Tr. 3337; RFF ¶ 458). Even with significant investments in shelf space, promotions, and expanded distribution, Elite was not a success. (Gifford (Altria) Tr. 2717 ("[E]ven with the investment behind it -- [we just weren't able to] get the consumer to uptake it to any great extent."); *see also* RFF ¶¶ 431-59).

492. A July 2018 Altria presentation for Altria's management to assess Nu Mark's e-vapor portfolio indicated that the MarkTen cigalike was doing well in a declining category (PX7026 (Gardner (Altria), Dep. at 122-25); PX4060 (Altria) at 012 (Vapor Portfolio Assessment)).

Response to Proposed Finding No. 492:

The Proposed Finding is incomplete and misleading without additional context. Though the cited document indicates that the MarkTen cig-a-like was "[p]erforming well in market; [d]eclining category," it also indicates that the product's "Conversion Potential" is "Low." (PX4060 (Altria) at 011; *see also* RFF ¶ 743 (confirming that this conversion rating reflected the view of every Altria witness who was asked about conversion in this proceeding)). Even if the product was otherwise "[p]erforming well" in its "[d]eclining category," this "Low" conversion rating sounded a death knell for the MarkTen cig-a-like, because without the ability to convert adult smokers, the product could not compete and could not obtain FDA approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

Moreover, Complaint Counsel undersells the importance of the "[d]eclining category" context. By November 2018, according to a JLI slide that Complaint Counsel presented during its opening statement, MarkTen brands accounted for just 4.7% of total e-vapor sales. (RFF ¶¶ 1442-43). By the end of 2018, cig-a-like cartridge volume had declined to less than 19 percent, and by September 2020, it had plummeted further to only 5 percent. (RFF ¶ 1325). In addition, by the end of 2018, Altria projected that Nu Mark would lose an additional $235 million over the next three years, not even including the millions in support that was not allocated specifically to Nu Mark. (RFF ¶¶ 1083-84).

As a result, the performance of MarkTen in a declining category does not speak to whether Nu Mark had competitive e-vapor products.

C. ALTRIA WAS WELL-POSITIONED TO CONTINUE TO COMPETE IN CLOSED SYSTEM E-CIGARETTES AT THE TIME OF THE ACQUISITION

1. Altria's Traditional Cigarette Business Provided the Company with Significant Advantages in the Sale of E-Cigarettes

a) Altria Has a Large Network of Distributors and an Experienced Network of Sales Representatives

493. A presentation on Altria's innovation strategies observed that Altria was "well-positioned to successfully launch and market [its] products in new markets" and that Altria had "achieved this by leveraging [its] strengths in manufacturing and building individual and organizational capability." (PX1264 (Altria) at 007 (Innovation Challenges and Opportunities Presentation September 2017)).

Response to Proposed Finding No. 493:

The Proposed Finding is incomplete and misleading without additional context. No amount of marketing, sales, or distribution expertise can make a product successful if consumers do not like it. "If people don't like the product, they're not going to buy the product," no matter what you do. (PX7030 Wexler (Turning Point Brands) Dep. at 105; RFF ¶ 440). "[T]o be successful in the e-vapor marketplace, it's not enough just to have the resources of a large tobacco

company, you also have to have a product that's attractive to consumers and that can clear the regulatory hurdles." (PX7012 Eldridge (ITG Brands) Dep. at 161; *see also* [redacted]; PX7014 Baculis (Altria) Dep. at 62-63 (explaining that Altria's distribution network, marketing team, and sales network simply could not make an undesirable product succeed); PX7037 Huckabee (Reynolds) Dep. at 82 (agreeing that if a product is "suboptimal" that will "impact the repurchase of the product for consumers")). Ultimately, for all the resources that Altria had and leveraged as a big tobacco company, its products were not successful because they were not attractive to adult smokers and could not clear FDA's regulatory hurdles. (*See* RFF ¶¶ 184-202, 1501-31).

494. [redacted] (PX4042 (Altria) at 006-07 (2017 Annual Incentive Compensation Memo) (*in camera*)).

Response to Proposed Finding No. 494:

The Proposed Finding is incomplete and misleading without additional context. The cited source indicates that during 2017, Nu Mark met Altria's strategic initiative of [redacted]. But the document also states, [redacted]

[redacted]

Thus, though Altria was able to grow MarkTen's cig-a-like sales volume by expanding distribution, such growth was not sustainable, (*see* Quigley (Altria) Tr. 1945; PX7013 Brace (Altria) Dep. at 84; RFF ¶ 432), and did not demonstrate that Altria had "used its logistical expertise to achieve success in the e-vapor space," as Complaint Counsel contends. By the end of 2017, "the market dynamics clearly changed, and there appeared to be one format that was winning in the marketplace, which was pod-based product with nicotine salts, which primarily was JUUL." (Begley (Altria) Tr. 1055; RFF ¶ 343).

As of the time of the cited statement, Nu Mark was competing at the time only in cig-a-likes, which the undisputed evidence shows were a declining category that were being overtaken by pod-based products. (RFF ¶¶ 276-300, 390, 1324-29). By November 2018, according to a JLI slide that Complaint Counsel presented during its opening statement, MarkTen brands accounted for just 4.7% of total e-vapor sales. (RFF ¶¶ 1442-43). By the end of 2018, cig-a-like cartridge volume had declined to less than 19 percent, and by September 2020, it had plummeted further to only 5 percent. (RFF ¶ 1325). In addition, by the end of 2018, Altria projected that Nu Mark would lose an additional $235 million over the next three years, not even including the millions in support that was not allocated specifically to Nu Mark. (RFF ¶¶ 1083-84).

Moreover, as of this time, Altria had not yet conducted the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-877). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to

obtain FDA approval. (RFF ¶¶ 579-747, 839-877). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (*See* RFF ¶¶ 898-916, 1604-611).

As a result, the expanded distribution of Nu Mark's cig-a-likes in November 2017 does not speak to whether Nu Mark had competitive e-vapor products.

495. A February 2018 draft presentation for Altria's Board of Directors highlighted Elite was on retail shelves only three months after simultaneously signing exclusivity agreements and beginning production. (PX1298 (Altria) at 028 (Nu Mark 2018-2020 Three Year Strategic Plan BOD Deck Draft; slide title: "Rapid Commercialization of Elite")).

Response to Proposed Finding No. 495:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The cited document does not demonstrate that Altria "simultaneously" signed exclusivity agreements and began production. To the contrary, it indicates that Altria executed an IP/Exclusivity Agreement in October 2017, and then began production in January 2018. (PX1298 (Altria) at 028).

Moreover, any investment in a product launch is meaningless if the product itself is not appealing to consumers. (RFF ¶ 457). The evidence shows that, notwithstanding both substantial efforts to bring Elite to market quickly and substantial promotional efforts, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

496. The draft Nu Mark 2018 Three Year Strategic Plan noted that Altria's "[e]xceptional speed to market [was] made possible by: Partnerships with existing network of suppliers, Existing quality and compliance systems to integrate new suppliers, [and] collaboration with cross-functional teams." (PX1298 (Altria) at 028 (Nu Mark 2018-2020 Three Year Strategic Plan BOD Deck Draft; slide title: "Rapid Commercialization of Elite")).

Response to Proposed Finding No. 496:

The Proposed Finding is incomplete and misleading without additional context. A product's speed to market is meaningless if the product itself is not appealing to consumers. (RFF ¶ 457). The evidence shows that, notwithstanding both substantial efforts to bring Elite to market quickly and substantial promotional efforts, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

497. JLI's Valani testified that Altria had "huge distribution, huge expertise in the category, a huge customer database . . . and, yeah, huge skills," adding that Altria was "definitely well-equipped to do well in the [e-vapor] space." (PX7011 (Valani (JLI), IHT at 137-38)).

Response to Proposed Finding No. 497:

The Proposed Finding is incomplete and misleading without additional context. Valani did not say that the enumerated resources were *sufficient* to succeed in the e-vapor space. To the contrary, he explained that "large incumbent" firms are often less successful because, when confronted with a disruptive market entrant, they often resort to "off-the-shelf, commodity, nonintuitive, non-consumer-appealing products." (PX7011 Valani (JLI) IHT at 135). And that is what he thought Altria did with its MarkTen line, which he characterized as "terrible products." (PX7011 Valani (JLI) IHT at 134).

Valani's statements are consistent with testimony from witnesses acknowledging that resources alone cannot drive commercial success. "If people don't like the product, they're not

going to buy the product," no matter what you do. (PX7030 Wexler (Turning Point Brands) Dep. at 105). No amount of financial resources to support distribution, product rollout or marketing "can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis (Altria) Dep. at 62-63).

498. ITG executive Jeff Eldridge testified that he expected the MarkTen Elite brand to grow "[g]iven Altria's resources as the largest tobacco company in the U.S." (PX8011 at ¶ 28 (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 498:

The Proposed Finding is incomplete and misleading without additional context. Eldridge's comments were not premised on any meaningful knowledge about Elite's prospects. He acknowledged that he was not privy to any internal Altria information about MarkTen Elite; he was not aware that MarkTen Elite had a leaking problem; he did not know anything about the formaldehyde levels generated by Elite or its levels of harmful or potentially harmful chemicals; he did not know how well Elite was retaining customers; he did not know how much Nu Mark was investing in promotions; and he did not know anything about Elite's likelihood of securing PMTA approval. (PX7012 Eldridge (ITG Brands) Dep. at 158-60). He also did not have any information about how well Elite was doing in converting smokers from combustible cigarettes. (PX7012 Eldridge (ITG Brands) Dep. at 159). But he acknowledged that nicotine salts, which Elite did not have, (RFF ¶ 628), are important for improving nicotine delivery, (PX7012 Eldridge (ITG Brands) Dep. at 82).

As to resources, Eldridge agreed that "to be successful in the e-vapor marketplace, it's not enough just to have the resources of a large tobacco company, you also have to have a product that's attractive to consumers and that can clear the regulatory hurdles." (PX7012 Eldridge (ITG Brands) Dep. at 161; *see also* RFF ¶ 441). That is consistent with testimony from witnesses acknowledging that resources cannot drive commercial success. "If people don't like the product,

they're not going to buy the product," no matter what you do. (PX7030 Wexler (Turning Point Brands) Dep. at 105). No amount of financial resources to support distribution, product rollout or marketing "can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis (Altria) Dep. at 62-63).

b) Altria Has Prime Access to Shelf Space at Top Retailers

499. Prime shelf space is a significant advantage in selling e-vapor products. (King (PMI) Tr. 2362-63 ("the majority of all nicotine products are sold through convenience stores in the U.S. . . . [T]he convenience store universe is the biggest source for e-cigarettes . . . [G]etting distribution and being able to put it on the shelves can greatly facilitate the success of a product. . .so having the visibility and the ability to put it on the shelves is one aspect that would enhance success in any commercialization of e-cigarette or otherwise."); Begley (Altria) Tr. 1007 ("It is certainly beneficial to have the best space you can at retail stores to communicate your brand messaging."); PX7025 (Burns (JLI), Dep. at 28); *see also* PX8003 at 004 (¶ 24) (Wexler (Turning Point), Decl.) ("Because convenience stores have a relatively limited amount of shelf space available, that space is highly sought after in the channel.")

Response to Proposed Finding No. 499:

The Proposed Finding is incomplete and misleading without additional context. Though it is true that convenience store shelf space is an important way to improve product visibility, (RFF ¶ 416), products do not necessarily require premium shelf space to succeed. For example, "[JLI] was able to grow [its] brand, particularly regionally, early on without national shelf space," (Huckabee (Reynolds) Tr. 474), as was JTI's Logic product, (PX7037 Huckabee (Reynolds) Dep. at 115). (*See also* RFF ¶ 415; PX7022 Begley (Altria) Dep. at 215-16 ("Think about JUUL. JUUL's visibility was mixed in different stores. And even though JUUL didn't have, you know, the visibility that [Altria] enjoyed in these stores, they somehow found a way, because of the quality of their product, to do very well."); PX7009 Burns (JLI) IHT at 191-92 (noting JUUL went from "less than 1 percent of the combined cigarette/e-cig market to 7 to 8 percent, and [it was] doing that with less than optimal space"); PX7038 Myers (Altria) Dep. at 146-47 (noting that ZYN is another example of a product that "generally doesn't have a home" at retail—i.e., is "not

merchandised in a category"—but is the "largest [tobacco derived nicotine] product in the marketplace")). Nor is visibility alone sufficient to make a product competitive. (Begley (Altria) Tr. 1114; RFF ¶ 420). As Begley explained, "if you don't have a product that consumers like, it doesn't really matter how visible it is." (Begley (Altria) Tr. 1114; *see also* [redacted]; Myers (Altria) Tr. 3312-13 (describing failed rollout of Marlboro MST, which was unsuccessful despite visibility because "the product just wasn't good, and the consumer didn't adopt it")).

There also are ways to sell e-vapor products that do not require convenience store shelf space. For example, in the portion of King's answer that Complaint Counsel omits in this Proposed Finding, King acknowledges that "[t]here [also] are other venues that sell products, including more tobacco-focused stores and more vape-focused stores." (King (PMI) Tr. 2362).

500. Altria, as the largest tobacco company in the United States, had access to the best shelf space in all of the top retailers. (PX7004 (Willard (Altria) IHT at 23) ("And given the strength of some of our brands, we typically get quite good display space."); PX1618 (Altria) at 005 (Nu Mark Retail Offer Update September 2018) ("60 Accounts signed representing 50% of vapor volume & 41k stores…[a]chieved #1 Position for 3 years with space for current & future products.")).

Response to Proposed Finding No. 500:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]. By contrast, products that are appealing to consumers—such as JUUL—have grown sales without access to premium shelf space. (RFF ¶ 415).

501. Altria's ownership of the leading tobacco brands in other categories, such as Marlboro cigarettes, gives it leverage to get retailers to carry new products—and to give those products critical shelf placement. (PX7004 (Willard (Altria) IHT at 26-27) (explaining that dominant tobacco brands like Marlboro drive foot traffic to c-stores); PX8011 at 002, 007

(¶¶ 9, 31) (Eldridge (ITG), Decl.); PX7033 (O'Hara (JLI), Dep. at 130-32); PX8004 at 003 (¶ 14) (Farrell (NJOY), Decl.); PX2000 (JLI) at 001; PX2051 (JLI) at 024).

Response to Proposed Finding No. 501:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Willard's cited IH testimony does not support the claim that Altria's "ownership of leading tobacco brands in other categories . . . gives it leverage to get retailers to carry new products—and to give those products critical shelf space placement." (CCFF ¶ 501). Willard testified that retailers often focus on "the largest brands in the category . . . because they have a lot of consumers that are coming into the store that want to buy that brand, and so they will be, I think, particularly interested in stocking those brands, having them be visible and participating in the trade programs." (PX7004 Willard (Altria) IHT at 26-27). Complaint Counsel then asked Willard whether "when these contracts are negotiated, does Altria ever stipulate certain discount levels on just a cigarette space placement or do they ever say, listen, you have to put in Altria products, whether they be smokeless, e-vapor, cigarettes at certain display levels and then you get these discounts? Do they ever reference other categories?" And contrary to Complaint Counsel's Proposed Finding, Willard answered in the *negative*: "The contracts are between a specific business at Altria and the retail store. So the contracts typically apply to one category. And there may be multiple contracts from Altria operating companies with a single retail store. But they typically -- as a matter of fact, in every case I'm aware of, they really focus on individual contracts within their category." (PX7004 Willard (Altria) IHT at 27-28). Complaint Counsel's other cited evidence similarly fails to support its claim. (*See, e.g.*, PX2051 (JLI) at 024 ("Altria negotiates for shelf space as 4 operating companies (cigarettes, cigars, smokeless, vapor), *with no contingencies across categories*; cigarettes will get 50-60% shelf space (consistent with market share), vapor will secure incremental shelf space vs. market share[.]" (emphasis added))).

[redacted]

PX1232 (Altria) at 008-10 (projecting in May 2018 that total investment would be between $82.2-99.8 million)). This was a significant investment for Nu Mark. (Quigley (Altria) Tr. 1951).

502. Higher shelf space is preferable to lower shelf space because "if you have visibility when customers walk in, they can, A, understand that your products are present and can be purchased; and B, understand what prices the products are offered for." (Farrell (NJOY) Tr. 254-56; PX7025 (Burns (JLI), Dep. at 76-78 ("Depending on the store format, there's a perception that . . . there is certain shelf space that is going to be more attractive based on how consumers look at the shelf. For example, if you're at eye level looking behind the cashier, that's where your eyes would focus. If you're on the bottom level behind the cashier, in fact, from the counter, you might not even be able to see your product if it's in the bottom shelving section of the shelf."); *see also* PX7022 (Begley (Altria), Dep. at 215); Begley (Altria) Tr. 1007)).

Response to Proposed Finding No. 502:

The Proposed Finding is incomplete and misleading without additional context. Though it is true that convenience store shelf space is an important way to improve product visibility, (RFF

¶ 416), products do not necessarily require premium shelf space to succeed. For example, "JUUL was able to grow their brand, particularly regionally, early on without national shelf space," (Huckabee (Reynolds) Tr. 474), as was JTI's Logic product, (PX7037 Huckabee (Reynolds) Dep. at 115). (*See also* RFF ¶ 415). As Begley pointed out in the portion of his testimony immediately after the portion cited by Complaint Counsel in this Proposed Finding, "JUUL's visibility was mixed in different stores. And even though JUUL didn't have, you know, the visibility that [Altria] enjoyed in these stores, they somehow found a way, because of the quality of their product, to do very well." (PX7022 Begley (Altria) Dep. at 215-16; s*ee also* RFF ¶ 415; PX7009 Burns (JLI) IHT at 191-92 (noting JUUL went from "less than 1 percent of the combined cigarette/e-cig market to 7 to 8 percent, and [it was] doing that with less than optimal space"); PX7038 Myers (Altria) Dep. at 146-47 (noting that ZYN is another example of a product that "generally doesn't have a home" at retail—i.e., is "not merchandised in a category"—but is the "largest [tobacco derived nicotine] product in the marketplace")).

Nor is visibility alone sufficient to make a product competitive. (Begley (Altria) Tr. 1114; RFF ¶ 420). As Begley explained, "if you don't have a product that consumers like, it doesn't really matter how visible it is." (Begley (Altria) Tr. 1114; *see also* [redacted]; Myers (Altria) Tr. 3312-13 (describing failed rollout of Marlboro MST, which was unsuccessful despite visibility because "the product just wasn't good, and the consumer didn't adopt it")).

503. JLI's management perceived Altria's access to shelf space as a threat, with an executive warning JLI's then-CEO and CFO, "we will have a plan to address the Altria 3 year contracts that are being pitched. This is urgent. If we can't find a strategy around this, we will be severely restricted on shelf in a considerable part of the c-store universe for the next 3 years." (PX2001 (JLI) at 001(Email to JLI exec team in May 2018)).

Response to Proposed Finding No. 503:

The Proposed Finding is incomplete and misleading without additional context. Altria had no special access to shelf space. [redacted]. By contrast, products that are appealing to consumers—such as JUUL—have grown sales without access to premium shelf space. (RFF ¶ 415).

504. A week later JLI had crafted a presentation entitled "Altria Threat Competitive Response." In the executive summary section the presentation concludes that Altria's new shelf space agreements are "likely the first bid to foreclose shelf-space for their vapor products at the expense of JUUL. Initial analysis indicates that these competitor moved could cost our business ~$0.5B in sales per year." (PX2005 (JLI) at 003).

Response to Proposed Finding No. 504:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel focuses on Altria's shelf-space offer and entirely ignores the fact that JLI was prepared to respond and compete for the shelf-space in question. (*See* PX2005 (JLI) at 003 (suggesting that in response to Altria offers in certain chains, JLI "immediately commit[] to a 2019 $2M investment," to be expanded over time to a $48 million investment)). By November 15, 2018, JLI had determined that it would spend $100 million on "merchandising assets [and] execution to

support brand building in 2019." (PX2062 (JLI) at 022). This would involve "[o]verhauling storefront execution and instore execution within existing shelves alongside modular, security-protected displays." (PX2062 (JLI) at 022).

But while better shelf space would give JUUL increased visibility, JUUL's performance prior to 2019 shows that that its consumer appeal allowed it to grow sales volume even without access to premium shelf space. (RFF ¶ 415). Conversely, shelf space visibility alone is not sufficient to make a product successful. (RFF ¶¶ 420, 431, 440-41, 457; Begley (Altria) Tr. 1114 ("[I]f you don't have a product that consumers like, it doesn't really matter how visible it is."); *see also* [redacted]). For example, Nu Mark's products failed notwithstanding access to premium shelf space. (RFF ¶¶ 431-59).

505. In its "Altria Competitive Threat Response" presentation, JLI listed the implications of Altria's shelving contract at AMPM to include that the "JUUL product would be limited to a max of 16 facings, putting a significant limitation on the product re-introductions at ampm over a 3-year period – Additionally, knee level displays will likely reduce unplanned purchased due to low visibility." (PX2005 (JLI) at 004).

Response to Proposed Finding No. 505:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel focuses on Altria's shelf-space offer and entirely ignores the fact that JLI was prepared to respond and compete for the shelf-space in question. (*See* PX2005 (JLI) at 003 (suggesting that in response to Altria offers in certain chains, JLI "immediately commit[] to a 2019 $2M investment," to be expanded over time to a $48 million investment)). By November 15, 2018, JLI had determined that it would spend $100 million on "merchandising assets [and] execution to support brand building in 2019." (PX2062 (JLI) at 022). This would involve "[o]verhauling storefront execution and instore execution within existing shelves alongside modular, security-protected displays." (PX2062 (JLI) at 022).

But while better shelf space would give JUUL increased visibility, JUUL's performance prior to 2019 shows that that its consumer appeal allowed it to grow sales volume even without access to premium shelf space. (RFF ¶ 415). Conversely, shelf space visibility alone is not sufficient to make a product successful. (RFF ¶¶ 420, 431, 440-41, 457; Begley (Altria) Tr. 1114 ("[I]f you don't have a product that consumers like, it doesn't really matter how visible it is."); *see also* [redacted]). For example, Nu Mark's products failed notwithstanding access to premium shelf space. (RFF ¶¶ 431-59).

506. In response to this threat, JLI considered a multi-pronged approach that included among others the possibility of additional incentives to retailers, increased marketing spend, and even legal remedies to "challenge anticompetitive shelf-space foreclosure." (PX2005 (JLI) at 016 ("Altria Threat Competitive Response, May 2018")).

Response to Proposed Finding No. 506:

The Proposed Finding is incomplete and misleading without additional context. Regardless of what steps JLI considered in May 2018, later-in-time documents demonstrate that by November 15, 2018, JLI had determined that it would spend $100 million on "merchandising assets [and] execution to support brand building in 2019." (PX2062 (JLI) at 022). This would involve "[o]verhauling storefront execution and instore execution within existing shelves alongside modular, security-protected displays." (PX2062 (JLI) at 022). Complaint Counsel offers no evidence that JLI ever took any of the other steps considered in May, including legal remedies. And while better shelf space would give JUUL increased visibility, JUUL's performance prior to 2019 shows that that its consumer appeal allowed it to grow sales volume even without access to premium shelf space. (RFF ¶ 415).

2. Altria Has Significant Scientific and Regulatory Expertise

507. Altria had over 400 scientists, physicians, product developers, engineers, regulatory experts and others dedicated to product research and regulatory sciences. (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 507:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria employed these individuals is not determinative of Altria's ability to develop new competitive reduced-risk products. As Paige Magness, who was responsible for the e-vapor PMTAs, explained, "[i]t's almost irrelevant how good we are as a regulatory team. If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway." (PX7017 Magness (Altria) Dep. at 279). Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 611).

508. On November 2, 2017, Marty Barrington, Altria's then-CEO, stated to investors that Altria adapted its organization to win the dynamic non-combustible environment and has "an extraordinary financial engine to support these efforts." (PX9000 (Altria) at 008-09 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 508:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria may have adapted its organization and prepared financially to compete with non-combustible tobacco products has no bearing on the company's ability to do so. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

509. Altria's CEO addressed investors at Altria's November 2017 Investor Day, stating: "This year we're celebrating the 10th anniversary of our $350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are

developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 509:

The Proposed Finding is incomplete and misleading without additional context. Altria spent $350 million to create the Center for Research and Technology "to really focus on internal development of [] reduced-risk products," (Willard (Altria) Tr. 1332; RFF ¶ 170), and over time invested "billions of dollars" in the Center, (Jupe (Altria) Tr. 2212; RFF ¶ 172). But even fourteen years after the Center opened in 2007, Altria had still not successfully commercialized an internally developed, potentially reduced-risk product. (RFF ¶¶ 171, 173).

510. On November 2, 2017, Barrington stated to investors, once Altria "helped make [reduced risk products] possible," Altria immediately set out to acquire best-in-class regulatory and product development capability. (PX9000 (Altria) at 004 (Nov. 2017 Investor Day remarks) ("Second, to win in this new environment, we immediately set out to acquire top talent for best-in-class regulatory and product development capability")).

Response to Proposed Finding No. 510:

The Proposed Finding is incomplete and misleading without additional context. Barrington told investors that Altria had "helped make [the introduction of innovative, reduced-risk products] possible," through its support of the Tobacco Control Act. (PX9000 (Altria) at 004). But though Altria advocated for passage of the Tobacco Control Act, there were "others who supported this approach" too and the ultimate decision to pass the Act was made by the federal government. (PX9000 (Altria) at 004).

Moreover, Barrington's belief at that time that Altria had acquired top talent has no bearing on the ability of those employees to navigate FDA's regulatory requirements or develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611).

As a result, the company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

511. On November 2, 2017, Jim Dillard stated to investors that, with respect to reduced harm products, "We have the top talent we need, recruited from around the world. They include nearly 195 PhDs and 75 engineers across multiple disciplines. They represent 16 different countries and speak 32 different languages, all working together under one roof and laser focused on advancing Altria's harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications." (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 511:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria employed these individuals is not determinative of Altria's ability to develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611).

512. Altria built the 450,000 square-foot Center for Research and Technology to house its team of over 400 scientists, physicians, product developers, engineers, regulatory experts and others. (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 512:

The Proposed Finding is incomplete and misleading without additional context. Altria spent $350 million to create the Center for Research and Technology "to really focus on internal development of [] reduced-risk products," (Willard (Altria) Tr. 1332; RFF ¶ 170), and over time invested "billions of dollars" in the Center, (Jupe (Altria) Tr. 2212; RFF ¶ 172). But even fourteen years after the Center opened in 2007, Altria had still not successfully commercialized an internally developed project. (RFF ¶¶ 171, 173). The fact that Altria housed 400 employees at the Center is not determinative of Altria's ability to develop new competitive reduced-risk products.

Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611).

513. "Altria designed the CRT for functionality, collaboration, and flexibility to meet evolving needs. The end result is a truly world-class facility. It has nearly 150,000 square feet of purpose-designed lab space and the leading equipment which enables us to design new products from start to finish." (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 513:

The Proposed Finding is incomplete and misleading without additional context. Altria spent $350 million to create the Center for Research and Technology "to really focus on internal development of [] reduced-risk products," (Willard (Altria) Tr. 1332; RFF ¶ 170), and over time invested "billions of dollars" in the Center, (Jupe (Altria) Tr. 2212; RFF ¶ 172). But even fourteen years after the Center opened in 2007, Altria still not successfully commercialized an internally developed project. (RFF ¶¶ 171, 173). The fact that Altria designed the CRT to enable the company to design new products from start to finish is not determinative of the company's ultimate ability to design such products. Altria was never able to develop an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

514. Altria continued to supplement the Center of Research and Technology staff of over 400 experts and scientists with numerous additional experts. (Murillo (Altria/JLI) Tr. 2921-22 ("Yeah. We were -- I mean, we were hiring precisely for these things. Some of the folks we hired very specifically because they had unique expertise in these areas. We were constantly looking for more."); PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 514:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria employed experts and scientists is not sufficient to develop competitive reduced-risk products, nor can those experts and scientists secure FDA approval for a product that is not

appropriate for the protection of the public health. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not sell and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

3. Altria Had Exclusive Access to PMI's E-Cigarette Products and R&D Resources in the United States

a) The Joint Research, Development and Technology Sharing Agreement between Altria and PMI

515. Altria used the term "Project Vulcan" to refer to the joint sharing agreement between Altria and PMI in e-vapor. (Begley (Altria) Tr. 983-84).

Response to Proposed Finding No. 515:

The Proposed Finding is incomplete. "Project Vulcan" may refer to the e-vapor technology sharing agreement between Altria and PMI, (Begley (Altria) Tr. 983-84), but it may also refer to Altria's distribution agreement with PMI regarding the IQOS heat-not-burn product, (PX7028 Wappler (PWP) Dep. at 23; *see also* PX7040 Gifford (Altria) Dep. at 126 ("Vulcan was a master agreement we had in place with PMI. So, Vulcan was a title we used for two branches of that. One was a, I'll call it, product development or research and development related to vapor, and the other side was related to a distribution agreement for the product we talked about earlier, IQOS."); *infra* CCFF ¶ 1591 (stating that "Altria and PMI used the term 'Project Vulcan' to refer to their strategic partnership, which included the JRDTA in e-vapor")).

516. Altria had a Joint Research Development, and Technology sharing agreement with PMI ("JRDTA") "whereby both companies would pool technology, IP, et cetera, around e-cigarette developments and share those – that work with each other and coordinate what could be developed, such that together we would have better products for the e-cigarette space." (King (PMI) Tr. 2357-58).

Response to Proposed Finding No. 516:

Respondents have no specific response to the Proposed Finding's characterization of the scope of the JRDTA. But to the extent it implies that the JRDTA in fact led to "better products for the e-cigarette space," it is inaccurate. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]). Jupe offered a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

517. Regarding the JRDTA, "the idea was to pool our resources, to share the IP and technology that were developed by either company, such that PMI would have the technology and IP for international markets, and Altria would have the technology and IP for use in the U.S. And the idea was two can develop better than one, and we could pool resources and knowledge and science and everything else. (King (PMI) Tr. 2359).

Response to Proposed Finding No. 517:

Respondents have no specific response to the Proposed Finding's assertion that the intent of the JRDTA was to pool resources. But to the extent it implies that the two companies actually "develop[ed] better than one," it is inaccurate. As Jupe explained at trial, while the "intent of this agreement[] [was] to use resources in different parts of the word, different skill-sets" to "develop

better technologies for the future, . . . quite frankly, [the two companies] never really achieved" that. (Jupe (Altria) Tr. 2191-92). And King stated that PMI was "disappointed in the results of what was -- what was being contributed by Altria" and "had hoped that [Altria] would contribute more under the JRDTA." (King (PMI) Tr. 2529).

518. Altria and PMI entered into the JRDTA "round the middle of the year of 2015." (King (PMI) Tr. 2358).

Response to Proposed Finding No. 518:

Respondents have no specific response except to note that [redacted]

519. The JRDTA included VEEV, the MESH engine, and additional IP or patents. (King (PMI) Tr. 2358-59 ("That was the primary technology that we were working on, VEEV and the MESH engine and so forth, so that was the majority of it, yes. There may have been some additional IP or patents that had been filed that maybe would cover part of the space beyond just VEEV, but the bulk of it was what we were working on with VEEV. That was our big focus.")).

Response to Proposed Finding No. 519:

The Proposed Finding is vague, incomplete, and misleading without additional context. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]; *see also* PX7033 O'Hara (JLI) Dep. at 119 (explaining that PMI acquired the device that Altria later commercialized as Apex)). [redacted]

[redacted]

[redacted]

[redacted]

520. [redacted] (PX1937 (Altria) at 002-03 (May 2018 E-vapor Assessment Plan) (*in camera*)).

Response to Proposed Finding No. 520:

Respondents have no specific response.

521. Altria could have sold VEEV in the U.S. had it remained in the JRDTA. ("[PMI] own[s] the VEEV trademark now, so [Altria] would need permission from us to use the VEEV trademark in the U.S., but under the JRDTA, the joint research and development, they would have been able to launch VEEV on their own with the technology that was shared in that agreement. They owned the technology, the IP, during the term of the agreement. They owned that in the United States." (King (PMI) Tr. 2365).

Response to Proposed Finding No. 521:

The Proposed Finding is incorrect, incomplete, and misleading without additional context.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]. And it is undisputed that VEEV must receive PMTA approval before it can be introduced into the United States, a process that takes at least three years

when accounting for PMTA preparation and FDA review. (RFF ¶¶ 56-71, 1546-50; *see also* RFF ¶ 1622).

Second, Complaint Counsel has not shown and cannot show that Altria and JLI would have reached an agreement to extend the JRDTA but for Altria's investment in JLI.

Altria was aware of PMI's disappointment. In communications with Altria about the JRDTA, a PMI scientist conveyed that "[h]er executives [were] commenting that [PMI was] doing too much for Altria." (PX4052 (Altria) at 001). This was "was a common concern in the

relationship. . . . PMI was concerned they were going to do too much and Altria not enough." (PX7026 Gardner (Altria) Dep. at 222). And according to a July 2018 email from one of the Chief Growth Officer's team members to Liz Mountjoy, then Vice President of Corporate Strategy, K.C. Crosthwaite, then Chief Growth Officer, believed that "PMI [was] unlikely to want to renew." (PX4253 (Altria) at 001).

And, when asked whether PMI intended to extend the JRDTA as of late 2018, King hedged, saying, "I don't know that we had made a firm decision. It would have all depended on that further discussion and whether, you know, it would make sense given whatever the two sides agreed to." (PX7020 King (PMI) Dep. at 218).

Third, "agreements on exactly how [products] would be commercialized were not in the JRDTA." (King (PMI) Tr. 2359). [redacted].

522. Altria could not remain in the JRDTA or launch VEEV while they have a non-compete agreement with JLI. (King (PMI) Tr. 2369 ("the "joint" in joint development and technology would no longer have made sense if Altria wasn't able to launch, develop, work in the e-cigarette space, then there couldn't really be a joint development agreement going forward. And, in fact, even before the term ended, our feeling was that they had -- they had essentially left the playing field because of their agreement not to work in the e-cigarette space.")).

Response to Proposed Finding No. 522:

The Proposed Finding is inaccurate and is not supported by the cited evidence. *First*, although the noncompete limited Altria's ability to undertake development work and

commercialize e-vapor products, (Jupe (Altria) Tr. 2196), it did not prevent Altria from "remain[ing] in the JRDTA." [redacted]

Second, the noncompete did not preclude Altria from participating in the launch of VEEV in the event that Altria and PMI were to merge. As Complaint Counsel emphasizes at length in proposed findings, the noncompete contained an exception that allowed a combined Altria and PMI to compete in e-vapor, including by commercializing VEEV, provided that Altria forfeited certain governance rights in JLI. (CCFF ¶¶ 1698-703).

b) Altria's Introduction of Apex in the U.S. under the JRDTA

523. Apex is a pod-based e-vapor product primarily developed by PMI. (Begley (Altria) Tr. 983; Willard (Altria) Tr. 1240).

Response to Proposed Finding No. 523:

Respondents have no specific response except to note that even PMI did not intend for Apex to be "anything other than a limited test," (King (PMI) Tr. 2547); the product lacked nicotine salts, was "big" and "bulky," (PX7023 Fernandez (Altria) Dep. at 197), and PMI understood from the outset that it would need to be "quite a bit smaller" to be a commercially viable product, (King (PMI) Tr. 2547; *see also* King (PMI) Tr. 2535 ("Q. And you knew from the very beginning that the version [of mesh] you placed on that test market would be difficult for consumers to accept,

right? A. Well, we knew the form factor, in particular, was something we needed to work on. It was too large."); RFF ¶¶ 1520-23).

524. Nu Mark confirmed they were a planning a PMTA for APEX in January 2017. (PX1779 at 001 (January email from Magness regarding PMTAs)).

Response to Proposed Finding No. 524:

The Proposed Finding is incomplete and misleading without additional context. The cited document was created over a year before Nu Mark even launched Apex in limited e-commerce distribution. (RFF ¶ 1518). By early 2018, Altria had decided not to invest in a PMTA for Apex. (RFF ¶ 1519; PX7027 Murillo (Altria/JLI) Dep. at 191-92). Thus, by June 2018, Joe Murillo, then Senior Vice President of Regulatory Affairs at Altria, gave an overview of Altria's PMTA filing plans that did not list Apex among the "Planned Submissions." (RX0671 (Altria) at 006-13; *see also* PX7027 Murillo (Altria/JLI) Dep. at 191 (explaining that Altria "was not investing behind preparing a PMTA for Apex")).

Paige Magness, who was responsible for e-vapor PMTAs at the time, testified that "[Altria] never really built out a [PMTA] plan for Apex." (PX7017 Magness (Altria) Dep. at 114). As she explained, "Nu Mark deprioritized [Apex] because it was having trouble acquiring the devices for [Regulatory Affairs] to be able to get the answers [it] needed." (PX7017 Magness (Altria) Dep. at 62-63; *see also* PX7017 Magness (Altria) Dep. at 288-89).

525. Altria had the rights to commercialize Apex and its MESH technology in the United States through the JRDTA with PMI. (Begley (Altria) Tr. 983-84 (Q. Altria had the rights to commercialize Apex in its mesh technology in the United States, correct? A. That's correct. Q. And Altria had those rights pursuant to an IP sharing agreement that was entered into between Altria and PMI, correct? A. That's correct. Q. Altria used the term "Project Vulcan" to refer to the joint sharing agreement between Altria and PMI in e-vapor, correct? A. That's correct"); Schwartz (Altria) Tr. 1916 ("Q. What about the Apex product? A. Apex product was a PMI product. Here again, with our relationship with PMI, the Vulcan agreement, we had access to that technology. . .")).

Response to Proposed Finding No. 525:

Respondents have no specific response.

526. Nu Mark's President Judy Begley explained APEX to investors in 2017: "Through our joint development agreement with PMI, Nu Mark has exclusive rights to commercialize the "MESH" technology, which we put in the U.S. market before the FDA's August 8, 2016 deeming deadline. The product consists of a closed tank of e-liquid that is heated through a mesh-like metal plate, rather than the traditional wick and coil method. We've received positive results from our initial consumer research, and as a result, we plan to further test this product - called APEX in the U.S. – as a line extension under the MarkTen brand." (PX9000 (Altria) at 018 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 526:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context to the extent it implies that Apex performed well in consumer research. Early consumer research showed that "Apex prompted mixed reactions among [adult smokers and vapers]." (RX1290 (Altria) at 032). Consumers did "not like the fatter cigar-like shape" or its "[b]ulky feel in the hand." (RX1290 (Altria) at 032). In addition, "Apex was not seen, especially post-trial, as a product that would compete with JUUL." (RX1290 (Altria) at 032). While JUUL was seen as a product "for cigarette occasions," Apex—which lacked nicotine salts, (RFF ¶ 1520)—was perceived as "like a vape," (RX1290 (Altria) at 032). An extended study of Apex, known as a home use test, (RFF ¶¶ 374-75), confirmed that "Apex [was] more for those seeking the vapor experience than the smoking experience," (PX1225 (Altria) at 001).

527. And Nu Mark sold Apex on a limited basis through e-commerce in the United States. (Begley (Altria) Tr. 984). [redacted] (PX0018 (Altria) at 008 (Altria Response to Request for Additional Information and Documentary Materials, Oct. 3, 2019) ([redacted]) (*in camera*)).

Response to Proposed Finding No. 527:

Respondents have no specific response except to note that Apex was in very limited distribution beginning on August 28, 2018 and was only available for online purchase in 10 states. (PX7017 Magness (Altria) Dep. at 288; PX1072 (Altria) at 004; *see also* RFF ¶ 1518).

528. [redacted] (PX4042 (Altria) at 007 [redacted]) (*in camera*)).

Response to Proposed Finding No. 528:

Respondents have no specific response except to note that the cited document says that Altria intended to [redacted] As Begley explained, a lead market refers to a limited product rollout intended to "understand[] what consumer preferences were," after which Nu Mark would "mak[e] a decision as to whether or not [it] should expand distribution more broadly." (PX7022 Begley (Altria) Dep. at 119-20).

529. Altria recognized an alternative to obtaining a controlling interest in JUUL in which ". . . Altria would leverage the PMI vapor Apex partnership." (PX1632 at 004 (June 2018 Altria presentation: Level Setting Session Follow Up Small Group)).

Response to Proposed Finding No. 529:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context to the extent it implies that Apex was a product that would have enabled Altria to compete successfully with JUUL. *First,* the cited document proposed that, as an alternative to obtaining a controlling interest in JUUL, Altria "[l]everage PMI vapor partnership (Apex)" *and* obtain a "[s]trategic minority stake in Juul." (PX1632 (Altria) at 004).

Second, there is no evidence that Altria viewed Apex as a viable alternative to JUUL. "Apex was not seen, especially post-trial, as a product that would compete with JUUL." (RX1290

(Altria) at 032; *see also* Begley (Altria) Tr. 1043-44). The product had no nicotine salts and a low nicotine concentration, (RFF ¶ 1520), and was "too big, bulky," (PX7023 Fernandez (Altria) Dep. at 197; RFF ¶ 1522). Nu Mark did not view Apex as a product that appealed to adult smokers. (RFF ¶ 1521). Instead, Nu Mark wanted to explore whether Apex could be a closed-tank product for open-system vapers in the event that open-system products could not obtain FDA approval. (RFF ¶ 1521). Thus, even with Apex in the portfolio, Nu Mark leadership believed that the company "[l]ack[ed] quality pod products" and "[p]roducts that provide immediate nicotine satisfaction." (PX1644 (Altria) at 006, 018; RFF ¶ 841).

530. [redacted] (PX1144 (Altria) at 017 (July 2018 Altria presentation: Combined Assessment e-Vapor Pipeline) (*in camera*)).

Response to Proposed Finding No. 530:

The Proposed Finding is incomplete and misleading without additional context. The cited document refers to [redacted]. Complaint Counsel notes as much elsewhere, explaining [redacted]. "Apex—Current Version" is discussed in a different slide. (PX1144 (Altria) at 013).

[redacted] The slide describing "Apex—Current Version" identifies numerous problems: "[f]lavor intensity low for vaping audience," "[f]orm factor not aesthetically pleasing—clunky," "[c]ategory trending toward smaller devices," and "minimal nicotine satisfaction compared to cigarette smoke." (PX1144 (Altria) at 013). [redacted]

[redacted]

531. Altria was still investing in Apex at least past August 2018 when Nu Mark approved moving forward with a new version of the Apex mouthpiece without a PMTA on August 30, 2018. (PX1638 (Altria) at 001 (Email between Michael Brace and Michelle Baculis)).

Response to Proposed Finding No. 531:

The Proposed Finding is inaccurate and misleading without additional context. *First*, the cited exhibit does not state that Nu Mark approved a new *mouthpiece* for Apex. Instead it discusses a silicone *plug* intended to prevent leakage during transit. "One side of the plug is inserted into the mouthpiece opening during manufacturing. The plug is then removed by the consumer and discarded at first usage." (PX1638 (Altria) at 002).

Second, the cited document is ambiguous on its face about whether Altria actually implemented the plug on the market version of Apex. And Complaint Counsel, which neither raised the exhibit at trial, (CC Exhibit Index at 21), nor showed it to any witness during a deposition, has no evidence that the plug was implemented.

D. ALTRIA PUBLICLY STATED ITS INTENTION TO COMPETE IN THE CLOSED-SYSTEM E-CIGARETTE MARKET LONG-TERM

532. Testimony and ordinary-course documents of Altria and JLI show Altria publicly stated its intention to compete in the closed-system e-cigarette market long term. (*See* CCFF ¶¶ 533-44, below).

Response to Proposed Finding No. 532:

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 533-44, Respondents incorporate their responses to those Proposed Findings herein. Respondents note also that as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple

ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

533. On November 2, 2017, Barrington stated to investors, "So we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 533:

Respondents have no specific response except to note that Altria's aspirations with respect to e-vapor products often did not come true. (PX7013 Brace (Altria) Dep. at 175 (agreeing that "[m]any" of Nu Mark's "aspirations" failed to come true)).

534. On November 2, 2017, Barrington stated to investors, once Altria "helped make reduced risk products possible," Altria immediately set out to acquire best-in-class regulatory and product development capability. (PX9000 (Altria) at 004 (Nov. 2017 Investor Day remarks) ("Second, to win in this new environment, we immediately set out to acquire top talent for best-in-class regulatory and product development capability")).

Response to Proposed Finding No. 534:

The Proposed Finding is incomplete and misleading without additional context. Barrington told investors that Altria had "helped make [the introduction of innovative, reduced-risk products] possible," through its support of the Tobacco Control Act. (PX9000 (Altria) at 004). But though Altria advocated for passage of the Tobacco Control Act, there were "others who supported this approach" too and the ultimate decision to pass the Act was made by the federal government. (PX9000 (Altria) at 004).

Moreover, Barrington's belief at that time that Altria had acquired top talent has no bearing on the ability of those employees to navigate FDA's regulatory requirements or develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611).

As a result, the company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

535. In November 2017, Barrington also stated to investors, "Winning long term in this dynamic axis of competition will require the financial firepower and flexibility to invest in products, capabilities and market-building actions as may be appropriate. With the free cash flow we generate and a strong balance sheet, we have plenty of both firepower and flexibility . . . to make the necessary investments. We've been investing for years and now, with the FDA's new direction on innovative products, we're prepared to make any further investments we need to win." (PX9000 (Altria) at 008).

Response to Proposed Finding No. 535:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria may have prepared financially to compete with non-combustible tobacco products has no bearing on the company's ability to do so. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

536. On November 2, 2017, Willard stated to investors: "As Marty [Barrington] said, we aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products" at Altria's 2017 Investor Day. (Willard (Altria) Tr. 1150-51; PX9000 (Altria) at 010).

Response to Proposed Finding No. 536:

The Proposed Finding is incomplete and misleading without additional context. This forward-looking statement of Altria's aspirations has no bearing on the company's likelihood of achieving those goals. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

537. Altria's CEO gave a presentation at the February 2018 Consumer Analysis Group New York ("CAGNY") conference stating "We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products." (PX9044 (Altria) at 015 (February 2018 Altria CAGNY Investor Presentation February)).

Response to Proposed Finding No. 537:

Respondents have no specific response except to note that his forward-looking statement of Nu Mark's aspirations has no bearing on the company's likelihood of achieving those goals. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

538. In February 2018, Altria's CEO stated to investors, "Preparing for this opportunity, we've spent years acquiring best-in-class regulatory and product development talent and building a compelling portfolio of non-combustible tobacco products with the potential to reduce risk." (PX9045 (Altria) at 002 (2018 CAGNY Conference Remarks by Marty Barrington, Feb. 21, 2018)).

Response to Proposed Finding No. 538:

The Proposed Finding is incomplete and misleading without additional context. Barrington's belief at the time that Altria had acquired best-in-class talent has no bearing on the ability of those employees to navigate FDA's regulatory requirements or develop new competitive reduced-risk products. Ultimately, Altria determined that it did not have the talent it needed to develop successful e-vapor products. (RFF ¶¶ 848, 907, 971-77, 1564, 1611). As a result, the company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

539. In February 2018, Howard Willard stated to investors, "Nu Mark's goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products. . ."

(PX9045 (Altria) at 006 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 539:

The Proposed Finding is incomplete and misleading without additional context, and duplicative of Proposed Findings 450 and 539. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through acquisition, rather than internal development. (RFF ¶¶ 164-69).

This forward-looking statement of Nu Mark's goal has no bearing on the company's likelihood of achieving that goal. Ultimately, Altria was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

540. In May 2018, Altria announced a major restructuring, designed to realize "its aspiration to be the U.S. leader in authorized, non-combustible, reduced-risk products." The new structure included the creation of a Chief Growth Officer position that was filled by K.C. Crosthwaite and that reported directly to the CEO. (PX9042 (Altria) at 001; *see also* PX2003 (JLI) at 001 ("the CGO reports to the CEO")).

Response to Proposed Finding No. 540:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, that Altria had to adopt a new organizational structure is a reflection of the fact that its existing efforts with potential reduced risk products had failed. (RFF ¶¶ 579-95). Recognizing those failures, after becoming CEO in May 2018, Willard wanted Altria "to change [its] approach on innovation to have a better chance to fulfill [its] aspiration of being the U.S. authorized leader in noncombustible reduced-risk products." (Willard (Altria) Tr. 1372-73; *see also* RFF ¶¶ 579-

80). Willard accordingly restructured Altria into "two divisions—core tobacco and innovative products." (RX0836 (Altria) at 001; *see also* RFF ¶ 581). The goals of the overhaul were several: to "align" Altria's business units to the regulatory approach FDA recently had announced, namely the continuum of risk between "combustible and noncombustible products"; "to rapidly transform [Altria's] product development capability"; "to turn around [its] e-vapor business," (PX7003 Quigley (Altria) IHT at 25-26); and to overcome "the siloed nature of the way Altria did work," (PX7034 Mountjoy (Altria) Dep. at 93).

However, the fact that the company hoped the restructuring would help Altria achieve these goals has no bearing on whether it actually would do so. Ultimately, the company's restructuring was not enough to salvage its failed attempts to develop and compete with innovative e-vapor products. The company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not be commercially successful and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

541. In a July 2018 earnings conference call, Willard noted that Altria continued to make strategic investments in pursuit of long-term leadership in innovative tobacco products. (PX9047 (Altria) at 003 ("And we continue to make strategic investments to support long-term strength in our core tobacco businesses and our pursuit of leadership in innovative products…. And just as we lead in traditional tobacco products, we intend to lead in offering adult smokers more choices with innovative reduced-risk products. In May, we announced a new corporate structure to maximize our core tobacco businesses and accelerate our innovation pipeline")).

Response to Proposed Finding No. 541:

The Proposed Finding is incomplete and misleading without additional context. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). The fact that Altria "intended" to lead in innovative, reduced-risk products and hoped its

restructuring would accelerate the company's innovation pipeline has no bearing on whether Altria could achieve its aspiration or whether the restructuring would have that effect. Ultimately, no amount of additional investment or restructuring was enough to salvage Altria's failed attempts to develop and compete with innovative e-vapor products. The company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not sell and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

542. Willard told investors in November 2018 that Altria was prepared to make significant investments to achieve long-term leadership in e- vapor. (Willard (Altria) Tr. 1156 ("Q. And Altria here is signaling to its investors that it's prepared to make those investments necessary to achieve sustained long-term leadership in the e-vapor category, correct? A. Certainly we were communicating that that was our goal, although we were a fair distance from it at this point."); PX9045 (Altria) at 007 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 542:

The Proposed Finding is incomplete and misleading without additional context. The fact that Altria "was prepared" to make significant investments to achieve long-term leadership in e-vapor has no bearing on the company's likelihood of achieving this goal. As Willard said himself, Altria was "a fair distance" from the goal "at this point." (Willard (Altria) Tr. 1156). Moreover, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340).

Ultimately, no amount of additional investment was enough to salvage Altria's failed attempts to develop and compete with innovative e-vapor products. The company was not able to develop or acquire an e-vapor product that appealed to adult smokers. (RFF ¶¶ 184-202, 1501-31). And if a product could not convert adult smokers, it would not sell and could not obtain regulatory approval. (*See* RFF ¶¶ 76, 81, 596-613, 743-47).

The Proposed Finding also inaccurately states that Willard made certain statements to investors in November 2018. The statements in question were made at the February 2018 CAGNY conference. (*See* Willard (Altria) Tr. 1153, 1155-56; PX9045 (Altria) at 001, 007).

543. As late as September 2018, Altria planned to continue optimizing MarkTen support, improve merchandising and visibility, e commerce, vapor customer data, PMTAs, and licensing for third-party platforms. (PX1323 (Altria) at 024 (September 2018 Ranch Presentation)).

Response to Proposed Finding No. 543:

The Proposed Finding is incomplete and misleading without additional context. As of September 2018, Altria's plans for its e-vapor products were in flux, as it tried to determine how to address FDA concerns, free up resources for the Growth Teams, and account for Nu Mark's dismal financials and ongoing product problems. (RFF ¶¶ 900, 908-13, 938-51). Though as of September 2018 Altria was planning to keep supporting traditional flavors of just the MarkTen cig-a-like, by December 2018 the company had decided that the products should be discontinued due to their poor financial performance and dire regulatory prospects. (RFF ¶¶ 1074-90).

544. An October 24, 2018, Altria "Communication and Engagement Plan" draft stated "We fully intend to offer a compelling portfolio of e vapor products. . ." (PX1034 (Altria) at 004 (Communications and Engagement Plan)).

Response to Proposed Finding No. 544:

The Proposed Finding is incomplete and misleading without additional context. The full sentence from which Complaint Counsel quotes states: "We fully intend to offer a compelling portfolio of e-vapor products *for adult smokers and vapers through FDA's product review pathways or when underage use of e-vapor is addressed*." (PX1034 (Altria) at 004 (emphasis added to Complaint Counsel's omission)). By this time, Altria had decided that it "needed to put in place growth teams to get started right away, knowing that [it] would be out on the market, call it, . . . five to seven years to get through the FDA process." (Gifford (Altria) Tr. 2799; *see also*

Willard (Altria) Tr. 1380-81, 1434 (discussing PX1182 (Altria) at 001); Jupe (Altria) Tr. 2307-08; RFF ¶ 902). Thus, this reference to a portfolio of e-vapor products reflects Altria's commitment at this time to internal development via the Growth Teams, and hope that the Growth Teams would develop new products that "had the potential to leapfrog the JUUL product, which was at the time the superior product in the marketplace." (Willard (Altria) Tr. 1275; RFF ¶ 903).

VII. JLI'S RAPID GROWTH THREATENED ALTRIA'S GOAL OF LEADING THE CLOSED-SYSTEM E-CIGARETTE MARKET, LEADING ALTRIA TO INVEST IN INNOVATION TO BETTER COMPETE WITH JLI

545. Testimony and ordinary course documents show that Altria considered JLI's growth to be incredibly rapid, a threat to Altria's goal of leading the closed-system e-cigarette market, and led Altria to invest in several potential competing products as well as developing and innovating future products. (*See* CCFF ¶¶ 546-48, 555-71, below).

Response to Proposed Finding No. 545:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 546-48 and 555-71, Respondents incorporate their responses to those Proposed Findings herein.

A. THE DRAMATIC GROWTH OF JUUL IN 2017 AND 2018

546. Willard testified "JUUL was experiencing incredibly rapid growth. They had been growing for quite some time, but when you got into the back half of 2017 and early 2018, they grew quite dramatically and, frankly, became the number one selling product in the e-vapor category." (Willard (Altria) Tr. 1355-56).

Response to Proposed Finding No. 546:

Respondents have no specific response.

547. In the first half of 2017, Altria assessed that the closed tank e-cigarette market was highly attractive because JUUL "was starting to demonstrate some strong growth . . ." (PX7004 (Willard (Altria), IHT at 055-56); PX1286 (Altria) at 009).

Response to Proposed Finding No. 547:

Respondents have no specific response except to object to the extent that the Proposed Finding implies that the relevant market is all closed-system products. Complaint Counsel has the burden to prove the relevant market, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

548. Howard Willard testified that when Altria evaluates a product market's overall attractiveness, it will look to the "size of the market," the "market's growth rate," and the "competitive environment" in a segment. (PX7004 (Willard (Altria) IHT at 054-55)).

Response to Proposed Finding No. 548:

The Proposed Finding is incomplete and misleading without additional context. The testimony cited in the Proposed Finding concerns Altria's evaluation of the overall attractiveness of "*categor[ies]*" or "*segment[s]*" of the market—and not specific products. (PX7004 Willard (Altria) IHT at 54-55 (emphases added)).

B. THE E-CIGARETTE INDUSTRY VIEWED JLI AS A DISRUPTIVE THREAT

1. JLI Considered Itself a Disruptive Threat to the Tobacco Industry

549. March 2018 internal JLI investor talking points reveal "[JLI] The Company views traditional cigarettes and tobacco as the main competition. (PX2017 (JLI) at 039 (March 2018 JUUL Investor Presentation Script)).

Response to Proposed Finding No. 549:

Respondents have no specific response.

550. In an October 2018 JUUL investor presentation, JUUL shares that it views converting users of traditional cigarettes as "the engine for its future growth" and stressed its proven ability to "capture share" from traditional cigarettes. (PX2061 (JLI) at 036 (JUUL Confidential Information Memorandum October 2018).

Response to Proposed Finding No. 550:

Respondents have no specific response.

551. A Q4 2018 JLI earnings script states, "[a]s JUUL has gained both dollar and volume share of the U.S. combined cigarette and ENDS market, cigarette declines have accelerated." (PX2098 (JLI) at 017 (JUUL 4Q18 Earnings Script)).

Response to Proposed Finding No. 551:

Respondents have no specific response except to note that this is further evidence that JUUL was successfully converting adult smokers.

552. JLI's goal was to switch over 20 million smokers switch from cigarettes by 2020. (PX7005 (Danaher (JLI), IHT at 050 (Q. And then, "Our goal is to help over 20 million smokers switch away from cigarettes by 2020?" A. Right. Q. Was that a goal at JLI? A. Yeah, we were talking about by 2020.")).

Response to Proposed Finding No. 552:

Respondents have no specific response.

553. Timothy Danaher, JLI's former CFO, believed JUUL was the "category killer" for traditional cigarettes. (PX7005 (Danaher (JLI), IHT at 054-55 (Q. And what did you mean when you characterized JUUL as a "category killer?" A. Meaning that it is, once again, core to our mission, right? And speaking about our vision, right, which is then hitting again on our mission to improve the lives of the world's adult smokers, that I believe we can be very successful in our mission.")).

Response to Proposed Finding No. 553:

Respondents have no specific response.

554. Joseph O'Hara, JLI's competitive intelligence expert, viewed JLI as a disruptive player in the combustible tobacco industry. (PX7033 O'Hara (JLI), Dep. at 51-52 (" . . . we were able to convert adult smokers at a level that had never been seen before, and that was highly disruptive to the overall tobacco industry, especially the combustible tobacco industry.")).

Response to Proposed Finding No. 554:

Respondents have no specific response.

2. Altria Viewed JLI as a Disruptive Threat and Responded by Investing in New E-Cigarette Products

555. [redacted] (Begley (Altria) Tr. 1044 [redacted] (*in camera*)).

Response to Proposed Finding No. 555:

Respondents have no specific response.

556. Altria saw rapid growth in pod-based products. JUUL's success in pod-based products was a driving factor in Nu Mark's decision to acquire Elite. (Begley (Altria) Tr. 985 ("Q. NuMark thought it was important in terms of placing the multiple bets that we've spoken of to participate in the pod segment, correct? A. We did. We saw fairly rapid growth of the pod segment and we thought it was important to compete. Q. The recent success of JUUL further influenced Nu Mark's desire to acquire Elite, correct? A. That was certainly a driving factor.")).

Response to Proposed Finding No. 556:

Respondents have no specific response.

557. Altria launched MarkTen Elite on February 26, 2018. Willard (Altria) Tr. 1356-57); (O'Hara (JLI) Tr. 631-32 (discussing PX2086 (JLI) at 001-02).

Response to Proposed Finding No. 557:

Respondents have no specific response.

558. Altria hoped Elite would disrupt JUUL's growth. (Begley (Altria) Tr. 991 ("Q. You hoped at the time that Elite would disrupt JUUL's growth, correct? A. We were hopeful at the time.")).

Response to Proposed Finding No. 558:

Respondents have no specific response except to note that Altria's aspirations with respect to e-vapor products often did not come true. (PX7013 Brace (Altria) Dep. at 175 (agreeing that "[m]any" of Nu Mark's "aspirations" failed to come true)). In reality, Elite did not disrupt JUUL's growth, as it was a commercial failure with dismal sales. (RFF ¶¶ 431-59).

559. Willard testified that, with respect to MarkTen Elite, "-- it was a well-funded launch because we just looked at the growth of JUUL. I mean, if MarkTen Elite had a potential to compete with JUUL, we wanted to get it out there as quickly as possible and we wanted to get it out there effectively. So it was the number one priority of our sales force." (Willard (Altria) Tr. 1356-57).

Response to Proposed Finding No. 559:

Respondents have no specific response except to note that any investment in a product launch is meaningless if the product itself is not appealing to consumers. (RFF ¶ 457). The evidence shows that notwithstanding both substantial efforts to bring Elite to market quickly and substantial promotional efforts, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

560. Willard testified that Altria "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341).

Response to Proposed Finding No. 560:

Respondents have no specific response.

561. In 2018, Altria prepared a competitive assessment called the "JUUL Book of Knowledge" to inform Altria of what JLI was doing to achieve success. (Jupe (Altria) Tr. 2131-32). In a September 10, 2018, email Jupe wrote: We are being asked to put together a total assessment of Juul. I am envisioning something along the lines of a "book" of knowledge . . . This book should be all encompassing as to the performance of Juul the product, toxicological assessment, IP, market performance, CMI work and the company dynamics. This should include regulatory and social commentary on the product." (PX1986 (Altria) at 001).

Response to Proposed Finding No. 561:

Respondents have no specific response.

562. [redacted] (PX1268 (Altria) at 003 [redacted] (*in camera*)).

Response to Proposed Finding No. 562:

The Proposed Finding is incomplete and misleading without additional context. Nu Mark's ability to [redacted] was limited by (1) significant regulatory and commercial hurdles facing its existing portfolio of e-vapor products and, relatedly, (2) FDA rule that significant modifications would result in a product being considered "new" for

regulatory purposes, and therefore it could not be introduced in the market until *after* securing PMTA approval. (RFF ¶¶ 64-67, 1501-31).

563. In May 2018, Altria changed its corporate structure and added a Chief Innovation Officer to improve Nu Mark and its ability to innovate to be successful in e-vapor. (Willard (Altria) Tr. 1371-72).

Response to Proposed Finding No. 563:

Respondents have no specific response except to note that the new position was officially titled "Chief Growth Officer" (not Chief Innovation Officer), (RFF ¶ 590), and its addition came as part of a series of changes to Altria's "approach on innovation to have a better chance to fulfill [its] aspiration of being the U.S. authorized leader in noncombustible reduced-risk products," (Willard (Altria) Tr. 1372-73; *see also* RFF ¶ 580).

564. Altria "Anticipate[d] significant difficulty in threatening JUUL leadership with the current portfolio due to lack of ATC satisfaction" in September 2018 and determined its planned portfolio needed "significant investment in product improvement." (PX1316 (Altria) at 021) (Sept. 22, 2018 [Reduced Harm Product] Ranch presentation: E-vapor takeaways)).

Response to Proposed Finding No. 564:

Respondents have no specific response.

565. Nu Mark expected to 'moderate' their investment in MarkTen in 2018 as focus shifted toward launching other e vapor products such as CYNC, APEX, and VIM in the future. (PX1251 (Altria) at 048 (Altria Group 2018-2020 Three Year Plan)).

Response to Proposed Finding No. 565:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. The cited document says Nu Mark "expect[ed] to moderate its investment in *MarkTen cig-alike products* in the back half of 2018 as it shifts promotional resources to launch new products." (PX1251 (Altria) at 048 (emphasis added)). The document is thus further evidence that cig-a-likes were a stagnating category and that a manufacturer like Nu Mark needed pod-based products to be competitive. (RFF ¶¶ 388-90, 1324-29). It is also contrary to Complaint Counsel's proposed

market definition, as the document expressly distinguishes between cig-a-likes and pod-based products. (PX1251 (Altria) at 048; *see also* RFF ¶¶ 1407-14).

Indeed, [redacted]. After that date, Altria and Nu Mark reassessed their view of the three potential products identified in the document. Nu Mark ultimately chose not to commercialize Cync because it had a "risk of acute chronic nickel poisoning" and performed worse than even Elite in consumer testing. (RFF ¶¶ 1526-27). Similarly, Nu Mark never commercialized VIM because the product presented significant toxicological risks and there was inadequate documentation that the product had been sold as of August 8, 2016. (RFF ¶¶ 1530-31). And although Nu Mark commercialized Apex in August 2018, it did so only in a limited, e-commerce test market. (RFF ¶ 1518). By then, the company had no plans to pursue Apex long term and had abandoned any investment in a PMTA. (RFF ¶ 1519).

566. A September 22, 2018, Altria presentation draft states "We will overhaul Altria's approach to develop and commercialize innovative tobacco products that will convert consumers and win in the market." (PX1316 (Altria) at 031 (Sept. 22, 2018 draft [Reduced Harm Products] presentation)).

Response to Proposed Finding No. 566:

Respondents have no specific response except to note that (1) the quoted statement in the cited slide is further evidence that Nu Mark's existing e-vapor products were not competitive, (PX1316 (Altria) at 031), and (2) that the cited slide is part of a presentation with a "draft" designation in its title, (PX1316 (Altria) at 001). In addition, Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 20), or in any deposition, so there is no evidence in the record about the cited slide and whether it was ever presented.

567. Altria also proposed at a September of 2018 board meeting to have two core innovation teams for e-vapor. (PX1316 (Altria) at 034 (September 22, 2018 draft [Reduced Harm Products] presentation)).

Response to Proposed Finding No. 567:

Respondents have no specific response except to note that (1) the contemplated innovation teams for e-vapor ultimately became the Growth Teams, (RFF ¶¶ 898-916), and (2) the cited slide is part of a presentation with a "draft" designation in its title, (PX1316 (Altria) at 001). Moreover, Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 20), or in any deposition, so there is no evidence in the record about the cited slide and whether it was ever presented.

568. Altria invested in an improved version of MarkTen Elite, Elite 2.0, which would have included nicotine salts, and considered other potential products to compete with JUUL. (Jupe (Altria) Tr. 2155-56).

Response to Proposed Finding No. 568:

The Proposed Finding is incomplete and misleading without additional context. Elite 2.0 was never more than "a product in the pipeline that was subject to product development." (Garnick (Altria) Tr. 1614; *see also* RFF ¶ 520). Altria never finalized the design of Elite 2.0, nor was it ever sold in the market. (RFF ¶ 520; *see also* PX7027 Murillo (Altria/JLI) Dep. at 159 (describing Elite 2.0 as "a series of concepts on pieces of paper")). "The kind of changes that were being contemplated for Elite 2.0 would clearly require a PMTA," so the modified product could not be introduced on the market in advance of FDA approval. (Garnick (Altria) Tr. 1700; *see also* RFF ¶ 521). As of June 2018, Nu Mark estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0, (RFF ¶ 527), and the evidence shows these sorts of timelines were aspirational and had to be continually pushed back, (Jupe (Altria) Tr. 2299-3000).

569. Altria compared the JUUL development process to Elite while working to accelerate Altria's reduced risk products pipeline. (PX1000 (Altria) at 003, 012 (Altria Innovation Aspiration Framework; Long Term Strategic Planning Meeting 2018)).

Response to Proposed Finding No. 569:

The Proposed Finding is incomplete and misleading without additional context. The presentation cited in the Proposed Finding does not compare the JUUL development process to that of Elite's; instead, the presentation merely says that JUUL would be a "key competitor" for MarkTen Elite. (PX1000 (Altria) at 012). That JUUL was viewed as "key competitor" is not surprising given that it was the market leader at the time. (RFF ¶¶ 398-400). And the fact that JUUL was listed as a "key competitor" for another pod-based product, Elite, but not the MarkTen cig-a-like (which was instead compared to Vuse in the presentation, a brand that had not yet launched a pod-based product, (RFF ¶ 243)) underscores Complaint Counsel's failure to prove that the relevant market includes both pod-based products and cig-a-likes, (PX1000 (Altria) at 012).

570. Nu Mark launched MarkTen Elite at a speed they had never done before to compete with JUUL. (Begley (Altria) Tr. 1124).

Response to Proposed Finding No. 570:

Respondents have no specific response except to note that (1) the speed at which Nu Mark launched Elite reflected the assessment that the company could not compete without a pod-based product, and (2) notwithstanding substantial efforts to bring the product to market quickly, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

571. The Elite rapid launch was a significant achievement. (Begley (Altria) Tr. 990 ("Q. You considered Elite's rapid launch a significant achievement A. Yeah, I've got to tell you, a lot of people did a lot of hard work to get that in the market so quickly"))

Response to Proposed Finding No. 571:

The Proposed Finding is incomplete and misleading without additional context. Any investment in a product launch is meaningless if the product itself is not appealing to consumers. (RFF ¶ 457). The evidence shows that notwithstanding substantial efforts to bring the product to market quickly, Elite failed commercially. (RFF ¶¶ 368-72, 407-59).

3. Other Market Participants Perceived JLI As a Disruptive Threat and Responded by Investing in New E-Cigarette Products

572. [redacted] (PX3218 (Reynolds) at 011 [redacted] (*in camera*)).

Response to Proposed Finding No. 572:

Respondents have no specific response.

573. [redacted] (PX3218 (Reynolds) at 022 [redacted] (PX3218 (Reynolds) at 024-25 [redacted] (*in camera*)).

Response to Proposed Finding No. 573:

Respondents have no specific response.

574. Martin King of PMI testified about traditional cigarette companies' reaction to JUUL's rapid growth stating, "there was a great deal of effort by Reynolds and Altria and others to have products that could compete, and there was also, you know, some mergers and acquisition type activity of e-cigarette companies and so forth." (King (PMI) Tr. 2378-79 (Martin King being asked how traditional cigarette companies reacted to rapid growth in e cigarettes)).

Response to Proposed Finding No. 574:

Respondents have no specific response except to note that the referenced products introduced in reaction to JUUL were pod-based products, like Altria's MarkTen Elite and Reynolds's Vuse Alto. (RFF ¶¶ 243-46, 301-14, 326, 368-72).

575. [redacted] (PX3211 (Reynolds) at 002 (Aug. 1, 2019, VUSE Demand Review) (*in camera*)).

Response to Proposed Finding No. 575:

Respondents have no specific response.

576. Reynolds launched its own e-vapor product in response to JUULs rapid growth (PX7037 Huckabee (Reynolds), Dep. at 31-32 ("No. I think the -- the experience that I had in my role at the time was that the company witnessed a high degree of growth of Juul products and we were not participating in -- in that growth. As such, there was interest in developing the portfolio to -- to grow our vapor business.")).

Response to Proposed Finding No. 576:

Respondents have no specific response except to note that this product, Vuse Alto, was a pod-based product that took substantial share from JUUL and was the market leader in device share by September 2020. (RFF ¶¶ 1371-74).

577. JUUL's success and disruption of traditional cigarettes was driving investors to demand traditional cigarette companies to compete in the e-vapor space. (King (PMI) Tr. 2378-79 ("Q. What effect was the growth in e-cigarettes having on sellers of traditional cigarettes in the U.S. around that time, in 2018? A . . . The success of JUUL was causing investors to be very concerned about disruption for established cigarette companies, and we received a great number of questions from investors about what we were doing to be able to compete in the e-cigarette space. And I'm assuming Altria was in a similar situation as PMI. Q. Why are you assuming that? A. Well, I know from reading analyst reports and so forth that they were receiving similar – similar series of questions. We share essentially the same investor base with Altria, there's a 90, 95 percent overlap. . .")).

Response to Proposed Finding No. 577:

Respondents have no specific response except to note that King's assumption about Altria's "situation" lacks foundation and personal knowledge.

VIII. RESPONDENTS AGREED THAT ALTRIA WOULD EXIT THE E-CIGARETTE MARKET IN EXCHANGE FOR A STAKE IN JLI

A. OVERVIEW OF TRANSACTION NEGOTIATIONS

1. Several Senior Altria Executives, Two JLI Board Members, and JLI's Then-CEO Were the Primary Deal Negotiators

a) Altria Deal Negotiators

578. The primary transaction negotiators for Altria were senior executives Howard Willard, William ("Billy") Gifford, Murray Garnick and K.C. Crosthwaite. (Willard (Altria) Tr.

1169-70; PX7031 (Willard (Altria), Dep. at 123); *see also* CCFF ¶¶ 579-88, below). Altria Board member Dinyar ("Dinny") Devitre also played a role in negotiations. (*See* CCFF ¶¶ 590-95, below).

Response to Proposed Finding No. 578:

Respondents have no specific response except to note that Devitre's role in the negotiations was "purely facilitation and nothing else." (PX7001 Devitre (Altria) IHT at 66-67). To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 579-88 and 590-95, Respondents incorporate their responses to those Proposed Findings herein.

579. JLI's lead negotiators most frequently interacted with Willard, Gifford, and Garnick, with Willard and Gifford being the primary points of contact. (Pritzker (JLI) Tr. 662-63; Gifford (Altria) Tr. 2761; PX7011 (Valani (JLI), IHT at 31)).

Response to Proposed Finding No. 579:

Respondents have no specific response.

580. Willard was the lead negotiator for Altria. (Gifford (Altria) Tr. 2878). Gifford typically joined Willard for in-person meetings with JLI, but Gifford did not participate in every phone conversation that Willard had with JLI. (Gifford (Altria) Tr. 2878).

Response to Proposed Finding No. 580:

Respondents have no specific response.

581. Willard was Chairman and CEO of Altria from approximately May 2018 until April 2020. (JX0001 at 003 (¶ 25)). Prior to becoming CEO in May 2018, Willard was Altria's Chief Operating Officer. (PX7004 (Willard (Altria), IHT at 14-15)).

Response to Proposed Finding No. 581:

Respondents have no specific response.

582. Billy Gifford is Altria's current CEO. (JX0001 at 003 (¶ 26)). He became CEO of Altria in April 2020. (JX0001 at 003 (¶ 26)). Prior to becoming CEO in April 2020, Gifford was Altria's CFO starting in March 2015, and its Vice Chairman starting in May 2018. (JX0001 at 003 (¶ 26)).

Response to Proposed Finding No. 582:

Respondents have no specific response.

583. Murray Garnick is Executive Vice President and General Counsel of Altria, a position he has held since July 2017. (JX0001 at 003 (¶ 27)). Garnick also leads Altria's Regulatory Affairs (since July 2017) and Regulatory Sciences (since June 2018). (JX0001 at 003 (¶ 27)).

Response to Proposed Finding No. 583:

Respondents have no specific response.

584. K.C. Crosthwaite was Chief Growth Officer at Altria from June 2018 until September of 2019. (PX7024 (Crosthwaite (JLI/Altria), Dep. at 14). Prior to becoming Chief Growth Officer, Crosthwaite was President and CEO of Altria subsidiary Philip Morris USA. (PX7024 (Crosthwaite (JLI/Altria), Dep. at 15)).

Response to Proposed Finding No. 584:

Respondents have no specific response.

585. Crosthwaite became CEO of JLI in September 2019, which is the position he still holds today. (PX7024 (Crosthwaite (JLI/Altria), Dep. at 14); PX7006 (Crosthwaite (JLI/Altria), IHT at 8)).

Response to Proposed Finding No. 585:

Respondents have no specific response.

586. Willard discussed Altria/JLI transaction term sheets with Gifford, Garnick, and Crosthwaite, often as a collective discussion in meetings. (PX7031 (Willard (Altria), Dep. at 133-35)).

Response to Proposed Finding No. 586:

Respondents have no specific response.

587. When JLI would send a term sheet, it was the normal practice for Willard to share the term sheet with Gifford, Gifford, and Crosthwaite. (PX7031 (Willard (Altria), Dep. at 176-77)).

Response to Proposed Finding No. 587:

Respondents have no specific response.

588. Willard, Gifford, Garnick, and Crosthwaite would provide verbal comments and feedback on term sheets, and Altria's lawyers would consolidate those comments into marked-up term sheets. (Willard (Altria) Tr. 1195-96). The lawyers would then circulate the mark-ups to make sure that they captured the feedback provided. (Willard (Altria) Tr. 1195-96).

Response to Proposed Finding No. 588:

Respondents have no specific response.

(1) Altria Board Member Dinyar Devitre Was Directly Involved in Negotiations with JLI

589. Altria board member Dinyar ("Dinny") Devitre was involved in negotiations with JLI. (*See* CCFF ¶¶ 590-95, below).

Response to Proposed Finding No. 589:

The Proposed Finding is incomplete and misleading without additional context. Devitre and JLI's Valani are acquaintances, and Devitre at times discussed the potential transaction with Valani in the context of their personal relationship. (*See* PX7004 Willard (Altria) IHT at 191; PX7011 Valani (JLI) IHT at 34). But as Devitre explained, he was not involved in substantive negotiations with JLI: "I have been on the board of six or seven public companies, so I'm very aware of my fiduciary duties as a director. And I was always very careful never to make an offer or to negotiate. . . . [W]hen it came to anything to do with a deal or M&A, it would be purely facilitation and nothing else." (PX7001 Devitre (Altria) IHT at 66-67). Similarly, as Willard explained in his deposition, Devitre "was not involved in the details of the negotiation," (PX7031 Willard (Altria) Dep. at 143), and he "was significantly less involved in the actual discussion of term sheets and negotiations" than Altria's executives involved in negotiating the deal, (PX7031 Willard (Altria) Dep. at 134).

590. Devitre is a member of Altria's board of directors, on which he has sat since 2008. (PX7001 (Devitre (Altria), IHT at 13)). Devitre served as CFO and Senior Vice President at Altria from 2002 until 2008. (PX7001 (Devitre (Altria), IHT at 12)).

Response to Proposed Finding No. 590:

Respondents have no specific response.

591. When Willard and the other key Altria negotiators engaged in discussions with JLI, Devitre sometimes participated. (PX7004 (Willard (Altria), IHT at 191)). Devitre attended some of the negotiation meetings between Altria and JLI. (PX7040 (Gifford (Altria), Dep. at 120)).

Response to Proposed Finding No. 591:

The Proposed Finding is incomplete and misleading without additional context. Although Devitre occasionally attended negotiation meetings between Altria and JLI, he did not substantively participate in the negotiations. (*See* PX7031 Willard (Altria) Dep. at 134, 143; PX7001 Devitre (Altria) IHT at 66-67; *see also* RRFF ¶ 589). Instead, due to his personal relationship with Valani, Devitre's involvement was as a "trusted acquaintance . . . trying to help bring the two parties together." (PX7004 Willard (Altria) IHT at 191; *see also* PX7001 Devitre (Altria) IHT at 66-67 (describing his role as "purely facilitation and nothing else")).

592. Devitre was a "facilitator" between the Altria and JLI negotiators. (PX7001 (Devitre (Altria), IHT at 80)).

Response to Proposed Finding No. 592:

Respondents have no specific response.

593. Riaz Valani, one of JLI's board members and lead deal negotiators, would sometimes reach out to Devitre to discuss JLI's thoughts on the deal or to express concerns about what Altria was proposing. (PX7031 (Willard (Altria), Dep. at 143-44)). Devitre was a trusted acquaintance of Valani, and Devitre helped in trying to bring the two parties together. (PX7004 (Willard (Altria), IHT at 191)).

Response to Proposed Finding No. 593:

Respondents have no specific response except to note that in these discussions with Valani, Devitre "was always very careful never to make an offer or to negotiate. . . . [W]hen it came to anything to do with a deal or M&A, it would be purely facilitation and nothing else." (PX7001 Devitre (Altria) IHT at 66-67).

594. Although the senior Altria executives would periodically update the Altria board on discussions with JLI, they kept Devitre more informed than other board members about the deal negotiations. (PX7031 (Willard (Altria), Dep. at 143-44)). The Altria negotiators wanted Devitre to be prepared to respond whenever Valani reached out to him. (PX7031 (Willard (Altria), Dep. at 143-44)).

Response to Proposed Finding No. 594:

The Proposed Finding is incomplete, and misleading without additional context. Willard's testimony was that Altria executives would "*on occasion* . . . keep Mr. Devitre more informed about what was going on [with] the deal." (PX7031 Willard (Altria) Dep. at 143 (emphasis added)). As Willard explained, the reason for this was "because it was not unusual that Mr. Valani would reach out to Mr. Devitre . . . . And so while Mr. Devitre was not involved in the details of the negotiation, we tried to keep him fairly up-to-date so that he would be prepared to respond if he got a call from Mr. Valani, and sometimes he would give us perspective from those conversations." (PX7031 Willard (Altria) Dep. at 143-44).

595. Mr. Devitre kept the Altria negotiators informed regarding what he heard from Valani. (PX7031 (Willard (Altria), Dep. at 143-44)).

Response to Proposed Finding No. 595:

Respondents have no specific response.

(2) James Wappler of Perella Weinberg Partners Was Involved in Negotiating the Transaction for Altria

596. Perella Weinberg Partners ("PWP") is the investment bank that advised Altria on the transaction. (Willard (Altria) Tr. 1181).

Response to Proposed Finding No. 596:

Respondents have no specific response.

597. James Wappler, a partner at PWP, led the PWP team advising Altria on the transaction. (Willard (Altria) Tr. 1182; PX7028 (Wappler (PWP), Dep. at 12)).

Response to Proposed Finding No. 597:

Respondents have no specific response.

598. PWP representatives participated in transaction negotiations and sometimes communicated directly with JLI representatives. (Willard (Altria) Tr. 1181; PX7028 (Wappler (PWP), Dep. at 15-16)).

Response to Proposed Finding No. 598:

Respondents have no specific response.

b) JLI Deal Negotiators

599. The primary deal negotiators for JLI were Nicholas Pritzker, Riaz Valani, and Kevin Burns. (Pritzker (JLI) Tr. 661-62, 676, 758-59; Willard (Altria) Tr. 1171; PX7031 (Willard (Altria), Dep. at 124-25)); *see also* CCFF ¶¶ 600-13, below).

Response to Proposed Finding No. 599:

Respondents have no specific response except to clarify that Pritzker, Valani, and Burns were members of JLI's Strategic Committee that was responsible for participating in negotiations. (*See* Pritzker (JLI) Tr. 661-62, 676). To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 600-13, Respondents incorporate their responses to those Proposed Findings herein.

600. Nicholas ("Nick") Pritzker is a member of JLI's board of directors. (JX0001 at 004 (¶ 34)). He has been on the board of JLI (and its predecessors) since approximately 2013. (JX0001 at 004 (¶ 34); Pritzker (JLI) Tr. 764-65).

Response to Proposed Finding No. 600:

Respondents have no specific response.

601. Pritzker is an investor in JLI though his family investment entities. (Pritzker (JLI) Tr. 660). His family investment entity Tao LLC first invested in JLI around 2011. (Pritzker (JLI) Tr. 660). As JLI shareholders, Pritzker's family investment entities received a portion of the $12.8 billion that Altria paid to acquire its 35 percent interest in JLI. (Pritzker (JLI) Tr. 662).

Response to Proposed Finding No. 601:

Respondents have no specific response.

602. Riaz Valani is a member of JLI's board of directors. (JX0001 at 004 (¶ 35); Valani (JLI) Tr. 899). He has been on the board of JLI (and its predecessors) since approximately 2007. (JX0001 at 004 (¶ 35); Valani (JLI) Tr. 899-900).

Response to Proposed Finding No. 602:

Respondents have no specific response.

603. Through his venture capital business, Global Asset Capital ("GAC"), Valani was one of the initial investors in the company that is now JLI. (Valani (JLI) Tr. 899). GAC received a portion of the $12.8 billion that Altria paid to acquire its 35% interest in JLI. (Valani (JLI) Tr. 902).

Response to Proposed Finding No. 603:

Respondents have no specific response.

604. After Pax Labs spun off non-vapor products and became JLI in 2017, Valani and GAC-related entities owned more than 20 percent of JLI's shares. (PX7011 (Valani (JLI), IHT at 21-22)). As of early 2020, Valani and GAC-related entities owned around 10 percent of JLI's shares. (PX7011 (Valani (Altria), IHT at 21-22)).

Response to Proposed Finding No. 604:

Respondents have no specific response.

605. Pritzker and Valani were the only members of the JLI board's Strategic Committee, which was formed to negotiate with Altria. (Pritzker (JLI) Tr. 661-62, 676; Valani (JLI) Tr. 901; PX7011 (Valani (JLI), IHT at 25-26)).

Response to Proposed Finding No. 605:

Respondents have no specific response except to clarify that although Pritzker and Valani were the only non-executive Board members on the JLI Board's Strategic Committee, Kevin Burns (then-CEO of JLI) also participated as a member of the committee. (Pritzker (JLI) Tr. 676).

606. Kevin Burns was the CEO of JLI from approximately December 2017 to September 2019. (JX0001 at 004 (¶ 32)).

Response to Proposed Finding No. 606:

Respondents have no specific response.

607. [redacted]

Response to Proposed Finding No. 607:

Respondents have no specific response.

608. Investment banking firm Goldman Sachs advised JLI on the transaction. (Pritzker (JLI) Tr. 678).

Response to Proposed Finding No. 608:

Respondents have no specific response.

609. Peter Gross, the Vice Chairman of Investment Banking at Goldman Sachs, worked on the Altria transaction on behalf of JLI. (Pritzker (JLI) Tr. 678; PX7043 (Gross (Goldman Sachs), Dep. at 14, 16)). Gross's assignment for JLI was "to help them negotiate an agreement with Altria, where Altria would take some type of minority position in JLI." (PX7043 (Gross (Goldman Sachs), Dep. at 16)).

Response to Proposed Finding No. 609:

The Proposed Finding is incomplete and misleading without additional context. As an investment banker, Gross's focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross explained, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38).

610. At JLI, Gross worked with Valani, Pritzker, and Burns, and sometimes had discussions with other board members. (PX7043 (Gross (Goldman Sachs), Dep. at 16-17)).

Response to Proposed Finding No. 610:

Respondents have no specific response.

611. Gross was involved in negotiating directly with Altria. (PX7043 (Gross (Goldman Sachs), Dep. at 17)). During negotiations, he spoke with Willard, Gifford, Crosthwaite, and Altria board member Devitre. (PX7043 (Gross (Goldman Sachs), Dep. at 17); PX1309 (Altria) at 002 (June 13, 2018 email indicating that Gross spoke directly to Willard to request a meeting between JLI and Altria negotiators); PX2413 (JLI) at 001 (Nov. 26, 2018, text message to Valani in which Gross mentions speaking to Altria executive Crosthwaite); PX2428 (JLI) (Nov. 28, 2018, Gross text message to Valani referring to speaking to Altria executive Crosthwaite privately)).

Response to Proposed Finding No. 611:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel does not—and cannot—cite any evidence that Gross engaged in any substantive negotiations with Altria outside the presence of JLI principals. Gross testified only that he attended negotiation meetings alongside JLI principals as an agent of JLI and occasionally spoke to certain

Altria representatives outside of these meetings, (*see* PX7043 Gross (Goldman Sachs) Dep. at 17, 25), including to arrange meetings of the principals, (*see* PX1309 (Altria) at 002).

Further, as an investment banker, Gross's focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross explained, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38).

612. Altria board member Devitre knew Gross personally from Devitre's time as Altria's CFO. (PX7001 (Devitre (Altria), IHT at 82)). Then-Altria executive (and current JLI CEO) Altria's Crosthwaite also knew Gross. (PX7032 (Valani (JLI), Dep. at 108-10)).

Response to Proposed Finding No. 612:

Respondents have no specific response.

613. Gross sometimes communicated directly with Altria's PWP adviser James Wappler about a potential Altria/JLI transaction. (PX3168 (PWP) at 001 (June 30, 2018, email from Wappler noting that he had spoken to Gross regarding JLI's valuation); PX2446 (JLI) at 002 (June 18, 2018, email from Wappler to Gross confirming a planned meeting in July and referring to a previous discussion with Gross)).

Response to Proposed Finding No. 613:

Respondents have no specific response except to clarify that the planned July 13, 2018 meeting discussed in PX2446 was later canceled. (*See* RX1170 (Altria) at 001).

2. The Altria and JLI Deal Negotiators Met and Otherwise Communicated Numerous Times During the 18-Month Course of Negotiations

614. Negotiations between Altria and JLI spanned about 18 months, beginning in mid-2017. (Valani (JLI) Tr. 902-03; Gifford (Altria) Tr. 2761-62; PX7011 (Valani (JLI), IHT at 32)). During the course of negotiations, the Altria and JLI deal negotiators met in person, spoke by phone, and exchanged text messages numerous times. (*See* CCFF ¶¶ 615-24, below).

Response to Proposed Finding No. 614:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 615-24, Respondents incorporate their responses to those Proposed Findings herein.

615. The Altria and JLI negotiators got together "fairly frequently" over the course of 2018, often in person. (PX7031 (Willard (Altria), Dep. at 125-26)). Willard testified that both Altria and JLI "felt more comfortable [] face to face." (PX7031 (Willard (Altria), Dep. at 125-26)).

Response to Proposed Finding No. 615:

Respondents have no specific response.

616. During the course of negotiations, JLI's Valani, Pritzker, and Burns met in person and spoke on the phone with Altria's Willard and Gifford. (Valani (JLI) Tr. 902; Willard (Altria) Tr. 1168; PX7011 (Valani (JLI), IHT at 32-33)).

Response to Proposed Finding No. 616:

Respondents have no specific response.

617. For some of these meetings and phone calls, no counsel was present. (Pritzker (JLI) Tr. 887-88).

Response to Proposed Finding No. 617:

Respondents have no specific response except to note that, regardless of whether counsel was present on every call between the principals, Altria and JLI were assisted in the negotiations by experienced outside counsel "every step of the way," (Garnick (Altria) Tr. 1683), and all term sheets, issues lists, and other deal documents exchanged between the parties were drafted and revised by outside counsel, (*see* RFF ¶¶ 1162-65).

618. JLI negotiators Pritzker and Valani met with Altria's Willard and Gifford about fifteen to twenty times over the course of negotiations. (PX7011 (Valani (JLI), IHT at 32-33)).

Response to Proposed Finding No. 618:

Respondents have no specific response except to clarify that Valani testified he met with Willard and Gifford roughly "10 to 15 [times], 20 max" over the 18-month span of the negotiations. (PX7011 Valani (JLI) IHT at 32-33).

619. Pritzker and Valani had roughly the same number (fifteen to twenty) of joint phone calls with Willard and Gifford over the course of negotiations. (PX7011 (Valani (JLI), IHT at 32-33)).

Response to Proposed Finding No. 619:

The Proposed Finding is inaccurate to the extent it suggests that Valani and Gifford participated in all 10 to 20 calls. Valani testified that there were "[m]aybe the same number of phone calls"—that is, "10 to 15, 20 max"—between Altria and JLI principals. Of those estimated 10 to 20 phone calls, "typically . . . [it would be] Nick and me present or it was Nick alone" speaking with Willard. (PX7011 Valani (JLI) IHT at 32-33).

Further, Complaint Counsel did not ask witnesses about the content of these calls at trial or otherwise adduce evidence about what was discussed.

620. In addition, there were other calls in which Pritzker was the only JLI representative on phone with Willard. (PX7011 (Valani (JLI), IHT at 32-33)).

Response to Proposed Finding No. 620:

The Proposed Finding is inaccurate. As explained above in response to Proposed Finding 619, Valani's estimate that there were 10 to 20 phone calls between Altria and JLI principals already included calls where Pritzker spoke to Willard without Valani present. (*See* PX7011 Valani (JLI) IHT at 33 ("I would say 10 to 15, 20 max [meetings]. . . . Maybe the same number of phone calls. And typically the phone calls would have had Nick and me present or it was Nick alone.")). The Proposed Finding inaccurately states that these calls between Pritzker and Willard were "[i]n addition" to the 10 to 20 calls referenced in CCFF ¶ 619.

Further, Complaint Counsel did not ask any witnesses about the content of these calls at trial or otherwise adduce evidence about what was discussed.

621. When negotiating important deal points, particularly points on which there was disagreement between Altria and JLI, oftentimes Pritzker, Valani, or Burns would reach out to one of the four senior executives at Altria—Willard, Gifford, Garnick, or Crosthwaite. (PX7031 (Willard (Altria), Dep. at 130-32)).

Response to Proposed Finding No. 621:

Respondents have no specific response.

622. Valani also had meetings and calls with Altria board member Devitre. (Valani (JLI) Tr. 903). During the course of negotiations, JLI's Valani and Altria board member Devitre had "back channel-type" discussions about how to get the parties to talk. (PX7011 (Valani (Altria), IHT at 96)).

Response to Proposed Finding No. 622:

Respondents have no specific response except to note that there was not "ever anything really conclusive discussed or determined during" the "back channel-type discussion[s]" that Valani and Devitre had about how to get the parties to talk. (PX7011 Valani (JLI) IHT at 96). There is no evidence that Valani and Devitre engaged in substantive negotiations concerning a noncompete, the treatment of Altria's existing products, or any other topic during these "back channel-type discussion[s]."

623. Over the course of negotiating the transaction, Valani estimates that he met with Devitre around ten to fifteen times. (PX7032 (Valani (JLI), Dep. at 16-17)). Valani and Devitre were the only attendees at some of these meetings. (PX7032 (Valani (JLI), Dep. at 17)).

Response to Proposed Finding No. 623:

Respondents have no specific response.

624. Over the course of negotiating the transaction, Valani also had phone calls with Devitre. (PX7032 (Valani (JLI), Dep. at 18)). For some of these calls, Valani and Devitre were the only call participants. (PX7032 (Valani (JLI), Dep. at 18)).

Response to Proposed Finding No. 624:

Respondents have no specific response.

3. "Tree," "Richard," and "Jack" Were Transaction-Related Code Names

625. During negotiations, Altria and JLI used several code names relating to the potential transaction. (*See* CCFF ¶¶ 626-28, below).

Response to Proposed Finding No. 625:

Respondents have no specific response.

626. "Tree" or "Project Tree" referred to the potential Altria/JLI transaction, or to JLI itself. (Pritzker (JLI) Tr. 725; Willard (Altria) Tr. 1183).

Response to Proposed Finding No. 626:

Respondents have no specific response.

627. The code name "Richard" referred to Altria. (Pritzker (JLI) Tr. 688-89; Willard (Altria) Tr. 1210; Garnick (Altria) Tr. 1586).

Response to Proposed Finding No. 627:

Respondents have no specific response.

628. The code name "Jack" referred to JLI. (Pritzker (JLI) Tr. 688; Garnick (Altria) Tr. 1586).

Response to Proposed Finding No. 628:

Respondents have no specific response.

B. ALTRIA AND JLI FIRST STARTED DISCUSSING A POTENTIAL TRANSACTION IN 2017

629. Altria and JLI began discussing a potential transaction in 2017. (*See* CCFF ¶¶ 630-38, below).

Response to Proposed Finding No. 629:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 630-38, Respondents incorporate their responses to those Proposed Findings herein.

630. Devitre met with Valani in late 2016 or early 2017, by which time JLI was selling the JUUL product that exists today. (PX7001 (Devitre (Altria), IHT at 47-48)). After that

meeting, Devitre gave JLI's contact information to Altria's then-head of R&D. (PX7001 (Devitre (Altria), IHT at 48)).

Response to Proposed Finding No. 630:

Respondents have no specific response.

631. In April 2017, at Altria's request, the first exploratory conversation took place at JLI's headquarters in San Francisco. (PX7022 (Begley (Altria), Dep. at 152)). The attendees at that meeting were Altria's Jody Begley (then-President of Nu Mark), Crosthwaite, David Wise, and Steve Schroeder, and JLI's co-founder James Monsees and then-CEO Tyler Goldman. (PX7022 (Begley (Altria), Dep. at 152-53)).

Response to Proposed Finding No. 631:

Respondents have no specific response.

632. Subsequently, Altria senior management wanted to meet with JLI. (PX7001 (Devitre (Altria), IHT at 49)).

Response to Proposed Finding No. 632:

Respondents have no specific response.

633. On June 5, 2017, Altria board member Devitre introduced JLI's Valani to Altria's then-CFO Gifford via email. (PX1340 (Altria); PX1341 (Altria); PX7001 (Devitre (Altria), IHT at 50-51)). In response to Devitre's introductory email, Valani asked Gifford about a possible meeting on the West Coast in late June or July 2017. (PX1342 (Altria)).

Response to Proposed Finding No. 633:

Respondents have no specific response.

634. After introducing Valani and Gifford in June 2017, Devitre met with Valani "quite a few" times in 2017, "maybe two or three times a month." (PX7001 (Devitre (Altria), IHT at 66)).

Response to Proposed Finding No. 634:

Respondents have no specific response except to note that Devitre was a personal acquaintance of Valani's, and he was not substantively involved in negotiations. (*See* PX7004 Willard (Altria) IHT at 191; PX7031 Willard (Altria) Dep. at 134, 143; PX7011 Valani (JLI) IHT at 34; PX7001 Devitre (Altria) IHT at 66-67).

635. JLI's Valani first met in person with Altria's Willard and Gifford in July 2017, and met with them two more times before the end of 2017. (Valani (JLI) Tr. 902-03). At the time of the July 2017 meeting, both Altria and JLI sold e-cigarettes. (Valani (JLI) Tr. 902-03).

Response to Proposed Finding No. 635:

Respondents have no specific response.

636. In the fall (Q4) of 2017, Valani and Pritzker met with Willard and Gifford at Altria's offices. (Pritzker (JLI) Tr. 663-64, 771-73). This was the first time Pritzker met Willard and Gifford. (Pritzker (JLI) Tr. 663-64, 771-73).

Response to Proposed Finding No. 636:

Respondents have no specific response.

637. At this meeting in Q4 of 2017, Altria suggested purchasing all of JLI's domestic business. (Pritzker (JLI) Tr. 663-64, 772-73).

Response to Proposed Finding No. 637:

Respondents have no specific response.

638. On December 15, 2017, Willard and Gifford met with Valani and Pritzker. (PX3167 (PWP) at 002; PX3164 (PWP)). Afterwards, Altria's PWP adviser Wappler exchanged emails with JLI's Goldman Sachs adviser Gross regarding continuing discussions. (PX3167 (PWP) at 001-02).

Response to Proposed Finding No. 638:

Respondents have no specific response.

C. DURING THE FIRST HALF OF 2018, ALTRIA AND JLI NEGOTIATORS HAD MEETINGS AND COMMUNICATED ABOUT A POTENTIAL TRANSACTION

639. During the first six months of 2018, Altria and JLI negotiators met and communicated about a potential transaction. (*See* CCFF ¶¶ 640-67, below). Instead of a transaction for Altria to purchase all of JLI's domestic business, as Altria initially proposed in 2017 (*see* CCFF ¶ 637, above), the discussions came to focus on the notion of Altria purchasing a partial interest in JLI. (*See* CCFF ¶¶ 640-67, below).

Response to Proposed Finding No. 639:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 640-67, Respondents incorporate their responses to those Proposed Findings herein.

640. Discussions between Altria and JLI about a potential deal continued into early 2018. (Valani (JLI) Tr. 903; Gifford (Altria) Tr. 2761-62; Pritzker (JLI) Tr. 664).

Response to Proposed Finding No. 640:

Respondents have no specific response except to note that discussions between Altria and JLI "heat[ed] and cool[ed] through time," (Gifford (Altria) Tr. 2761), proceeding in "fits and starts," (PX7000 Garnick (Altria) IHT at 83).

641. On January 17, 2018, Altria's PWP adviser Wappler had a call with JLI's Goldman Sachs adviser Gross. (PX3163 (PWP) at 001). After that call, Wappler worked with Altria to develop a proposed structure for a transaction. (PX3163 (PWP) at 001). In the resulting document, Altria's position was that it was willing to acquire less than 100% of JLI, but that it must own more than 50% "in order to provide meaningful operational assistance" to JLI. (PX3163 (PWP) at 004) (Project Tree: Illustrative Transaction Structure, Jan. 18, 2018)).

Response to Proposed Finding No. 641:

Respondents have no specific response except to note that Complaint Counsel's cited document is not evidence that the attached "preliminary working draft" nor the specific positions contained therein were shared with JLI. Indeed, as Wappler wrote: "Altria plans to socialize this structure with GS in the next 24 – 48 hours (specific timing TBD). To be clear, Altria would 'discuss' with Goldman rather than sending a formal proposal." (PX3163 (PWP) at 001).

642. Willard and Wappler met with JLI's adviser Gross on January 19, 2018. (PX3164 (PWP)). Wappler wrote to his PWP colleagues that Willard "was disappointed in the outcome" of the meeting, and that assuming Gross came "back with bad news," Altria could either tell JLI "'good luck' or potentially try one more back channel with Riaz [Valani]." (PX3164 (PWP)).

Response to Proposed Finding No. 642:

Respondents have no specific response.

643. On February 8, 2018, Willard, Gifford, Jay Moore (Altria's then-SVP of Strategy and Business Development), and Wappler scheduled a call with Pritzker, Valani, and Gross. (PX2293 (JLI); PX2292 (JLI)).

Response to Proposed Finding No. 643:

Respondents have no specific response except to note that a calendar invite scheduling a call is not evidence that the call took place or of the contents of any such call, and there was no affirmative testimony that the scheduled call took place or of the contents of any such call. (*See* PX7021 Pritzker (JLI) Dep. at 41 ("Q. Do you recall attending this [call] on February 8 at 3 p.m.? A. No, I don't recall that specific call.")).

644. In a February 23, 2018 email, Altria's Jay Moore provided a list of key takeaways to Gifford in preparation for a call between Gifford and Altria board member Devitre. (PX1216 (Altria) at 001). One of the key takeaways is that "JUUL proposal for 40% does not work for antitrust purposes. . ." (PX1216 (Altria) at 001).

Response to Proposed Finding No. 644:

The Proposed Finding is incomplete and misleading without additional context to the extent Complaint Counsel intends to imply that the "antitrust" issue referenced in the cited email referred to the treatment of Altria's e-vapor portfolio in the event of a transaction. The record reflects that throughout the course of negotiations, Altria used the terms "antitrust," "antitrust issue," "antitrust risk," and so on to refer to multiple antitrust-related issues other than the treatment of Altria's e-vapor portfolio in the event of a transaction. (*See, e.g.*, Garnick (Altria) Tr. 1645-46 (describing antitrust issues "related to when the money would be" paid, "when we would file for HSR[,] and other antitrust issues such as upstream affiliates"); PX7028 Wappler (PWP) Dep. at 75 ("Q. What were you referring to when you say 'this antitrust issue'? A. The notion of the simultaneous sign and close."); PX7032 Valani (JLI) Dep. at 31-33 (explaining his belief that

"antitrust risk" in PX2303 (JLI) referred to the issue of whether Altria would purchase nonvoting stock initially or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained"); PX7036 Garnick (Altria) Dep. at 60 ("Q. What do you recall about the discussions with Tree to resolve the antitrust issues? A. There were many discussions on antitrust issues with our lawyers and with the Tree lawyers in order to ensure that we would comply and understood the antitrust laws.")). Because Complaint Counsel did not ask any witness about the mention of "antitrust purposes" in the cited document, there is no evidence about what antitrust issue it was intended to describe.

645. On March 1, 2018, Devitre told JLI's Valani that he expected Altria's Willard would be calling Valani the following day. (PX2294 (JLI)).

Response to Proposed Finding No. 645:

Respondents have no specific response.

646. On April 5, 2018, JLI's Valani, Pritzker, and Burns met with Altria's Willard and Gifford at Altria's headquarters in Richmond. (Pritzker (JLI) Tr. 664-65; PX2296 (JLI); PX2297 (JLI)). At the meeting, they discussed a potential transaction in which Altria would acquire an interest in JLI, including some general terms and some specifics about how a transaction might happen. (Pritzker (JLI) Tr. 664-65, 776-77). The same group had dinner together the night before the meeting. (Pritzker (JLI) Tr. 664-65).

Response to Proposed Finding No. 646:

Respondents have no specific response.

647. After the meeting in Richmond, Pritzker emailed Willard and Gifford and thanked them for the "very constructive conversation." (PX2299 (JLI)).

Response to Proposed Finding No. 647:

Respondents have no specific response.

648. On April 16, 2018, Willard emailed an illustrative payment structure proposal to Pritzker, Valani, and Burns ahead of a conference call to discuss the transaction. (PX2124 (JLI) at 001-02). The proposed structure envisioned Altria purchasing 50.1% of JLI. (PX2124 (JLI) at 002).

Response to Proposed Finding No. 648:

Respondents have no specific response.

649. Willard suggested in his April 16, 2018 email that Altria's and JLI's antitrust counsel "connect to assess antitrust risk." (PX2124 (JLI) at 001). That afternoon, Willard and Gifford scheduled a call with Pritzker, Burns, and Valani. (PX2547 (JLI)).

Response to Proposed Finding No. 649:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the record reflects that throughout the course of negotiations, Altria used the terms "antitrust," "antitrust issue," "antitrust risk," and so on to refer to multiple antitrust-related issues other than the treatment of Altria's e-vapor portfolio in the event of a transaction. (*See, e.g.*, Garnick (Altria) Tr. 1645-46 (describing antitrust issues "related to when the money would be" paid, "when we would file for HSR[,] and other antitrust issues such as upstream affiliates"); PX7028 Wappler (PWP) Dep. at 75 ("Q. What were you referring to when you say 'this antitrust issue'? A. The notion of the simultaneous sign and close."); PX7032 Valani (JLI) Dep. at 31-33 (explaining his belief that "antitrust risk" in PX2303 (JLI) referred to the issue of whether Altria would purchase nonvoting stock initially or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained"); PX7036 Garnick (Altria) Dep. at 60 ("Q. What do you recall about the discussions with Tree to resolve the antitrust issues? A. There were many discussions on antitrust issues with our lawyers and with the Tree lawyers in order to ensure that we would comply and understood the antitrust laws.")). Because no witness was ever asked about the mention of "antitrust risk" in PX2124 (JLI), there is no evidence about antitrust issue it was intended to describe.

Second, the Proposed Finding's assertion that the call was scheduled after Willard's email in PX2124 is belied by the documents. The call was scheduled on April 16, 2018 at 6:03 AM PDT to take place at 12:00 PM PDT, (*see* PX2547 (JLI) at 001), and Willard's email was sent later that

morning at 9:56 AM PDT, (*see* PX2124 (JLI) at 001), in advance of the scheduled call. Respondents further note that a calendar invite scheduling a call is not evidence that the call took place or of the contents of any such call, and there was no testimony that the call occurred or of the contents of any such call.

650. On April 20, 2018, JLI CEO Burns sent a letter to Altria CEO Willard reflecting JLI's "current thinking on price, payment and related terms." (PX2026 (JLI) at 001-02). Burns' April 20, 2018, letter contemplated Altria purchasing a 50.1% interest in JLI. (PX2026 (JLI) at 003).

Response to Proposed Finding No. 650:

The Proposed Finding is incomplete and misleading without additional context. (*See* RFF ¶¶ 544-51). The April 20 letter, which was sent by Burns but prepared by JLI's counsel, contemplated that Altria would acquire 50.1 percent of JLI's U.S. business in two steps. (Pritzker (JLI) Tr. 778-81; *see also* RFF ¶¶ 546-47). Altria would initially purchase a 40 percent nonvoting ownership stake for $6.4 billion, with an expectation that "no HSR filing would be required in connection with this portion of the transaction." (PX2026 (JLI) at 003; *see also* Pritzker (JLI) Tr. 780-81). Then, "[p]romptly following [Altria's] initial $6.4 billion investment, Altria would seek regulatory approval to obtain a 50.1% . . . ownership interest in [JLI] via an additional $1.6 billion capital investment (for a total of $8.0 billion)." (PX2026 (JLI) at 003; *see also* Pritzker (JLI) Tr. 780-81). Following "regulatory approvals," the previously acquired nonvoting equity would convert to voting equity. (PX2026 (JLI) at 002; *see also* Pritzker (JLI) Tr. 780-81).

In addition to the payments for equity shares, JLI would receive $1 billion upon receipt of regulatory approval of its PMTA for JUUL. (PX2026 (JLI) at 003 & n.1; *see also* Pritzker (JLI) Tr. 781). Thus, all told, the letter contemplated an investment of $9 billion for 50.1 percent of the domestic company. (Pritzker (JLI) Tr. 781).

651. Burns' April 20, 2018, letter proposed that "JUUL's and Altria's respective anti-trust counsel would discuss and develop a plan with respect to seeking and obtaining regulatory

> approval for the majority investment, including the treatment of any competitive products owned by Altria." (PX2026 (JLI) at 003). Valani understood the reference to "competitive products" to mean electronic nicotine delivery systems. (PX7032 (Valani (JLI), Dep. at 30)). As of April 20, 2018, the electronic nicotine delivery systems [e-cigarettes] sold by Altria included MarkTen and MarkTen Elite. (Pritzker (JLI) Tr. 667-68).

Response to Proposed Finding No. 651:

The Proposed finding is incomplete and misleading without additional context. *First*, this letter was prepared by JLI's counsel. (Pritzker (JLI) Tr. 789; PX7011 Valani (JLI) IHT at 59).

Second, as Valani testified, the term "competitive products" was a "general term" meant to refer to electronic nicotine delivery systems, but it was not intended to reflect the competitiveness of any of Altria's products in particular—as Valani testified, he was "not sure that [he] was really aware of what Altria was selling at the time." (Valani (JLI) Tr. 905).

Third, as Pritzker testified, the April 20 letter stated that Altria and JLI's respective antitrust counsel "would discuss and develop a plan with respect to seeking and obtaining regulatory approval" because JLI understood from the outset of negotiations that "if [JLI was] going to pursue a transaction of this nature, that it would be closely scrutinized by regulatory agencies, and that antitrust counsel would have to be brought in at an early stage so that any conversations around control, board seats, existing products, all of that would be structured in a way so as to be above-board and to optimize the chance for a successful regulatory outcome." (Pritzker (JLI) Tr. 784; *see also* RFF ¶ 549).

At the time of the April 20 letter, Pritzker's "assumption [was that] the FTC would most likely require divestiture of products, meaning the sale of products to another entity, so those products would stay in the market and not be withdrawn and that Altria would be free to sell them to some other tobacco company or private equity company or somebody that would continue to market those products." (Pritzker (JLI) Tr. 785-86; *see also* RFF ¶ 550).

652. Willard and Gifford scheduled a call with Pritzker, Burns, and Valani on the afternoon of April 20, 2018, after Burns sent his letter. (PX4385 (Altria) at 001; PX2549 (JLI)).

Response to Proposed Finding No. 652:

The Proposed Finding is inaccurate to the extent it claims the call was scheduled after Burns sent the April 20 letter. The call was scheduled at some point before April 19. (*See* PX4385 (Altria) at 001-02 (April 19, 2018 Pritzker email referencing "our scheduled call tomorrow at 3ET" and noting JLI was "planning to get a short letter to [Altria] before the call")). Respondents further note that a calendar invite scheduling a call is not evidence that the call took place or of the contents of any such call, and there was no testimony that the scheduled call occurred or of the contents of any such call.

653. The Altria and JLI negotiators first had conversations about what Altria would do with its existing e-cigarette products around the time that the notion of Altria purchasing less than 100% of JLI arose. (PX7021 (Pritzker (JLI), Dep. at 64-65)).

Response to Proposed Finding No. 653:

Respondents have no specific response.

654. Between the April 20, 2018, letter from Burns to Willard and July 30, 2018, Altria and JLI had several conversations and Altria sent at least two letters to JLI to propose additional terms. (Pritzker (JLI) Tr. 793).

Response to Proposed Finding No. 654:

The Proposed Finding is incomplete and omits necessary context from Pritzker's cited testimony. As Pritzker explained, during this period "there was back-and-forth, and it was not really leading anywhere. . . . I would say the big problem was in that intervening period of time, that we, JLI, became more and more concerned about the nature of control, and it became clear to us that we were going to be unable or unwilling to do a transaction where Altria either had control or had a path to control of JLI." (Pritzker (JLI) Tr. 793). Meanwhile, throughout this period, JLI "was not worried about any of [Altria's] products" posing a threat to JLI. (Pritzker (JLI) Tr. 794).

655. On April 23, 2018, Altria's Willard and Gifford scheduled a call with JLI's Burns, Pritzker, and Valani. (PX2551 (JLI)).

Response to Proposed Finding No. 655:

The Proposed Finding is inaccurate. The cited calendar invite scheduled a call for April 24, not April 23. (PX2551 (JLI) at 001). Further, Respondents note that a calendar invite scheduling a call is not evidence that the call took place or of the contents of any such call.

656. On April 24, 2018, Willard sent an email to Valani, Pritzker, and Burns stating that he had a "proposal to partially address your antitrust risk concern." (PX2303 (JLI)). Valani testified that he thinks Willard was referring to the issue of whether Altria would purchase nonvoting stock initially (JLI's preference) or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained." (PX7032 (Valani (JLI), Dep. at 31-33)).

Response to Proposed Finding No. 656:

Respondents have no specific response except to note that (1) Valani also testified that he did not recall JLI raising any antitrust risk concerns other than what was reflected in the April 20 letter regarding the purchase of voting or nonvoting stock, (PX7032 Valani (JLI) Dep. at 32; *see also* PX2026 (JLI) at 003), and (2) this illustrates that the companies used the terms "antitrust" or "antitrust risk" to refer to issues other than the treatment of Altria's e-vapor portfolio in the event of a transaction, (*see* RRFF ¶¶ 644, 649).

657. Later in the day on April 24, 2018, Willard, Gifford, Valani, Pritzker, and Burns scheduled a conference call. (PX2551 (JLI); PX2303 (JLI)).

Response to Proposed Finding No. 657:

Respondents have no specific response except to note that emails scheduling a call are not evidence that the call took place or of the contents of any such call, and there was no affirmative testimony that the call occurred or of the contents of any such call. (*See* PX7032 Valani (JLI) Dep. at 34 ("I don't remember specifically this conversation.")).

658. On April 26, 2018, Willard emailed Pritzker and proposed a meeting between Altria and JLI on May 6, 2018, in Chicago. (PX2390 (JLI) at 001). Willard wrote that they would have "the antitrust experts available by phone." (PX2390 (JLI) at 001).

Response to Proposed Finding No. 658:

Respondents have no specific response except to note that emails scheduling a meeting are not evidence that the meeting took place. Indeed, on May 2, Willard proposed by email that the parties "still target a live meeting sometime between Saturday, May 6 and Tuesday[,] May 9," but Respondents are aware of no evidence showing such a meeting occurred. (PX4389 (Altria) at 001).

659. On May 3, 2018, Willard sent a letter to Burns, Pritzker, and Valani in response to Burns' April 20, 2018, letter. (PX2184 (JLI) at 001). Prior to sending the letter, Willard suggested by email that the Altria and JLI negotiators have an in-person meeting and "exclude bankers and outside lawyers" from the meeting. (PX4389 (Altria)).

Response to Proposed Finding No. 659:

Respondents have no specific response except to note that Complaint Counsel chose not to ask about PX4389 at trial, so there is no testimony to put the document in context. (CC Exhibit Index at 69). As a result, Complaint Counsel's insinuation that there was something improper about Willard suggesting a principals-only meeting is baseless. Further, emails scheduling a meeting are not evidence that the meeting took place, and Respondents are aware of no evidence showing that the meeting suggested in PX4389 occurred.

660. Pritzker and Valani scheduled a phone call with Willard and Gifford on May 15, 2018. (PX2403 (JLI)).

Response to Proposed Finding No. 660:

Respondents have no specific response except to clarify that the call was scheduled *for* May 15, 2018; the scheduling itself took place on May 12. (*See* PX2403 (JLI) at 001). Respondents further note that emails scheduling a call are not evidence that the call took place or

of the contents of any such call, and there was no testimony that this call occurred or of the contents of any such call.

661. On May 29, 2018, Willard emailed Valani and Pritzker, writing, "We are finalizing our response to the subjects we discussed last week and we will send it out to you tomorrow May 30." (PX2414 (JLI)).

Response to Proposed Finding No. 661:

Respondents have no specific response.

662. On May 30, 2018, Willard sent a letter to Pritzker and Valani regarding potential deal terms. (PX1355 (Altria) at 002-03).

Response to Proposed Finding No. 662:

Respondents have no specific response.

663. On June 3, 2018, Valani forwarded Pritzker an "open issues list" from JLI board member Zach Frankel that included, "Does [Altria] divest Markten?" (PX2406 (JLI); PX7032 (Valani (JLI), Dep. at 36-38)).

Response to Proposed Finding No. 663:

Respondents have no specific response.

664. On June 13, 2018, Altria's PWP adviser James Wappler had a 30-minute call with Peter Gross, JLI's Goldman Sachs adviser. (PX1309 (Altria) at 002 (email from James Wappler to Altria executives). During that call, Gross requested that Altria meet with JLI on July 13, 2018. (PX1309 (Altria) at 002). Gross had previously spoken directly to Willard to request a meeting on July 13, 2018. (PX1309 (Altria) at 002).

Response to Proposed Finding No. 664:

Respondents have no specific response except to clarify that the planned July 13, 2018 meeting discussed in PX1309 was later canceled. (*See* RX1170 (Altria) at 001).

665. On June 14, 2018, Valani told Devitre that he would call that evening. (PX2388 (JLI) at 001).

Response to Proposed Finding No. 665:

Respondents have no specific response.

666. On June 15, 2018, Devitre emailed Valani to ask if he was available to speak in the next few hours. (PX2389 (JLI)). After an exchange of emails, Valani wrote that he would call Devitre on the evening of June 16, 2018. (PX2389 (JLI)).

Response to Proposed Finding No. 666:

Respondents have no specific response.

667. Altria and JLI planned to have a meeting on July 13, 2018. (PX1195 (Altria) at 001, 006). On June 18, 2018, Altria's PWP adviser Wappler emailed JLI's Goldman Sachs' adviser Gross to confirm the planned meeting between JLI and Altria on July 13, 2018, noting that for Altria, Willard, Gifford, and Crosthwaite planned to attend. (PX2446 (JLI) at 002). Wappler also noted that he and Gross had discussed Burns, Valani, and Pritzker attending the planned July 13, 2018 meeting for JLI. (PX2446 (JLI) at 002).

Response to Proposed Finding No. 667:

The Proposed Finding is incomplete and misleading without additional context. The planned July 13, 2018 meeting discussed in PX1309 was later canceled. (*See* RX1170 (Altria) at 001). Respondents also note that the presentation prepared in advance of the planned July 13, 2018 meeting, attached to PX1195 and cited by Complaint Counsel, discusses several key issues in the negotiations—valuation, size of equity stake, deal payment structure, governance/control, IPO rights, and more—but makes no mention of any noncompete agreement or of the state of Altria's existing e-vapor products in the event of a transaction. (*See* PX1195 (Altria) at 007-15).

D. DEAL NEGOTIATIONS CONTINUED IN JULY 2018, WITH JLI SENDING THE FIRST DRAFT TERM SHEET ON JULY 30, 2018

1. Altria and JLI Communications Increased Leading up to the July 30, 2018 Term Sheet

668. JLI and Altria negotiators communicated a number of times in July 2018, leading up to JLI sending the July 30, 2018 initial term sheet. (*See* CCFF ¶¶ 669-79, below).

Response to Proposed Finding No. 668:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 669-79, Respondents incorporate their responses to those Proposed Findings herein.

669. On July 9, 2018, JLI's Pritzker emailed Altria's Willard and Gifford to tell them that JLI had to cancel the planned July 13, 2018, meeting. (PX4390 (Altria)). Pritzker and Willard arranged to speak by phone the next day, with Valani and Burns joining as well. (PX4390 (Altria)).

Response to Proposed Finding No. 669:

Respondents have no specific response except to clarify that Gifford also joined the call. (*See* RX1170 (Altria) at 001 (email from Pritzker thanking Willard and Gifford for the call)).

670. On July 10, 2018, Altria board member Devitre and JLI's Valani spoke by phone. (PX4374 (Altria) at 005) (Devitre phone records)).

Response to Proposed Finding No. 670:

Respondents have no specific response except to note that Complaint Counsel adduced no evidence of what the call was about, and it declined to ask Devitre or Valani about it. Additionally, Respondents note that Complaint Counsel declined to call Devitre as a witness at trial or to seek his deposition after filing the Complaint in this matter.

671. On July 18, 2018, JLI's Goldman Sachs adviser Peter Gross called Altria CEO Willard and indicated that another major tobacco company was "willing to buy a minority stake" in JLI. (PX3183 (Altria)).

Response to Proposed Finding No. 671:

Respondents have no specific response except to note that PX3183 is an email from Wappler reporting to other PWP team members that JLI has "another buyer willing to buy a minority stake at a $25bn valuation." (PX3183 (PWP) at 001). Respondents also note that Wappler's email does not state that the potential buyer was a tobacco company—it merely states JLI has "another buyer." (PX3183 (PWP) at 001).

672. On July 19, 2018, Pritzker emailed Willard that he was available to talk that afternoon or evening, or the next morning. (PX2329 (JLI)). Pritzker and Willard had a 25-minute phone call on July 19, 2018. (PX4376 (Altria) at 002 (Willard phone records).

Response to Proposed Finding No. 672:

Respondents have no specific response.

673. On July 24, 2018, Altria's PWP adviser, Wappler, emailed Willard and said he received the update that Willard was planning to speak to JLI adviser Gross regarding JLI's valuation. (PX3170 (PWP) at 001). Wappler's email included some valuation-related discussion topics for Willard to consider covering with Gross. (PX3170 (PWP) at 001).

Response to Proposed Finding No. 673:

Respondents have no specific response except to note that Wappler sent the "valuation-related discussion topics" for Willard's planned discussion with Gross shortly after Altria learned that "another buyer" had offered $25 billion for a minority stake in JLI, according to Wappler's July 18 email discussed above. (*See* PX3183 (PWP) at 001; CCFF ¶ 671).

674. On July 26, 2018, JLI's board discussed a proposed transaction with Altria, and the board meeting minutes stated:

> Mr. Pritzker, with input from Mr. Valani presented on the status of Project Richard, focusing on recent conversations and exchanges with Richard, who had presented revised terms for Richard's proposed investment. As part of this presentation, Mr. Pritzker and Mr. Valani described in detail Richard's changes to its previous non-binding, high-level positions and the reasons provided for same, as well as highlighted the elements of such positions that were unchanged. The Board, then discussed the terms of a possible response to certain elements of Richard's changed positions and considered a draft Summary of Terms (the "Summary of Terms"), a copy of which had been circulated to the Board prior to the meeting. Mr. del Calvo explained that the Summary of Terms was intended to be responsive to the positions taken by Richard. An interactive discussion followed. Mr. Gross and Mr. Ryan (the "Goldman Representatives") then joined the meeting telephonically. They described to the Board their recent exchanges with Richard and its representatives and then presented to the Board their thoughts on the terms presented by Richard. (PX2117 (JLI) at 019).

Response to Proposed Finding No. 674:

The Proposed Finding is incomplete and misleading without additional context, as Complaint Counsel's quoted portion omits some of the necessary context included in the JLI Board meeting minutes. The minutes continued:

> As part of this presentation, they [the Goldman Representatives] explained in detail the basis of their analysis and conclusions. The Board asked the Goldman Representatives a number of questions, including how Richard's proposed valuation compared with the Company's other financing alternatives, such as a private placement later in the year or a future IPO, and strategic alternatives. The

> Goldman Representatives were also asked to discuss in detail their thoughts regarding Project Bobby. Mr. Gross responded to these questions in detail and an interactive discussion followed, after which the Goldman Representatives were excused from the meeting and the Board continued its deliberations.
>
> The Board then discussed the key terms of the proposed response to Richard and, in reliance on the advice received from the Goldman Representatives and counsel, input from management and its understanding of the status of the Company and its prospects going forward (based in part on the analysis presented at the preceding Board meeting) and other factors, achieved a consensus on same. Ultimately, the Board concluded that a further oral discussion of high level terms with Richard was appropriate given the nature of the non-binding positions outlined by Richard and agreed on an outline of a proposed high level, non-binding response to Richard. Mr. Pritzker and Mr. Valani were authorized to communicate the same to Richard.

(PX2117 (JLI) at 19-20). There is no evidence that, at the meeting, the Board discussed the proposed noncompete or what would happen to Altria's existing e-vapor products in the event of a transaction.

675. In a July 27, 2018 email to Pritzker, JLI's Goldman Sachs adviser Peter Gross wrote that he was "under the impression that [Altria] would just shut down Mark 10." (PX2330 (JLI) at 001).

Response to Proposed Finding No. 675:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, despite Complaint Counsel's repeated reliance on this isolated line from Gross's email, (*see, e.g.*, Tr. 39), it declined to call Gross as a witness at trial so that the Court could hear from Gross directly.

Second, Complaint Counsel ignores Gross's deposition testimony explaining that he had not heard from anyone, either at Altria or JLI, that Altria was planning to "shut down" MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, as Pritzker explained at trial, he did not know where Gross had "got[ten] any of these ideas"; no one, including Gross, had ever told Pritzker that Altria would discontinue any products. (Pritzker (JLI) Tr. 796).

Third, Complaint Counsel takes this single line of Gross's email out of context. Gross's email continued: "We don't want them thinking that they will receive any consideration for co[n]tributing it to newco." (PX2330 (JLI) at 001). Gross's focus was on whether Altria would contribute its e-vapor products to JLI in exchange for payment or other consideration from JLI. Gross explained in his deposition that as an investment banker, his focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross testified, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38). Because Gross had "heard . . . that [Altria's e-vapor] products, including MarkTen, were inferior products that had no traction in the market," "[w]hat [he] wanted to avoid was Altria believing that they could" pay a lower price in exchange for contributing their "inferior products" to JLI. (PX7043 Gross (Goldman Sachs) Dep. at 36, 38). Gross "assumed [Altria] attributed no value to MarkTen" based on the "considerable sum" it was willing to pay for JUUL. (PX7043 Gross (Goldman Sachs) Dep. at 34).

Finally, Gross's email must be read in context with Pritzker's response: "I think they may need to sell it." (PX2330 (JLI) at 001). As Pritzker explained at trial, "by 'sell it,' what [he] was referring to was divestiture, . . . selling the product to another company so that those products would remain in the market." (Pritzker (JLI) Tr. 680). This is consistent with Pritzker's expectation that "the FTC would require a divestiture and that the product would then stay in the market with a different ownership," and that Altria should be obligated to cooperate with the FTC in that regard. (Pritzker (JLI) Tr. 681; *see also* Pritzker (JLI) Tr. 797 ("I didn't understand where [Gross] was coming from with this notion of receiving consideration for contributing, because, as I testified, the company didn't want them. . . . [M]y response was, as I testified, I assumed from

the beginning that divestiture was going to be the appropriate thing and that which the FTC would be likely to require or be the right thing in any event."); *see also, e.g.*, RFF ¶¶ 1208-14).

676. Pritzker responded, "I think they may need to sell it." (PX2330 (JLI) at 001). "They" refers to Altria and "it" refers to Altria's competitive products. (Pritzker (JLI) Tr. 797-98 (discussing PX2330 (JLI) at 001)).

Response to Proposed Finding No. 676:

The Proposed Finding is incomplete and misleading without the additional context of Pritzker's full response, particularly to the extent Complaint Counsel suggests it was Pritzker's opinion that Altria's products were "competitive." As Pritzker testified at trial:

> [A.] And so what I meant by that was "they," meaning Altria, and "sell it," meaning that they would need to sell those products into the market.
>
> Q. And I don't want to be too technical about exact verbiage when you're writing a short email late at night, but could you tell the Court why you chose to say they may "need" to sell it? What did you mean by that?
>
> A. Again, it was late at night, but I know what I meant was need, meaning the -- I assumed that the FTC would require as part of this transaction that products that [Altria was] selling that [FTC] might deem to be competitive would need to be sold to another owner so that those products would not be discontinued but would remain in the market.
>
> Q. And so your prediction was that that would be a requirement that the FTC would impose on JLI if it went through -- or on Altria if it went through with this transaction. Do I have that correct?
>
> A. Yeah. I thought that was almost certainly what we would be looking at.

(Pritzker (JLI) Tr. 797-98).

677. On July 28, 2018, Pritzker and Willard spoke on the phone. (PX2305 (JLI); PX2304 (JLI); PX4376 (Altria) at 002 (Willard phone records)).

Response to Proposed Finding No. 677:

Respondents have no specific response except to note that the phone call lasted just seven minutes, (PX4376 (Altria) at 002), and Complaint Counsel adduced no evidence of what the call was about, (CC Exhibit Index at 43, 69).

678. On July 29, 2018, JLI's board discussed in detail the status and terms of the proposed transaction with Altria. (PX2117 (JLI) at 022). The board meeting minutes state:

> Initially, Mr. Pritzker made a presentation to the Board regarding his discussions with Richard since the preceding Board meeting. A discussion followed, during which the Board covered in detail the status of the Richard negotiations and the terms of the proposed investment from, and strategic relationship with, Richard. Mr. Pritzker recommended as a next step that the Company finalize and send to Richard a non-binding Summary of Terms, setting forth the Company's current position on the proposed transaction with Richard.
>
> Mr. del Calvo then presented to the Board revisions that had been made to the Summary of Terms which had been previously circulated to the Board on July 26, 2018. He noted that a draft Summary of Terms, as so revised, had been circulated to the Board prior to this meeting. Mr. del Calvo also noted that such revisions reflected input from Mr. Pritzker (based on his conversations with Richard), outside counsel, management and others. (PX2117 (JLI) at 022).

Response to Proposed Finding No. 678:

Respondents have no specific response except to note that the Board meeting minutes continue beyond Complaint Counsel's quoted section, stating that the Board discussed the proposed changes and ultimately requested that counsel prepare for the Board's review a further revised version of the Summary of Terms reflecting the Board's comments from the meeting. (PX2117 (JLI) at 022). There is no evidence that, at the meeting, the Board discussed the proposed noncompete or what would happen with Altria's existing e-vapor products in the event of a transaction. (*See* PX2117 (JLI) at 022).

679. On July 30, 2018, JLI's board met to consider "revisions that had been made, at the direction of the Board since its last meeting, to the proposed non-binding Summary of Terms []." (PX2117 (JLI) at 024). At the conclusion of the meeting, "the Board authorized Mr. Pritzker to forward the Summary of Terms as so revised to [Altria] and continue discussions with [Altria], together with Mr. Valani and Mr. Burns, regarding a potential investment and strategic transaction on that basis." (PX2117 (JLI) at 024).

Response to Proposed Finding No. 679:

Respondents have no specific response except to note that there is no evidence that, at the meeting, the Board discussed the proposed noncompete or what would happen with Altria's existing e-vapor products in the event of a transaction. (*See* PX2117 (JLI) at 024).

2. JLI's July 30, 2018 Term Sheet Required Altria to Dispose of Its E-Cigarette Assets and to Refrain from Competing in E-Cigarettes

680. On July 30, 2018, JLI sent Altria the first term sheet. (*See* CCFF ¶¶ 681-88, below). JLI's July 30, 2018 term sheet required Altria to get rid of its existing e-cigarette products and assets by divesting them, contributing them, or ceasing to operate them. (*See* CCFF ¶¶ 684-85, below). The July 30, 2018 term sheet also included a non-competition provision requiring Altria to refrain from competing in e-cigarettes. (*See* CCFF ¶ 686, below).

Response to Proposed Finding No. 680:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The July 30 term sheet did not "require[] Altria to get rid of" its products. Instead, the "Antitrust Clearance Matters" section of the term sheet proposed steps for the treatment of Altria's existing e-vapor assets following an investment in the context of FTC review of the investment, for the purpose of complying with any FTC requirements and facilitating HSR clearance for the transaction. (PX1300 (Altria) at 004-05; Pritzker (JLI) Tr. 690, 811; *see also* RFF ¶¶ 772-86).

By contrast, the July 30 term sheet included a proposed noncompete, located in the "Richard Support Obligations" section of the term sheet, that expressly contemplated that Nu Mark could continue to sell "MarkTen and MarkTen Elite prior to their divestiture or contribution as described above" in the Antitrust Clearance section. (PX1300 (Altria) at 005-06; Pritzker (JLI) Tr. 821-23; *see also* RFF ¶¶ 787-91).

Finally, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 681-88, Respondents incorporate their responses to those Proposed Findings herein.

681. On July 30, 2018, JLI's Pritzker sent Altria's Willard a Summary of Terms on behalf of JLI's negotiating team. (PX1300 (Altria) at 001-02; PX2173 (JLI) at 001-02; Pritzker (JLI)

Tr. 693). Pritzker reviewed the Summary of Terms before sending it. (Pritzker (JLI) Tr. 693).

Response to Proposed Finding No. 681:

Respondents have no specific response.

682. Prior to sending the July 30, 2018 Summary of Terms, Pritzker told Altria that he would be sending a term sheet. (Pritzker (JLI) Tr. 803-04).

Response to Proposed Finding No. 682:

Respondents have no specific response.

683. The July 30, 2018 Summary of Terms was the first term sheet exchanged between JLI and Altria. (Pritzker (JLI) Tr. 804).

Response to Proposed Finding No. 683:

Respondents have no specific response.

684. The July 30, 2018 Summary of Terms that Pritzker sent to Willard included the following term:

> Promptly and in no event later than nine months following the Purchase, subject to the license referenced above, Richard [Altria] will divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, then cease to operate), all Richard [Altria] assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed, or has under development. (PX1300 (Altria) at 005).

Response to Proposed Finding No. 684:

Respondents have no specific response except to note that: (1) this language was a proposal drafted by counsel in a nonbinding term sheet, not an agreement between the parties, (*see* Pritzker (JLI) Tr. 789 (explaining "the lawyers drafted all the letters and the term sheets"); Pritzker (JLI) Tr. 814 (explaining that "between a term sheet and the final deal," "terms are fluid and subject to significant . . . expansion"); PX1300 (Altria) at 002 n.1 (stating the term sheet "is illustrative but not definitive")); and (2) the provision appeared in the "Antitrust Clearance Matters" section of the draft term sheet, and it reflected steps that JLI thought Altria might need to take in the context

of FTC review in order to obtain HSR clearance, (PX1300 (Altria) at 004-05; *see also* Pritzker (JLI) Tr. 689 ("The goal of this provision was that -- that Altria agree, as we would, that if the FTC were to require any of the above, that it would agree to do so as part of an FTC process following an acquisition."); RFF ¶¶ 772-86). Notably, the two bullet points immediately below this term state: (1) "Richard [Altria] and Jack [JLI] would be required to use reasonable best efforts to seek Antitrust Clearance for a period of at least nine months after the Purchase"; and (2) "During the Antitrust Clearance process, Richard [Altria] and Jack [JLI] will cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in Richard's [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005; *see also* RFF ¶ 784).

685. "Richard" refers to Altria, and "Jack" refers to JLI. (Pritzker (JLI) Tr. 688-89). "Field" is defined as "vapor-based electronic nicotine delivery systems." (PX2173 (JLI) at 004). The word "contribute" referred to Altria selling or granting to JLI its e-cigarette products. (Pritzker (JLI) Tr. 689-90).

Response to Proposed Finding No. 685:

The Proposed Finding is incomplete and misleading regarding the meaning of "contribute." As Pritzker testified, "when we referred to 'contribute,' what we were talking about was the possibility that Altria would, in fact, sell or grant to JLI those products and that JLI would operate them or do something with them," (Pritzker (JLI) Tr. 690), but only *if required by the FTC*, (Pritzker (JLI) Tr. 689 ("The goal of this provision was that -- that Altria agree, as [JLI] would, that if the FTC were to require any of the above, that it would agree to do so as part of an FTC process following an acquisition.")).

686. The July 30, 2018 term sheet included a term that stated:

> 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 or contribution as described above)." (PX1300 (Altria) at 006)).

Response to Proposed Finding No. 686:

Respondents have no specific response except to note that the noncompete and carve-out provision was included in the "Richard Support Obligations" section of the term sheet, which detailed various support services that JLI proposed Altria would provide to JLI, such as regulatory assistance with JLI's PMTAs. (PX1300 (Altria) at 005-06). As both JLI and Altria witnesses repeatedly testified, JLI requested the noncompete provision to protect its proprietary and confidential information, which Altria would have access to through its provision of services to JLI and seats on JLI's Board, from potential misuse. (*See, e.g.*, Pritzker (JLI) Tr. 668-69, 674-75, 821-22; Valani (JLI) Tr. 908; PX7021 Pritzker (JLI) Dep. at 70; PX7009 Burns (JLI) IHT at 138; PX7035 Masoudi (JLI) Dep. at 129-30; *see also* PX7031 Willard (Altria) Dep. at 229 ("[JLI's] real interest in -- in this provision not to compete was really more related to the future. They didn't want us to invest in JUUL, learn a whole lot about their product and what made it successful, and then, separate from our investment in JUUL, go out and create an e-vapor business based on their information, and that was a fairly reasonable expectation on their part."); RFF ¶¶ 1178-88).

687. Altria's and JLI's final transaction agreement specifies that Altria is prohibited from competing in all aspects of the e-cigarette business, including research and development, for an initial term of six years, with very limited exceptions. (*See* Section III.A.1. at ¶¶ 38-40, above).

Response to Proposed Finding No. 687:

The Proposed Finding is incomplete, inaccurate, and misleading without additional context. *First*, the length of the noncompete was expressly tied to the provision of services: Altria agreed "not to, directly or indirectly[,] . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" *while the Services Agreement remains in effect*. (PX1276 (JLI) at 025 § 3.1(a)). If the Services Agreement expired or was terminated, the noncompete provision would terminate as well. (PX1276 (JLI) at 025 § 3.1(a); *see also* RFF ¶ 1128). The

noncompete provision in the final Relationship Agreement is thus consistent with JLI's concern that Altria's provision of services—especially regulatory assistance in connection with the preparation and filing of JLI's PMTAs—would afford Altria access to JLI's proprietary information. (*See* RFF ¶¶ 1178-88).

Second, the noncompete provision in the final agreement includes a carve-out permitting Altria to "engage in the business relating to [its existing e-vapor products] . . . as such business is presently conducted," pending HSR approval. (PX1276 (JLI) at 026 § 3.1(a); Willard (Altria) Tr. 1194-95). Indeed, every term sheet and draft deal document exchanged between the parties contained a carve-out for Altria's existing products. (RFF ¶ 1192). As every JLI witness involved in the negotiations testified, JLI was not concerned about Altria's existing e-vapor products, and the noncompete provision did not apply to them. (*See* RFF ¶¶ 1189-202). Although Altria had withdrawn MarkTen and MarkTen Elite from the market by the time of the transaction, JLI believed that the final agreement's carve-out provision permitted Altria to bring back the products it had withdrawn from the market, (Pritzker (JLI) Tr. 879), which was permitted under the Deeming Rule because the products had been on the market as of August 8, 2016, (Murillo (Altria/JLI) Tr. 3022). And Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84; *see also* RFF ¶ 1130).

Third, the noncompete provision was limited to Altria's activities in "the e-Vapor Business," and therefore did not limit Altria's ability to market other innovative products such as IQOS and On! (*See* PX1276 (JLI) at 025 § 3.1(a); Willard (Altria) Tr. 1195; Gifford (Altria) Tr. 2709-10; *see also* RFF ¶ 1129).

688. After Altria's Willard received the July 30, 2018 term sheet from JLI, he sent it to his Altria colleagues Gifford, Garnick, and Crosthwaite. (PX1300 (Altria) at 001). Willard, Gifford, Garnick, and Crosthwaite reviewed and discussed the term sheet. (PX7004 (Willard (Altria), IHT at 167-68)).

Response to Proposed Finding No. 688:

Respondents have no specific response.

E. DEAL NEGOTIATIONS INTENSIFIED IN EARLY AUGUST 2018 WITH THE EXCHANGE OF ADDITIONAL TERM SHEETS

1. Altria and JLI Negotiators Met at the Park Hyatt in Washington, D.C., on August 1, 2018, and JLI Subsequently Sent a Revised Term Sheet

689. JLI and Altria negotiators met on August 1, 2018 at the Park Hyatt hotel in Washington, D.C., to discuss JLI's July 30, 2018 term sheet. (*See* CCFF ¶¶ 690-91, below). On August 4, 2018, JLI sent a revised term sheet. (*See* CCFF ¶¶ 692-94, below).

Response to Proposed Finding No. 689:

The Proposed Finding is inaccurate and misleading to the extent it suggests that JLI and Altria discussed every provision of the July 30 term sheet at the August 1 meeting. (*See* RRFF ¶ 691). Additionally, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 690-94, Respondents incorporate their responses to those Proposed Findings herein.

690. On the evening of August 1, 2018, Altria's Willard and Gifford met with JLI's Pritzker, Valani, and Burns at the Park Hyatt hotel in Washington, D.C. (Pritzker (JLI) Tr. 703-04; PX2173 (JLI) at 001; PX7031 (Willard (Altria), Dep. at 174-75)). The group met and had dinner in Pritzker's hotel suite. (PX2310 (JLI); PX7031 (Willard (Altria), Dep. at 174-75)). Burns arrived at the meeting after the others. (PX2173 (JLI) at 001; PX7031 (Willard (Altria), Dep. at 174-75)).

Response to Proposed Finding No. 690:

Respondents have no specific response.

691. The participants at the August 1, 2018, meeting at the Park Hyatt discussed the July 30, 2018, term sheet. (Pritzker (JLI) Tr. 703-04; PX7032 (Valani (JLI), Dep. at 56); PX7009 (Burns (JLI), IHT at 135-36)).

Response to Proposed Finding No. 691:

The Proposed Finding is inaccurate and misleading to the extent it suggests the parties discussed the term sheet in its entirety. (*See* PX7031 Willard (Altria) Dep. at 177-78; *see also* RFF ¶¶ 793-99). As Willard explained, the August 1 meeting "was not a meeting designed to go

through in detail [JLI's] term sheet." (PX7031 Willard (Altria) Dep. at 177). Instead, the parties discussed at a high level "some of the most important terms between the two sides, . . . to assess whether or not there was enough common ground to proceed." (PX7031 Willard (Altria) Dep. at 177-78).

The discussion was "[t]ense" and focused on issues of control and voting power. (RX1774 (PWP) at 001; PX7011 Valani (JLI) IHT at 85-87). For Altria, the ownership and control terms in JLI's initial term sheet were "insult[ing]," "outrageous," and "appalling." (Garnick (Altria) Tr. 1745; Gifford (Altria) Tr. 2764; *see also* Pritzker (JLI) Tr. 825 ("[Altria was] very unhappy with the term sheet.")). According to Gifford, the parties "barely got past" the proposed five percent voting power for a 45 percent economic interest, which was "a huge sticking point." (PX7040 Gifford (Altria) Dep. at 143). "[I]t basically became a stand-still. [JLI] didn't give, and [Altria] didn't give." (Gifford (Altria) Tr. 2770). Pritzker similarly testified that Altria was "most unhappy" about "[t]he notion of buying 45 percent of the company and getting 5 percent of the vote." (Pritzker (JLI) Tr. 825). Altria also was "not happy about no control." (Pritzker (JLI) Tr. 826). "[T]heir goal was to acquire the company completely at some point, and [JLI was then] making it clear that that was not going to be possible." (Pritzker (JLI) Tr. 826; PX7021 Pritzker (JLI) Dep. at 107-08).

There is no evidence that the parties discussed the noncompete or the antitrust clearance provisions at the August 1 meeting. Willard does not believe the parties discussed the divest/contribute/"cease to operate" provision at all at the meeting. (PX7031 Willard (Altria) Dep. at 184-86). Similarly, an August 1 email from Valani summarizing Altria's comments from the meeting makes no mention of the noncompete. (PX2331 (JLI) at 001). Instead, Valani's summary reflects that Altria wanted, among other things, protections against share dilution and to reduce

from seven to five years the time period before which it could make an offer for a majority share of JLI. (PX2331 (JLI) at 001).

692. On August 3, 2018, Pritzker wrote to Willard that JLI was ready to send responses in a draft of the term sheet to specific issues raised by Altria. (PX2311 (JLI)). Pritzker asked to talk before sending it, and on August 4, 2018, Willard sent Pritzker his phone number. (PX2311 (JLI)).

Response to Proposed Finding No. 692:

Respondents have no specific response.

693. Pritzker and Willard spoke prior to Pritzker sending the revised term sheet, and Willard agreed with Pritzker "that an in person meeting asap is called for if we are going to get together." (PX2387 (JLI) at 001). Pritzker told Willard that JLI had taken its "best shot at responding to their concerns, and that we would appreciate any comments to our [term sheet] before or as part of a meeting." (PX2387 (JLI) at 001).

Response to Proposed Finding No. 693:

Respondents have no specific response except to note that Pritzker described his conversation with Willard as a "[s]hort friendly call" in the email cited by Complaint Counsel. (PX2387 (JLI) at 001). There is no evidence that Pritzker and Willard discussed the proposed noncompete or the treatment of Altria's existing e-vapor products in the event of a transaction.

694. On August 4, 2018, Pritzker sent Willard a revised term sheet. (PX2570 (JLI) at 001). One of the revisions was that the word "shutdown" was added to the bullet that reads:

> "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 described above)." (PX2570 (JLI) at 001, 007 (highlighting and underlining of the word "shutdown" in original); Pritzker (JLI) Tr. 704-06) (explaining that highlighting of the word "shutdown" indicates that it was added to the most recent draft of the term sheet).

Response to Proposed Finding No. 694:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel did not ask any Altria witnesses at trial or in depositions whether they discussed this revision with JLI, and there is no evidence that it was discussed. (*See* RFF ¶ 797). Pritzker testified

that the addition of "shutdown" was not a subject of discussion with Altria, and he did not remember why the word was added. (Pritzker (JLI) Tr. 829-30). Based on the process of the revisions, however, Pritzker believed a lawyer added the word "to make this draft compatible" with the three ranked scenarios in the divest/contribute/"cease to operate" Antitrust Clearance provision. (Pritzker (JLI) Tr. 829-30). The divest/contribute/"cease to operate" provision in the Antitrust Clearance Matters section of the August 4 term sheet remained unchanged from the July 30 term sheet. (*Compare* PX2570 (JLI) at 005, *with* PX1300 (Altria) at 004-05; *see also* RFF ¶¶ 802-03).

Notably, August 4 was the last proposed term sheet to make any reference to "cease to operate" or "shutdown"; those terms did not appear in any subsequent draft term sheet, draft deal document, or the final agreement. (*See* PX1432 (Altria) at 021-22, 024 (Aug. 19 term sheet); PX1269 (Altria) at 006, 008 (Oct. 15 term sheet); PX2503 (JLI) at 027-28, 030 (Oct. 28 term sheet); RX0285 (Altria) at 022, 024 (Oct. 30 term sheet); RX0838 (Altria) at 327-28, 373 (Nov. 15 draft purchase agreement); PX2141 (JLI) at 036-37 (Dec. 20 final purchase agreement)). Burns testified in his deposition that he does not recall the parties ever discussing "ceasing to operate" after it was removed from the term sheet. (PX7025 Burns (JLI) Dep. at 207-08; *see also* RFF ¶ 804).

2. Altria's Talking Points for an August 6, 2018 Call with JLI State That Altria Will "Potentially Exit" Its Own E-Vapor Business If It Does a Transaction with JLI

695. On August 6, 2018, Altria's Willard and Gifford spoke to JLI's Pritzker and Valani by phone. (*See* CCFF ¶ 702, below). Willard's draft talking points for the call state that Altria has accommodated JLI by "demonstrating flexibility with [Altria's] existing e-vapor business," and that Altria will "potentially exit [it's] own e-vapor business" if Altria and JLI do a transaction. (*See* CCFF ¶¶ 696-701, below).

Response to Proposed Finding No. 695:

The Proposed Finding is incomplete and misleading without additional context. In particular, the Proposed Finding omits that the term sheets exchanged by the parties on July 30 and August 4 both contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 004-05; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802-03). Such divestiture or contribution would amount to Altria eventually "exit[ing]" its e-vapor business, but only after the transaction as part of the FTC review process.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 696-702, Respondents incorporate their responses to those Proposed Findings herein.

696. On August 5, 2018, Altria in-house attorney Carmine ("Anthony") Reale sent Willard, Garnick, Gifford, and Crosthwaite talking points for Willard's upcoming call with JLI. (PX1390 (Altria) at 001). The talking points were drafted by Altria's adviser PWP, and the talking point forwarded to Willard, Garnick, Gifford, and Crosthwaite incorporated edits suggested by Reale. (PX1390 (Altria) at 001).

Response to Proposed Finding No. 696:

Respondents have no specific response except to note that the Proposed Finding omits the context of the draft talking points, which was to secure minority protections for Altria against a potential sale of JLI: "[T]here is one point that I wanted to discuss today because we consider it foundational… and it probably doesn't make sense to negotiate the other terms unless we agree on this particular item"; "The current term sheet assumes that the non-Altria shareholders can sell [JLI] without Altria's approval . . . . That's highly problematic for us." (PX1390 (Altria) at 003) (first ellipsis in original).

697. Willard testified that he had no reason to doubt that the August 5, 2018, talking points accurately summarized the state of the Altria-JLI negotiations at the time they were circulated. (Willard (Altria) Tr. 1191-92 (discussing PX1390 (Altria) at 003)).

Response to Proposed Finding No. 697:

Respondents have no specific response except to note that Willard testified: "I don't have any conflicting information, but all I have is this document. So I don't have any reason to doubt that. I don't remember the exact terms at this stage of the negotiation, because, of course, we went through a number of different deal structures and terms. But I don't have any reason to doubt his -- his statement that we had, at least in some form, met their requested valuation of $28 billion." (Willard (Altria) Tr. 1191-92).

Willard also testified that the talking points included in this document reflected the viewpoints "of the parties who drafted this document"—not Willard or the other principal Altria negotiators—and he could not recall whether specific points "w[ere] ultimately something that we shared on the -- on the phone call." (Willard (Altria) Tr. 1191; *see also* PX7004 Willard (Altria) IHT at 185 ("At this stage, I don't know whether we had a dialogue related to this script or not.")).

698. Altria's August 5, 2018 draft talking points for Willard state: "If we establish this partnership, then we expect that Altria will: . . . potentially exit our own vapor business . . . ." (PX1390 (Altria) at 003).

Response to Proposed Finding No. 698:

The Proposed Finding is incomplete and misleading without additional context. *First*, the reference that Altria would "potentially exit [its] own vapor business," (CCFF ¶ 698), is consistent with the term sheets exchanged by the parties on July 30 and August 4, which contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 004-05; PX2570 (JLI) at 005-06; *see also*

RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802-03). Such divestiture or contribution would amount to Altria eventually "exit[ing]" its e-vapor business, but only after the transaction as part of the FTC review process. Moreover, Complaint Counsel offers no evidence that an agreement was reached on this bullet.

Second, the Proposed Finding omits the context of the draft talking points, which was unrelated to the noncompete and the treatment of Altria's existing products in the event of a transaction. (PX1390 (Altria) at 003). The purpose of the call was to secure minority protections for Altria against a potential sale of JLI: "[T]here is one point that I wanted to discuss today because we consider it foundational… and it probably doesn't make sense to negotiate the other terms unless we agree on this particular item"; "The current term sheet assumes that the non-Altria shareholders can sell [JLI] without Altria's approval . . . . That's highly problematic for us." (PX1390 (Altria) at 003) (first ellipsis in original). Indeed, the full sentence of the quote excerpted by Complaint Counsel makes this context clear: "If we establish this partnership, then we expect that Altria will: accelerate [JLI's] growth, contribute meaningful synergies, potentially exit our own vapor business, and cannibalize our own combustible business – and then could potentially be forced to sell our stake in [JLI] to a 3rd party, at a valuation to a large degree the result of our various contributions to [JLI]." (PX1390 (Altria) at 003).

Finally, the draft talking points were circulated the day before the call and are therefore not a record of what Willard said on the call with JLI. To the contrary, Willard testified that the talking points included in this document reflected the viewpoints "of the parties who drafted this document"—not Willard or the other principal Altria negotiators—and he could not recall whether specific points "w[ere] ultimately something that we shared on the -- on the phone call." (Willard

(Altria) Tr. 1191 *see also* PX7004 Willard (Altria) IHT at 185 ("At this stage, I don't know whether we had a dialogue related to this script or not.")).

699. Altria's August 5, 2018 draft talking points for Willard also state: "I think you'll agree that Altria has come a long way to accommodate you in this process, including: . . . [Demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.]" (PX1390 (Altria) at 003-04 (brackets in original)).

Response to Proposed Finding No. 699:

The Proposed Finding is incomplete and misleading without additional context. The language here is consistent with the term sheets exchanged by the parties on July 30 and August 4, which contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 004-05; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802-03).

700. The August 5, 2018 draft talking points for Willard also state that Altria has come a long way to accommodate JLI by "meeting your requested valuation of $28 billion ($12.6 billion for 45%, US only, with Altria's operational support commencing immediately upon closing) [and by] [a]greeing to a minority stake instead of a controlling position." (PX1390 (Altria) at 003).

Response to Proposed Finding No. 700:

Respondents have no specific response.

701. On August 6, 2018, Garnick circulated his comments to the draft talking points. (PX1304 (Altria) at 003). The version Garnick circulated also included the statement that "[i]f we establish this partnership, then we expect that Altria will: . . . potentially exit our own vapor business . . . ." (PX1304 (Altria) at 003). The draft talking points circulated by Garnick state that if a deal does not work out, Altria and JLI should "shake hands, and agree to be competitors." (PX1304 (Altria) at 003).

Response to Proposed Finding No. 701:

The Proposed Finding is incomplete and misleading without additional context. *First*, regarding "potentially exit[ing]" the e-vapor business, the term sheets exchanged by the parties on

July 30 and August 4 both contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 004-05; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802-03). Such divestiture or contribution would amount to Altria eventually "exit[ing]" its e-vapor business, but only after the transaction as part of the FTC review process.

Second, Garnick's specific comment was: "[I]f you're unable to meet our ask on this point"—that is, the minority protections for Altria against the sale of JLI, the lack of which the talking points characterized as "unacceptable" and "a deal breaker"—"then it's time to break off these discussions, shake hands, and agree to be competitors." (PX1304 (Altria) at 003). In his deposition, Garnick explained what he meant by this statement: "[W]hen these talking points say, hey, if we can't make an agreement, we'll break this off and agree to be competitors, that's short for agree to continue being competitors, because we clearly were at this point in time." (PX7036 Garnick (Altria) Dep. at 57-58). As Garnick explained, under the terms of the investment being discussed at the time, "once there was HSR approval, we [Altria and JLI] would not have been competitors. So we were talking about a partnership that, with HSR approval, would have changed our status as competitors." (PX7036 Garnick (Altria) Dep. at 57). But if JLI was "unable to meet [Altria's] ask" regarding minority protections against a sale of JLI, those discussions about that potential partnership would cease. (PX1304 (Altria) at 003; PX7036 Garnick (Altria) Dep. at 57-58). Indeed, the full sentence of the quote excerpted by Complaint Counsel makes this context clear: "If we establish this partnership, then we expect that Altria will: accelerate [JLI's] growth, contribute meaningful synergies, potentially exit our own vapor business, and cannibalize our own

combustible business – and then could potentially be forced to sell our stake in [JLI] to a 3rd party, at a valuation to a large degree the result of our various contributions to [JLI]." (PX1304 (Altria) at 003).

702. On August 6, 2018, Willard and Gifford called Pritzker and Valani. (PX2312 (JLI); PX3202 (PWP)). Pritzker indicated to Willard that, assuming the parties could agree on a path forward, JLI wanted to meet "asap and negotiate the rest of the term sheet," even suggesting meeting the following weekend of August 11, 2018. (PX3202 (PWP)).

Response to Proposed Finding No. 702:

Respondents have no specific response except to note that on the call, Willard "indicated that [Altria] need[ed] to approve any potential sale of Tree in the future (i.e., not a [right of first refusal]—[Willard] indicated that [Altria] need[ed] to approve any sale transaction). Pritzker said he understood [Willard's] concern and would get back to [Altria] tomorrow." (PX3202 (PWP) at 001).

3. Altria's August 9, 2018 Term Sheet Strikes the Commitment to Divest, Contribute, or Cease to Operate Altria's E-Cigarette Assets

703. On August 8, 2018, Altria board member Devitre texted Willard: "I spoke to Riaz [Valani]. . . . He is ready to meet in SFO on Monday [August 13, 2018]. He sounds very eager to do a deal." (PX4167 (Altria) at 003).

Response to Proposed Finding No. 703:

Respondents have no specific response.

704. On August 9, 2018, Altria sent JLI a revised term sheet reflecting Altria's edits to JLI's term sheet. (*See* CCFF ¶ 705, below). Altria's August 9, 2018 term sheet removed the commitment for Altria to divest, contribute, or cease to operate its e-cigarette assets, and reserved the right to compete with existing and under development products prior to such time as the transaction received antitrust clearance. (*See* CCFF ¶¶ 706-07, below).

Response to Proposed Finding No. 704:

The Proposed Finding is inaccurate. The draft term sheet did not reserve the right to compete with existing and under development products "prior to such time as the transaction received antitrust clearance," (CCFF ¶ 704), but rather, "prior to the non-trademark IP license":

"[Altria] agrees to refrain from competing anywhere in the U.S. in the e-vapor business (other than with respect to existing and under development products *prior to the non-trademark IP license* as described above)." (PX2313 (JLI) at 017 (emphasis added)). The provision relating to the non-trademark IP license was, in turn, "[s]ubject to discussion between the parties." (PX2313 (JLI) at 014). Additionally, the August 9 term sheet added that the noncompete provision would "terminate upon the earliest of (i) failure to receive Antitrust Clearance, (ii) the expiration of the Services Term and (iii) if [Altria] ceases to own at least 20% of [JLI's] outstanding shares." (PX2313 (JLI) at 017).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 705-07, Respondents incorporate their responses to those Proposed Findings herein.

705. On August 9, 2018, Altria's Gifford sent JLI's Pritzker, Valani, and Burns a markup of JLI's term sheet. (PX1303 (Altria) at 001; PX2313 (JLI) at 001). Gifford wrote that the markup was to "serve as the basis for discussion at our upcoming meeting." (PX1303 (Altria) at 001; PX2313 (JLI) at 001).

Response to Proposed Finding No. 705:

Respondents have no specific response.

706. In Altria's August 9, 2018, markup to the term sheet, Altria struck out the entire provision requiring Altria to "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." (PX1303 (Altria) at 015; PX2313 (JLI) at 015; Pritzker (JLI) Tr. 707-08; Valani (JLI) Tr. 920-21).

Response to Proposed Finding No. 706:

Respondents have no specific response except to note that Altria's August 9 term sheet continued to propose that both parties would use "reasonable best efforts to seek Antitrust Clearance," adding that the "details related to such efforts" were "to be discussed by the parties." (PX2313 (JLI) at 015 (same document as PX1303 (Altria))). The term sheet also still required

Altria to "cooperate with the FTC and to agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2313 (JLI) at 015).

707. Altria also edited the non-compete clause, so that the clause appearing in Altria's August 9, 2018, term sheet read:

> Richard agrees to refrain from competing anywhere in the U.S. in the e-vapor business (other than with respect to existing and under development products prior to the non-trademark IP license described above). The non-compete will terminate upon the earliest of (i) failure to receive Antitrust Clearance; (ii) the expiration of the Services Term and (iii) if Richard ceases to own at least 20% of Jack's outstanding shares []. (PX1303 (Altria) at 017; PX2313 (JLI) at 017).

Response to Proposed Finding No. 707:

Respondents have no specific response.

708. The JLI board was disappointed with many of the terms contained in Altria's August 9, 2018, Revised Summary of Terms. (PX2117 (JLI) at 027-28 (Board Meeting Minutes, Aug. 9, 2018)).

Response to Proposed Finding No. 708:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that the JLI Board was "disappoint[ed]" by Altria's revisions to the "Antitrust Clearance Matters" or "Richard Support Obligations" sections of the August 9 term sheet. (*See* PX2117 (JLI) at 028). [redacted].

F. JLI PROVIDED A LIST OF BASIC CONDITIONS TO ALTRIA PRIOR TO THE AUGUST 18, 2018 MEETING BETWEEN ALTRIA AND JLI

709. Prior to finalizing a commitment to meet in person with Altria negotiators on August 18, 2018, in San Francisco, JLI sent Altria a list of "specific points" to make sure Altria understood where JLI would "need to draw the line." (*See* CCFF ¶¶ 710-27, below). One of JLI's specific points was that it had understood that Altria would only compete in e-cigarettes through JLI, and that it was "unacceptable" for Altria to retain any right to compete in e-cigarettes with existing products, products under development, or future products. (*See* CCFF ¶ 722, below). After JLI provided Altria with its list of specific points, Altria and JLI went forward with the August 18, 2018, meeting. (*See* CCFF ¶ 728, below).

Response to Proposed Finding No. 709:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. JLI's list did not say it was "'unacceptable' for Altria to retain any right to compete in e-cigarettes with existing products, products under development, *or* future products." (CCFF ¶ 709 (emphasis added)). To the contrary, the list made clear that JLI's concern with regard to the noncompete was related to *future* products, not Altria's existing products: "You have retained the right under certain circumstances to compete not only with existing Mark Ten products"—a right retained in every iteration of the term sheets drafted by either party pending HSR review, (*see* RFF ¶ 1192)—"but also with products under development and future products." (PX4171 (Altria) at 002). In other words, JLI took issue with Altria expanding the carve-out to apply not just to existing products (as JLI had proposed), but to future products as well. (PX4171 (Altria) at 002).

As both JLI and Altria witnesses repeatedly testified, JLI was concerned about Altria developing new products after becoming privy to JLI's proprietary information as a result of the transaction—but not Altria's existing products. (*See* RFF ¶¶ 1178-202). Pritzker explained that because Altria's employees would be "exposed to potential trade secrets, data, technology, information, as they provided regulatory services [to JLI, during] which they would see everything, it was not acceptable . . . for Altria to be developing products that might be incorporating" JLI's information. (Pritzker (JLI) Tr. 844; *see also* Valani (JLI) Tr. 933-34 (similar)). Pritzker went on to testify that he "would not have been worried about competition from MarkTen or MarkTen Elite as they were at that time"; instead, his concern was whether changes "might be made to those products," potentially as the result of confidential information Altria learned from JLI. (Pritzker (JLI) Tr. 895).

Further, Complaint Counsel's insinuation that because the August 18, 2018 meeting went forward there must have been an agreement for Altria to pull its e-vapor products is baseless. There is simply no evidence that JLI demanded, much less that Altria agreed, that Altria would pull its products as a precondition to the August 18 meeting. Indeed, such a theory is belied by the very documents Complaint Counsel rely on. As PX4171 makes clear, what JLI sought is a commitment from Altria that it would *divest* its existing e-vapor products if required by the FTC as part of the HSR clearance process following a transaction: "The commitment to divest Mark Ten has been stricken. This is not acceptable to us." (PX4171 (Altria) at 002). Notably, PX4171 made no mention of Altria striking "cease to operate" from the term sheet. (PX4171 (Altria) at 002). In addition, Willard does not "recall that [the] noncompete term was one that received significant face-to-face attention from [his] senior team or the JLI team." (Willard (Altria) Tr. 1223). "[T]here were a number of items that consistently, throughout the deal negotiation process, were viewed as important enough for [the parties] to have significant face-to-face negotiations on them, but they represented a subset of what was in the documents . . . ." (Willard (Altria) Tr. 1223). "[R]esolving some of the lesser issues, while they may have been included in something communicated to the whole team, was often delegated to more junior people." (Willard (Altria) Tr. 1223).

Additionally, Complaint Counsel offers no evidence that an agreement was reached on *any* of the "specific points" in JLI's list in advance of the meeting, or that JLI required such an agreement in order to meet; indeed, as PX1308 makes clear, Altria viewed JLI's list as "a list of matters to be discussed *on Saturday in SFO*," not demands that were to be met prior to the meeting. (PX1308 (Altria) at 001 (emphasis added)).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 710-28, Respondents incorporate their responses to those Proposed Findings herein.

710. On August 13, 2018, at 1:35am, Altria board member Devitre texted JLI's Valani:

> Spoke to Howard [Willard]. We are all set for meeting in SFO this coming weekend. I will be there. You and I should meet sometime this week and try to bake the cake before the weekend meeting. Then we can put icing on the cake on the weekend. Comprende? (PX4172 (Altria) at 001; Valani (JLI) Tr. 925).

Response to Proposed Finding No. 710:

Respondents have no specific response except to note that Complaint Counsel did not ask any witness to explain what this text meant, so there is no testimony in the record on this point.

711. In response to Devitre's text, Valani responded: "Funny I had the same idea. Let me figure out travel but thinking to stop in NYC Weds. Would that work?" (PX4172 (Altria) at 001; Valani (JLI) Tr. 925-26).

Response to Proposed Finding No. 711:

Respondents have no specific response.

712. At 6:30 P.M. PT on August 13, 2018, JLI's board met telephonically. (PX2117 (JLI) at 029). Pritzker and Valani provided a "description of a planned upcoming meeting between a Richard representative and Mr. Valani, which was intended to discuss open issues between the parties, whether they could be addressed and a process for considering and resolving same []." (PX2117 (JLI) at 029). Then the JLI board discussed "such issues, an approach to same and whether the parties' positions were irreconcilable." (PX2117 (JLI) at 029-30).

Response to Proposed Finding No. 712:

Respondents have no specific response except to note that the Board meeting minutes reflect that "[n]o action was taken" on this topic. (PX2117 (JLI) at 030).

713. On August 13, 2018, at 7:37pm, Pritzker emailed Willard and Gifford, copying Valani and Burns: "Howard/Billy: I gather Riaz met with Dinny and that the two of you and maybe Dinny as well may be interested in meeting with us in SF this Saturday. We are happy to do so, and provide lunch and entertainment if desired. Please let us know if you want to confirm and the best times for you." (PX2025 (JLI) at 002). "Riaz" refers to Valani and "Dinny" refers to Altria board member Devitre. (Pritzker (JLI) Tr. 708-10).

Response to Proposed Finding No. 713:

Respondents have no specific response.

714. On August 14, 2018, Willard responded, agreeing to meet in San Francisco the following Saturday (August 18). (PX2025 (JLI) at 001). Willard wrote that he planned for Gifford, Crosthwaite, and Devitre to attend the meeting with him from Altria. (PX2025 (JLI) at 001).

Response to Proposed Finding No. 714:

Respondents have no specific response.

715. Pritzker responded on August 14, 2018, writing:

> Howard/Billy: let's tentatively schedule a meeting in SF Saturday. Is it possible to start earlier, say 9AM? I hope this isn't too difficult considering travel times. We will arrange a location including break out space. Tomorrow night or Thursday morning we will be sending you our position on a number of specific points to make sure you understand where we will need to draw the line before finalizing a commitment to meeting. . . . (PX2025 (JLI) at 001).

Response to Proposed Finding No. 715:

Respondents have no specific response except to note that Pritzker's email continued: "Also, we believe we need to have counsel present with the goal of getting to an agreed upon term sheet in significant detail by the end of the weekend. Our thought is that we will include from our side our general counsel and no more than two outside lawyers and that you will include your legal team in proportion." (PX2025 (JLI) at 001).

716. Pritzker wanted to send Willard and Gifford JLI's "position on a number of specific points" because he wanted them to know some basic conditions that JLI had for a potential transaction. (Pritzker (JLI) Tr. 711).

Response to Proposed Finding No. 716:

Respondents have no specific response.

717. Willard responded to Pritzker on August 15, 2018, writing that "[w]e have arranged to be available in SF this Saturday at 9AM and we will add Murray Garnick our General Counsel and two of our deal lawyers to the meeting." (PX2025 (JLI) at 001).

Response to Proposed Finding No. 717:

Respondents have no specific response.

718. JLI's Burns forwarded Willard's email to Pritzker and Valani, writing "I wouldn't add lawyers to the meeting but would put them in the back rooms for support. Looks like we are a go pending Riaz's meeting today." (PX2025 (JLI) at 001).

Response to Proposed Finding No. 718:

Respondents have no specific response except to note that Valani testified that counsel was present in the room during the August 18 meeting. (PX7011 Valani (JLI) IHT at 101-02).

719. On August 15, 2018, Valani met with Devitre in Devitre's office in New York, starting around 4:15 or 4:30pm. (PX4172 (Altria) at 001-02 (Devitre phone records); PX1308 (Altria) at 001; PX7001 (Devitre (Altria) IHT at 93-95); Valani (JLI) Tr. 926-27 (discussing PX4171 (JLI) at 001)).

Response to Proposed Finding No. 719:

Respondents have no specific response.

720. On August 15, 2018, either prior to or during the meeting in Devitre's office, Valani emailed to Devitre the list of "specific points to make sure [Altria] understands where [JLI] will need to draw the line before finalizing a commitment to meeting," that Pritzker had told Willard would be forthcoming. (PX4171 (Altria) at 001-02; PX2025 (JLI) at 001; Valani (JLI) Tr. 929; Pritzker (JLI) Tr. 711; PX1308 (Altria) at 001-02); PX7001 (Devitre (Altria) IHT at 93-95)).

Response to Proposed Finding No. 720:

Respondents have no specific response.

721. The list of specific points that Valani sent to Devitre on August 15, 2018 set forth "foundational concepts that were important to JLI." (Valani (JLI) Tr. 929-32). JLI wanted to make sure that Altria was aligned with JLI on these foundational concepts prior to going forward with the August 18, 2018, meeting in San Francisco. (Valani (JLI) Tr. 929-32).

Response to Proposed Finding No. 721:

Respondents have no specific response except to note that there is no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting.

722. The list of specific points that Valani sent to Devitre on August 15, 2018 contained nine bullet points. (PX4171 (Altria) at 002-03). The second bullet point stated:

> 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. (PX4171 (Altria) at 002).

Response to Proposed Finding No. 722:

The Proposed Finding is incomplete and misleading to the extent Complaint Counsel insinuates that this bullet point required Altria to agree to pull its existing products as a precondition to the transaction. The above bullet point makes clear that JLI's concern with regard to the noncompete was related to *future* products, not Altria's existing products: "You have retained the right under certain circumstances to compete not only with existing Mark Ten products"—a right retained in every iteration of the term sheets drafted by either party pending HSR review, (*see* RFF ¶ 1192)—"but also with products under development and future products." (PX4171 (Altria) at 002). In other words, JLI took issue with Altria expanding the carve-out to apply not just to existing products (as JLI had proposed), but to future products as well. (PX4171 (Altria) at 002). As both JLI and Altria witnesses repeatedly testified, JLI was concerned about Altria developing new products after becoming privy to JLI's proprietary information as a result of the transaction—but not Altria's existing products. (*See* RFF ¶¶ 1178-202). Contrary to an agreement for Altria to pull its existing products, PX4171 makes clear that what JLI sought was a commitment from Altria that it would *divest* its existing e-vapor products if required by the FTC as part of the HSR clearance process following a transaction: "The commitment to divest Mark Ten has been stricken. This is not acceptable to us." (PX4171 (Altria) at 002). Notably, PX4171 made no mention of Altria striking "cease to operate" from the term sheet. (PX4171 (Altria) at 002).

Finally, Complaint Counsel offers no evidence that an agreement was reached on this bullet or *any* other of the "specific points" in JLI's list in advance of the August 18 meeting.

723. The final bullet in the list of specific points that Valani provided to Devitre read: "There are other matters on which we have fundamental disagreement, but we believe we need clarity on the above matters if there is to be any hope of a productive discussion this weekend." (PX4171 (Altria) at 003).

Response to Proposed Finding No. 723:

Respondents have no specific response except to note that there is no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting.

724. During their meeting on August 15, 2018, JLI's Valani discussed the list of JLI's specific points with Altria's Devitre in order to get "some verification from the Altria team that [] they were aligned with this prior to us sitting down again." (Valani (JLI) Tr. 932; PX7001 (Devitre (Altria) IHT at 96-97)).

Response to Proposed Finding No. 724:

The Proposed Finding is incomplete and misleading without additional context. Valani testified that he "presume[d]" that he and Devitre discussed the list, (Valani (JLI) Tr. 932), but he did not recall doing so, (PX7032 Valani (JLI) Dep. at 68-69). Devitre similarly testified that he does not recall "which points we discussed in any detail and which points we didn't discuss." (PX7001 Devitre (Altria) IHT at 98). Accordingly, there is no evidence regarding the substance of any conversation about JLI's list between Valani and Devitre, and there is no evidence that the second bullet point was discussed.

Further, Complaint Counsel offers no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting. Devitre participated in any such conversation in his role as "facilitator," not as a substantive negotiator for Altria. (PX7001 Devitre (Altria) IHT at 95; *see also* RRFF ¶¶ 589, 591). Devitre

testified that he could not "recall whether Altria got back to [JLI] on any of these points." (PX7001 Devitre (Altria) IHT at 103-04).

725. While Devitre was still meeting with Valani on August 15, 2018, Devitre forwarded JLI's list of specific points to Altria CEO Willard, writing: "I am still with Riaz but this is a list of matters to be discussed on Saturday in SFO." (PX1308 (Altria) at 001). Devitre told Willard that he would call him to discuss further later that night. (PX1308 (Altria) at 001).

Response to Proposed Finding No. 725:

Respondents have no specific response.

726. About an hour after receiving JLI's list of specific points from Devitre, Willard forwarded the list to his Altria colleagues Garnick and Crosthwaite in separate emails. (PX1168 (Altria) at 001; PX1302 at 001). Crosthwaite then forward it to Gifford, Garnick, and Altria in-house attorney Anthony Reale. (PX1361 (Altria) at 001).

Response to Proposed Finding No. 726:

Respondents have no specific response.

727. After receiving JLI's list of specific points, Altria's PWP adviser Wappler remarked that it "[l]ooks like [JLI] wants us to concede some key points prior to the [Saturday, August 18, 2018] meeting." (PX3174 (PWP) at 001).

Response to Proposed Finding No. 727:

Respondents have no specific response except to note that Wappler's email was sent to others at PWP, not to the Altria negotiators. (*See* PX3174 (PWP) at 001). There is also no evidence that "some key points" referred to the noncompete, particularly as opposed to the points about valuation, deal structure, minority rights, or others.

728. The planned August 18, 2018, meeting between Altria and JLI in San Francisco did take place. (Pritzker (JLI) Tr. 708-11; Valani (JLI) Tr. 924, 936; PX7032 (Valani (JLI), Dep. at 63-64)).

Response to Proposed Finding No. 728:

The Proposed Finding is incomplete and misleading to the extent it implies that because the August 18 meeting took place, Altria and JLI must have agreed on all of the points discussed in JLI's August 15 issues list. Contrary to Complaint Counsel's insinuation, there is no evidence

that as a precondition to the August 18 meeting, Altria agreed to pull its existing products from the market.

Indeed, the August 18 meeting went forward notwithstanding the fact that Altria and JLI clearly did not reach agreement on other "specific points" raised by JLI. (*See* CCFF ¶ 728). For example, JLI's list stated that the voting power term contained in Altria's August 9 term sheet was "not acceptable" compared to JLI's proposed "~15% of voting power initially to be voted in [Altria's] discretion, with any future voting power about 15% voted pro rata." (PX4171 (Altria) at 002). If Complaint Counsel's theory were true, Altria would have had to agree to this (and every other point in JLI's list) as a precondition to the August 18 meeting, but they did not. (*See* PX1432 (Altria) at 017-18 (August 19 term sheet in which *JLI* proposes Altria receive 20 percent voting power); PX2141 (JLI) at 007, PX2216 (JLI) at 001 (final purchase and voting agreements, together indicating that upon antitrust conversion, Altria would receive 35 percent voting power)).

G. AT THE AUGUST 18, 2018 MEETING, ALTRIA CLARIFIED THAT THERE WAS NO SUBSTANTIVE DISAGREEMENT ON THE COMMITMENT TO EXIT E-CIGARETTES

729. At the August 18, 2018 meeting in San Francisco, Altria clarified to JLI that there was no substantive disagreement regarding Altria's commitment not to compete in e-cigarettes. (*See* CCFF ¶¶ 730-31, below). The revised term sheet that came out of the August 18, 2018 meeting required Altria to contribute or divest its existing e-cigarettes, and prohibited Altria from competing in e-cigarettes except through JLI. (*See* CCFF ¶¶ 732-34, below).

Response to Proposed Finding No. 729:

The Proposed Finding is inaccurate, incomplete, and misleading. ***Complaint Counsel has not provided a shred of evidence*** to support its claim that at the August 18 meeting, "Altria clarified to JLI that there was no substantive disagreement regarding Altria's commitment not to compete in e-cigarettes," (CCFF ¶ 729), and it is telling that Complaint Counsel cites no direct testimony in support of its assertion. There was no such commitment. Indeed, there is no evidence that the noncompete provision was discussed by the principal negotiators at the August 18 meeting,

(*see* RFF ¶¶ 818-23), nor any evidence that Altria and JLI formed any agreement for Altria to discontinue its existing e-vapor products. As Willard explained, the treatment of Altria's e-vapor products was not a topic he recalled reaching during the discussions between the senior group of negotiators; rather, it was an issue "that the respective counsels at the companies were . . . focused on." (Willard (Altria) Tr. 1219; *see also* Willard (Altria) Tr. 1223-24 (explaining that Willard does not "recall that [the] non-compete term was one that received significant face-to-face attention from [his] senior team or the JLI team," despite its mention in JLI's August 15 issues list)).

Similarly, Valani testified that he did not recall whether there was any discussion at the August 18 meeting of the second bullet point in PX4171, related to the scope of the proposed noncompete and carve-out. (PX7032 Valani (JLI) Dep. at 80). He also did not recall any discussion about what Altria would do with its e-vapor business if a deal transpired. (PX7032 Valani (JLI) Dep. at 80). Gifford, meanwhile, recalled that at the meeting, the parties continued to discuss voting power and whether the potential investment would be in JLI's domestic business only or also include the international business. (Gifford (Altria) Tr. 2772).

Further, contrary to Complaint Counsel's misleading characterization, the revised term sheet circulated on August 19 proposed that Altria would contribute its existing e-vapor products to JLI "*upon receipt of Antitrust Clearance*," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months *after* the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22) (emphasis added)). Nothing in the August 19 term sheet "prohibited Altria from competing," (CCFF ¶ 729), with MarkTen and MarkTen Elite prior to receiving antitrust clearance for the transaction, much less prior to even entering the transaction.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 730-34, Respondents incorporate their responses to those Proposed Findings herein.

730. In Altria's "Notes/Outline" for the August 18, 2018 meeting with JLI, Willard's opening remarks explain that Altria's removal of the term requiring it divest, contribute, or cease to operate its e-cigarette business was driven by antitrust concerns and not by substantive disagreement. (PX1493 (Altria) at 002). Willard's talking points then reaffirm that upon receiving antitrust approval, Altria will contribute MarkTen to JLI and become subject to robust non-compete:

> - Some of the points you flagged in the document sent Wednesday also seem to boil down to miscommunication rather than substantive disagreement
>   - For example, our approach on MarkTen was driven by antitrust and for the protection of both companies. Upon receiving antitrust approval, we would contribute MarkTen to Jack and become subject to a robust non-compete that makes Jack our exclusive e-vapor play. We can't agree to these terms under antitrust laws prior to receiving HSR approval, which was driving our clarifications in the term sheet

(PX1493 (Altria) at 002).

Response to Proposed Finding No. 730:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context to the extent it asserts that "Altria's removal of the term requiring it divest, contribute, or cease to operate its e-cigarette business was driven by antitrust concerns and not by substantive disagreement." (CCFF ¶ 730). The excerpted bullets are not evidence of any agreement with respect to Altria's existing products, but rather evidence as to what Altria understood to be contemplated by JLI's prior term sheets: that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 004-05; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802-03). On that, there was no substantive disagreement from Altria, as Altria's August 9 term sheet continued to

propose that both parties would use "reasonable best efforts to seek Antitrust Clearance," adding that the "details relating to such efforts" were "to be discussed by the parties." (PX2313 (JLI) at 015). The term sheet also still required Altria to "cooperate with the FTC and to agree to the reasonable concessionary requirements of the FTC" in connection with changes in Altria's e-vapor business. (PX2313 (JLI) at 015).

Ultimately, Willard did not write these talking points, and neither he nor any other Altria executive is copied on the email cited by Complaint Counsel. (PX1493 (Altria) at 001). As Willard testified at trial, talking points were sometimes prepared for him in advance of meetings, including some meetings with JLI, by members of Altria's team who wanted to "provide their perspective on what they would say if they were in the meeting." (Willard (Altria) Tr. 1180). These talking points were not intended to be scripts; instead, Willard would "incorporate anything [he] thought was helpful and obviously leave out anything that [he] didn't think was appropriate." (Willard (Altria) Tr. 1180). In practice, such talking points were "rarely what [he] actually said at the meetings." (Willard (Altria) Tr. 1405). Accordingly, the talking points circulated on August 17, (PX1493 (Altria) at 001), are not evidence of what Willard said at the August 18 meeting. (Willard (Altria) Tr. 1406-07). In fact, there is no evidence that the noncompete provision was discussed by the principal negotiators at the August 18 meeting. (*See* RFF ¶¶ 818-23).

And despite relying on PX1493 in both its pre-trial and post-trial briefing, Complaint Counsel has never asked Willard (or any other witness) about this document, either in depositions or at trial.

731. At the meeting on August 18, 2018, in San Francisco, the Altria and JLI negotiators discussed the list of specific points that Valani had provided to Devitre three days earlier. (PX7001 (Devitre (Altria), IHT at 104-05)). Valani testified that the meeting entailed a detailed discussion around deal points and issues lists. (PX7032 (Valani (JLI), Dep. at 80)). Devitre testified that "a lot of the meeting was getting clarification from both sides" on

what each side meant, and that, as a result, "some of the issues [] became nonissues." (PX7001 (Devitre (Altria), IHT at 104-05)).

Response to Proposed Finding No. 731:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that, at the August 18 meeting, the parties formed any agreement regarding what would happen with Altria's e-vapor products following a transaction, much less before the potential transaction occurred. To the contrary, there is no evidence that the noncompete provision was discussed by the principal negotiators at the August 18 meeting. (*See* RFF ¶¶ 818-23). As Willard explained, the treatment of Altria's e-vapor products was not a topic he recalled addressing during the discussions between the senior group of negotiators; rather, it was an issue "that the respective counsels at the companies were . . . focused on." (Willard (Altria) Tr. 1219; *see also* Willard (Altria) Tr. 1223-24 (explaining that Willard does not "recall that [the] non-compete term was one that received significant face-to-face attention from [his] senior team or the JLI team," despite its mention in JLI's August 15 issues list)).

Similarly, Valani testified that he did not recall whether there was any discussion at the August 18 meeting of the second bullet point in PX4171 excerpted in Proposed Finding No. 722. (PX7032 Valani (JLI) Dep. at 80). He also did not recall any discussion about what Altria would do with its e-vapor business if a deal transpired. (PX7032 Valani (JLI) Dep. at 80). Gifford, meanwhile, recalled that at the meeting, the parties continued to discuss voting power and whether the potential investment would be in JLI's domestic business only or also include the international business. (Gifford (Altria) Tr. 2772).

732. After the August 18, 2018, meeting, JLI circulated a revised term sheet that was meant to reflect the progress made at the meeting. (PX7011 (Valani (JLI), IHT at 105-06 (discussing PX2185 (JLI) at 001))).

Response to Proposed Finding No. 732:

Respondents have no specific response except to note that the August 18 term sheet was more often referred to as the August 19 term sheet at trial, reflecting the date it was sent. (*See* Pritzker (JLI) Tr. 847; *see also* RFF ¶ 824).

733. The August 18, 2018 revised term sheet required Altria to contribute its e-cigarette assets to JLI upon antitrust clearance, and if antitrust clearance was not obtained by nine months after the purchase, to divest its e-cigarette assets within six months thereafter:

> - Richard agrees that it will contribute, upon receipt of Antitrust Clearance and at no cost to Jack, 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 (in each case to the extent it has the legal right to make such contribution).
>
> - In the event Antitrust Clearance for the foregoing contribution is not obtained within nine months after the Purchase, then subject to the license referenced above, Richard will divest all such Richard assets relating to the Field in the U.S. within six months thereafter.

(PX2185 (JLI) at 006).

Response to Proposed Finding No. 733:

Respondents have no specific response except to note that like the previous term sheets, the August 18 term sheet continued to require the parties to "cooperate with the FTC," "use reasonable best efforts to seek Antitrust Clearance," and to "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2185 (JLI) at 021). The term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment, (PX2185 (JLI) at 020-21), and nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

734. The non-competition clause in the revised August 18, 2018 term sheet read

- Richard agrees to refrain, and to cause its current and future affiliates to refrain, from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above). Richard will, and will cause its current and future affiliates to, coordinate any e-vapor business efforts through Jack and Jack will be the vehicle through which Richard participates in the e-vapor business. The non-compete will terminate as set forth in "Richard Exit Right" below. Richard agrees that, as a condition to any change of control transaction in which the acquiring party is a Jack competitor, the acquiring party will agree to be bound by the foregoing non-compete as if it were Richard.

(PX2185 (JLI) at 007-08).

Response to Proposed Finding No. 734:

Respondents have no specific response except to note that JLI's revisions to this provision are shown in redline at PX2185 (JLI) at 023. (*See* RFF ¶¶ 827-28).

H. PROJECT TREE DISCUSSIONS CONTINUED IN LATE AUGUST AND SEPTEMBER 2018

735. Project Tree discussions between Altria and JLI continued into late August and September 2018. (*See* CCFF ¶¶ 736-72, below). In late August 2018, an issue arose around whether Altria would agree to pay for non-voting shares up-front at signing, as JLI wanted, or wait to pay until obtaining antitrust approval and converting its interest to voting shares. (*See* CCFF ¶¶ 747-48, below). The parties continued to talk, and shortly after the issue arose, Altria informed JLI that it had a solution and would pay up front. (*See* CCFF ¶¶ 749-56, 779-80, below). Throughout the month of September 2018, Altria discussed plans for continued negotiations with JLI. (*See* CCFF ¶¶ 757-72, below).

Response to Proposed Finding No. 735:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The record is undisputed that the parties reached an impasse in late August 2018 due to substantive issues (around valuation, deal structure, and control) and JLI's decision to pursue a tender offer instead of the transaction with Altria. (*See* RFF ¶¶ 878-97). The impasse continued until early October 2018. (RFF ¶ 897). There were [redacted] no meetings, and no term sheets exchanged between the parties after the August 27 meeting until Willard sent a letter to JLI on October 5. (*See* Garnick (Altria) Tr. 1753, [redacted]; Willard (Altria) Tr. 1418-19; *see also, e.g.*, PX7028 Wappler (PWP) Dep. at 77-78 ("Q. When did negotiations between Altria

and [JLI] resume [after the August 27 meeting]? A. I don't recall the specific date, but this was a big breakdown in negotiations is what I recall. And there was a period of several weeks where there was no real traction being made on even beginning negotiations and no formal negotiations that I'm aware of. I believe they -- they renewed sometime in October."); PX7011 Valani (JLI) IHT at 112 ("Q. After this New York meeting with Altria, was there a break in negotiations for a period of time?" "A. Yeah. That was like a real break, where we were very committed to just not dealing with [Altria] anymore . . . ."); PX7011 Valani (JLI) IHT at 115 ("[Q.] At some point did negotiations obviously resume with Altria? A. . . . [I]n I think early October, you know, we received kind of an unsolicited letter from Howard Willard with a proposal that ended up being somewhat close to, you know, where we ended up.")).

JLI's Board meeting minutes also reflect the breakdown in negotiations. On August 28, the day after the August 27 meeting marking the beginning of the impasse, the JLI Board concluded that, "in light of the wholly unsatisfactory nature of recent discussions with [Altria]" the negotiations were "highly unlikely to result in an investment by, or strategic relationship with, [Altria]." (PX2117 (JLI) at 032-33). For that reason, the JLI Board approved the engagement of JPMorgan Chase to explore financing transactions unrelated to the potential transaction with Altria. (PX2117 (JLI) at 032-33). In his deposition, Pritzker explained that "wholly unsatisfactory" was a reference to Altria's proposed valuation for JLI. (PX7021 Pritzker (JLI) Dep. at 123). The companies "still were very far apart on what a reasonable price would be," in part because of "a failure by Altria to recognize the value of the international company"—which Altria wanted to exclude from the transaction—and JLI's concern that a 45 percent interest was "too close to 51 percent," as Altria might "somehow figure out how to get a controlling position." (PX7021 Pritzker (JLI) Dep. at 123-24).

The JLI Board met again on September 8, and this time concluded that JLI "should cease discussions of an investment or strategic relationship with [Altria]." (PX2117 (JLI) at 041). As the meeting minutes explain, the Board made this decision:

> [i]n light of the (i) lack of progress in the negotiations, (ii) the number of remaining, significant, unresolved outstanding issues between the parties, (iii) the ongoing distraction and burden on the Company's management of further negotiations with Richard at a time when the Company was experiencing extraordinary growth, and (iv) the increase in valuation of the Company during the course of its discussions with [Altria] and its prospects for future growth and further increases in valuation (independent of any transaction with [Altria]), which were not adequately reflected in the [Altria] investment offer . . . .

(PX2117 (JLI) at 041; *see also* PX7021 Pritzker (JLI) Dep. at 131 ("[W]e were no longer talking to Altria about the deal and . . . we determined at the board [meeting] that this was just not going to happen.")).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 736-72 and ¶¶ 779-80, Respondents incorporate their responses to those Proposed Findings herein.

736. On August 15, 2018, Willard wrote in an email to Altria's chairman, Thomas Farrell, that Altria and JLI had "agreed to 75 percent of the deal terms" ahead of a planned meeting the next weekend on August 18, 2018. (PX7031 (Willard (Altria) Dep. at 218-19 (discussing PX4076 (Altria) at 001)).

Response to Proposed Finding No. 736:

Respondents have no specific response except to note that Willard's email to Farrell also stated, "but they are playing hard ball on a few remaining items. We are prepared to agree to a reasonable deal or walk away from an unreasonable deal." (PX4076 (Altria) at 001).

737. On August 18, 2018, Willard met with JLI representatives to negotiate the transaction in San Francisco. (Willard (Altria) Tr. 1467-68). Willard flew directly from the August 18, 2020, negotiating session with JLI in San Francisco to Altria's Crazy Mountain Ranch ("Ranch") in Montana for [redacted] (Willard (Altria) Tr. 1468; *see also* PX1344 (Altria) at 001, 003-04 (*in camera*)).

Response to Proposed Finding No. 737:

Respondents have no specific response.

738. On August 19, 2018, Garnick emailed Crosthwaite: "Billy and I think we should not send back a mark up. Instead, we tell our outside counsel that they should 'clarify' the term sheet with Tree's lawyers and resolve the antitrust issues but leave alone those provisions as to which the principals will inevitably have to discuss. We don't want to send them a term sheet and have them send back another angry memo. In the meantime, today, Howard should go ahead and schedule a meeting with Tree post board meeting to discuss and resolve the issues that Wachtell crystalized for us." (PX4288 (Altria)).

Response to Proposed Finding No. 738:

The Proposed Finding is incomplete and misleading without additional context. The record reflects that throughout the course of negotiations, Altria used the terms "antitrust," "antitrust issues," and so on to refer to multiple antitrust-related matters other than the treatment of Altria's e-vapor portfolio in the event of a transaction. (*See, e.g.*, Garnick (Altria) Tr. 1645-46 (describing antitrust issues "relat[ing] to when the money would be" paid, "when we would file for HSR[,] and other antitrust issues such as upstream affiliates"); PX7028 Wappler (PWP) Dep. at 75 ("Q. What were you referring to when you say 'this antitrust issue'? A. The notion of the simultaneous sign and close."); PX7032 Valani (JLI) Dep. at 31-33 (explaining his belief that "antitrust risk" in PX2303 referred to the issue of whether Altria would purchase nonvoting stock initially or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained")). When asked in his deposition what was meant by "antitrust issues" in PX4288, Garnick explained: "There were many discussions on antitrust issues with our lawyers and with the Tree lawyers in order to ensure that we would comply and understood the antitrust laws. . . . I do not recall, not having seen this memo since August 2018, exactly what w[ere] the antitrust issues that we were focusing on [] that particular day." (PX7036 Garnick (Altria) Dep. at 60-61).

There is thus no evidence to support Complaint Counsel's insinuation that the "antitrust issues" referenced in PX4288 involved the treatment of Altria's e-vapor portfolio in the event of a transaction. Logically, this would not make sense—in the term sheet circulated on August 19, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust

Clearance," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22). In all material respects, this proposed treatment of Altria's e-vapor portfolio in the event of a transaction remained unchanged throughout the remaining term sheets. (*See* RFF ¶¶ 825-27, 834-38, 994-95, 1043-44, 1049).

739. [redacted] (PX1344 (Altria) at 001, 003-04 (*in camera*)). [redacted] (PX1344 (Altria) at 001 (*in camera*)).

Response to Proposed Finding No. 739:

Respondents have no specific response.

740. On August 22, 2018, JLI's Valani and Pritzker had a call with Altria's Willard, Devitre, Gifford, Crosthwaite, and Garnick, who were all at the Ranch in Montana. (PX7032 (Valani (JLI), Dep. at 82-86)).

Response to Proposed Finding No. 740:

Respondents have no specific response.

741. [redacted] (PX1344 (Altria) at 003-04 (*in camera*)).

Response to Proposed Finding No. 741:

Respondents have no specific response.

742. On August 23, 2018, JLI General Counsel Jerry Masoudi sent an email with the subject, "Fwd: Project Richard Term Sheet – IP and Non-Compete," attaching a document called "Tree – Term Sheet Issues List Jack draft 8.22.18. . ." (PX2505 (JLI) at 001). The attached document was withheld for privilege. (PX2505 (JLI) at 002).

Response to Proposed Finding No. 742:

The Proposed Finding is incomplete and misleading to the extent Complaint Counsel suggests that the mention of "Non-Compete" in the title of Masoudi's email related to Altria's e-vapor portfolio. To the contrary, on August 22—the day before Masoudi's email—counsel for

both parties circulated a joint issues list. (RX1783 (PWP) at 001; RX1784 (PWP) at 001). This list demonstrated that the parties had reached consensus on the treatment of Altria's existing e-vapor business in the event of a transaction, but that other issues potentially related to Masoudi's email title, "IP and Non-Compete," remained outstanding. (RX1784 (PWP) at 002-04; *see also* RFF ¶¶ 834-38).

First, regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions); *see also* RX1784 (PWP) at 002-03 (describing Antitrust Clearance procedure from August 19 term sheet as: "Upon receipt of antitrust clearance, [Altria] to contribute to [JLI] all [Altria] e-vapor assets at no cost to [JLI]"; and "[i]f antitrust clearance for contribution is not received within nine months, [Altria] to divest e-vapor assets within six months")). *Second*, the list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

Notably, the August 22 joint issues list also identifies areas where the parties were not aligned, including issues related to IP and the scope of the noncompete *unrelated to the treatment of Altria's existing products*, which potentially relate to Masoudi's email in PX2505. Regarding IP, Altria's position in the August 22 issues list stated: "Instead of granting IP license, [Altria] would irrevocably waive any claims that Jack has violated any [Altria] IP rights." (RX1784 (PWP) at 003). JLI responded that it "require[d] the non-exclusive US IP license and exclusive international IP license grant at the time of signing." (RX1784 (PWP) at 003). Meanwhile, regarding the noncompete provision, the August 22 joint issues list reflected that the parties

continued to debate whether upstream affiliates and potential acquirors of Altria would be bound by the noncompete in the event of a transaction. (RX1784 (PWP) at 004). There is no evidence that the subject line of Masoudi's email in PX2505 had any relation to the treatment of Altria's existing e-vapor portfolio.

Moreover, the Proposed Finding, which invites the Court to make an adverse inference on the basis of the invocation of privilege, is improper and should be disregarded. Courts have consistently "declined to impose adverse inferences on invocation of the attorney-client privilege." *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH* v. *Dana Corp.*, 383 F.3d 1337, 1345 (Fed. Cir. 2004) (collecting cases). The reasons for this are obvious. The privilege's "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). "To protect that interest, a client asserting the privilege should not face a negative inference about the substance of the information sought." *Parker* v. *Prudential Ins. Co. of Am.*, 900 F.2d 772, 775 (4th Cir. 1990).

743. On August 23, 2018, Willard emailed Pritzker that he had reviewed JLI's response to Altria's "proposal on the remaining issues." (PX2317 (JLI)).

Response to Proposed Finding No. 743:

Respondents have no specific response.

744. On the evening of August 23, 2018, JLI's Valani, Pritzker, Burns, and Masoudi had a call with Altria's Willard, Devitre, Gifford, Crosthwaite, and Garnick. (PX2408 (JLI) at 002-03; PX2559 (JLI)). After that call, Devitre suggested to Valani that he fly to Montana to meet, but then suggested meeting in New York the following Monday instead. (PX2408 (JLI) at 003; PX7032 (Valani (JLI), Dep. at 85)).

Response to Proposed Finding No. 744:

Respondents have no specific response except to note that Valani testified in his deposition that on the call, Altria expressed "[d]issatisfaction" with the state of negotiations and JLI's position on the outstanding issues. (PX7032 Valani (JLI) at 84-85).

745. On August 24, 2018, Altria's Garnick sent an internal email suggesting moving the planned meeting with JLI from Monday (August 27, 2018) to Tuesday (August 28, 2018). (PX4162 (Altria) at 001). Devitre responds that he thinks JLI's Pritzker is leaving for his trip to Africa on Tuesday morning. (PX4162 (Altria) at 001).

Response to Proposed Finding No. 745:

Respondents have no specific response.

746. On August 25, 2018, JLI's Pritzker and Altria's Willard spoke by phone. (PX2317 (JLI); (PX3177 (PWP)). Altria adviser Wappler reported that Pritzker indicated to Willard that "they [JLI] really want to get this deal done." (PX3177 (PWP)).

Response to Proposed Finding No. 746:

The Proposed Finding is incomplete and misleading without additional context. As Wappler's email states, "[Pritzker] called [Willard] last night and made a bit of a peace offering. [Pritzker] indicated that they really want to get this deal done, they recognize that they have been aggressive, and they want to meet in NYC on Monday with a constructive mindset." (PX3177 (PWP) at 001).

747. Also on August 25, 2018, Altria board member Thomas Farrell called Willard and confirmed that the board was supportive of moving forward with JLI with one key adjustment to the terms. (PX3177 (PWP)). The board did not want Altria to sign and close the deal simultaneously, but instead wanted to wait for antitrust approval before transferring payment to JLI. (PX3177 (PWP)).

Response to Proposed Finding No. 747:

Respondents have no specific response.

748. On or around August 27, 2018, JLI's Pritzker, Valani, Burns, and outside counsel met with Willard, Gifford, and Altria's outside counsel in New York. (PX7032 (Valani (JLI), Dep. at 87-88); PX7036 (Garnick (Altria), Dep. at 47)). At that meeting, Altria indicated it did

not want to pay until after HSR approval, and JLI indicated that was unacceptable. (PX7036 (Garnick (Altria), Dep. at 48); (PX7032 (Valani (JLI), Dep. at 87-89)).

Response to Proposed Finding No. 748:

Respondents have no specific response.

749. On August 28, 2018, Altria's Devitre and JLI's Valani planned to meet in Devitre's office in New York. (PX4155 (Altria)).

Response to Proposed Finding No. 749:

Respondents have no specific response except to note that an email from Devitre to his assistant noting that a meeting was planned is not evidence that the meeting took place, and there was no testimony stating that the meeting happened.

750. On August 28, 2018, Devitre's assistant sent an email (copying Devitre) to JLI's outside antitrust counsel Michael Sibarium and JLI's Valani confirming a conference call for August 29, 2018. (PX2394 (JLI); PX7032 (Valani (JLI), Dep. at 91-92)). Valani testified that this may have been a call between JLI outside counsel and Altria's counsel. (PX7032 (Valani (JLI), Dep. at 91-92)). Altria requested the call. (PX7032 (Valani (JLI), Dep. at 92)). Valani thinks Altria was still trying to "find solutions to the deal construct" issue. (PX7032 (Valani (JLI), Dep. at 92)).

Response to Proposed Finding No. 750:

Respondents have no specific response except to note that Valani testified he did not "know if this was a call that [he] or [Devitre] were actually on," and he does not recall participating in the call. (PX7032 Valani (JLI) Dep. at 91-92). An email from Devitre's assistant scheduling the call is not evidence that the call took place, and there is no affirmative testimony stating that the call took place.

Respondents further note that Valani testified that the "last iteration of the transaction came to, you know, a rather abrupt halt." (PX7032 Valani (JLI) Dep. at 92).

751. On August 29, 2018, Willard sent a note to Altria's board stating: "We are still in discussions on the Tree [JLI] Opportunity. We have hit some setbacks and given the unavailability of one the investors for two weeks we will likely have a break in the negotiations. If we have material developments, we will send a note or have a call." (PX4461 (Altria) at 002; PX4462 (Altria)).

Response to Proposed Finding No. 751:

The Proposed Finding is incomplete and misleading to the extent Complaint Counsel implies that Altria expected a two-week break in negotiations as a result of the unavailability of one of the investors. As Garnick testified at trial: "Q. Altria expected to have a two-week break in negotiations at that point, correct? A. I -- that's not what he said. He said that we will likely have a break in negotiations, and there are two reasons, one, we have hit some setbacks, and the other, the unavailability of one of the investors for two weeks. He did not say that the break in negotiations would last for two weeks." (Garnick (Altria) Tr. 1640 (discussing PX4451 (Altria) at 002)).

752. Garnick testified that in September 2018, Altria had internal discussions about pursuing the JLI transaction. (Garnick (Altria) Tr. 1823).

Response to Proposed Finding No. 752:

The Proposed Finding is incomplete and misleading without additional context. Garnick testified that in late August 2018, Altria and JLI "reached an impasse" and the negotiations broke down. (Garnick (Altria) Tr. 1753). Although Altria had internal discussions about the possibility of restarting negotiations with JLI [redacted] in September, there were no substantive negotiations between Altria and JLI during this time. (Garnick (Altria) Tr. 1753, [redacted]).

753. On September 4, 2018, Garnick informed Willard that JLI's Goldman adviser, Peter Gross, called Altria board member Devitre. (PX1314 (Altria)). Garnick also told Willard that he (Garnick) and Devitre had discussed a plan whereby subcommittees would "work on a comprehensive draft" of deal terms. (PX1314 (Altria)). Garnick reported that Devitre would call JLI's Valani to propose that plan. (PX1314 (Altria)).

Response to Proposed Finding No. 753:

The Proposed Finding is incomplete and misleading without additional context. As Garnick's email states, Gross called Devitre "to complain that [JLI] felt that we retraded and that they were concerned that another issue could arise out of the blue." (PX1314 (Altria) at 001). The

subcommittee idea was intended to "address that concern." (PX1314 (Altria) at 001). Altria proposed this plan to JLI, but JLI rejected the idea in PX4159, as described below (*see* RRFF ¶¶ 754, 756).

754. On September 5, 2018, Devitre emailed Garnick: "I spoke to my friend [Riaz Valani]. I have conveyed his views to Howard [Willard]. They are ready to move to anti-trust lawyers speaking to each other as soon as possible. But still not ready for sub-group meetings. We agreed that you should reach out to michael.sibarium@pillsburylaw.com and set up meeting. My friend [Valani] is giving him a heads up that you will be calling." (PX4159 (Altria); PX7001 (Devitre (Altria), IHT at 121)).

Response to Proposed Finding No. 754:

The Proposed Finding is incomplete and misleading without additional context. As Garnick testified, the antitrust proposal that was to be discussed on this call had no relation to Altria's existing e-vapor products: "[T]he issue related to when the money would be [paid]," "when we would file for HSR[,] and other antitrust issues such as upstream affiliates." (Garnick (Altria) Tr. 1645-46; *see also* RRFF ¶¶ 644, 738 (explaining that throughout the negotiations, the parties used the terms "antitrust," "antitrust issue," "antitrust risk," and so on to refer to multiple antitrust-related issues other than the treatment of Altria's e-vapor portfolio in the event of a transaction)). Pritzker similarly testified that the treatment of Altria's e-vapor products was not a point of disagreement, including at the time of the call discussed in PX4159. (PX7021 Pritzker (JLI) Dep. at 132-33).

Additionally, PX4159 should be read in context with PX2318, which is an internal JLI email chain discussing the same call. In that email, Valani states his view that it would be "worthwhile to hear [Altria] out and assess viability, bearing in mind the overall transaction is pencils down – for now and very possibly forever." (PX2318 (JLI) at 001). Pritzker responded: "Sounds like a Hail Mary from [Altria]." (PX2318 (JLI) at 001).

Asked about this document in his deposition, Pritzker explained: "'[P]encils-down' means, obviously, that we felt like we were no longer talking to Altria about the deal and, you know, there was a time within this time frame that we determined at the board that this was just not going to happen." (PX7021 Pritzker (JLI) at 130-31). He continued: "[T]his is the point where we -- I thought we were done. . . . We didn't have a transaction. The reasons, the frustrations that I described before, were still there, that being price, separation of the companies, timing of payments. . . . [T]hose deal points were still out there. And we had decided around this time [that] we were doing another financing and wanted to just get that done and move on." (PX7021 Pritzker (JLI) at 132).

755. Devitre recalls that Valani's "views" that he conveyed to Willard, as referenced in his September 5, 2018, email, were related to what would happen if antitrust approval was not received. (PX7001 (Devitre (Altria), IHT at 121) (discussing PX1339 (Altria) at 002)). Valani told Devitre that he (Valani) had spoken to Sibarium and that "the two sides could iron out the matter." (PX7001 (Devitre (Altria), IHT at 123 (discussing PX1339 (Altria) at 002))).

Response to Proposed Finding No. 755:

The Proposed Finding is incomplete and misleading, and it takes Devitre's testimony out of context. There is no evidence that the "views" regarding antitrust that Valani conveyed to Devitre had any relation to Altria's existing e-vapor products. (*See* RFF ¶¶ 654, 754). To the contrary, as Valani discussed in his deposition, a core issue that caused the impasse involved whether Altria would purchase "a large stake of nonvoting stock up front," which could be converted to voting upon antitrust approval. (PX7032 Valani (JLI) Dep. at 87-90; *see also* Garnick (Altria) Tr. 1826-27; RFF ¶ 888).

756. On September 6, 2018, Garnick reported that he had spoken with JLI's outside antitrust counsel, Sibarium. (PX1339 (Altria) at 002). Garnick wrote: "I reviewed with him again our revised proposed structure. I told him we would send his client a revised term sheet, but it would contain no surprises, just the proposal I had already reviewed with him when Riaz was on the line. I emphasized our idea of going forward with small drafting teams to

prepare a document open to renegotiation by both sides. . . . I told him that we were ready to proceed in any way they preferred." (PX1339 (Altria) at 002).

Response to Proposed Finding No. 756:

The Proposed Finding is incomplete and misleading without additional context. As Garnick described the call in a contemporaneous email, "Although [Sibarium] was expecting my call, he had no agenda and no questions. I reviewed with him again our revised proposed structure . . . . He joked that he was a simple antitrust lawyer, but that he would pass on the message." (PX1339 (Altria) at 001). Garnick further testified that "this idea of having small drafting teams, making progress, nothing came of that." (Garnick (Altria) Tr. 1645-46).

757. Devitre responded to Garnick, "Thanks. I think they are a very disjointed group! Let things stand for a while." (PX1339 (Altria) at 001).

Response to Proposed Finding No. 757:

Respondents have no specific response.

758. Devitre testified that after September 6, 2018, discussions continued and that "[t]his matter was a small subsect of the discussions and did not come in the way of the main negotiations." (PX7001 (Devitre (Altria), IHT at 124)).

Response to Proposed Finding No. 758:

The Proposed Finding is incomplete and misleading without additional context. Devitre testified that beginning in August, "there was certainly a gap [in negotiations] that we felt would be difficult to surmount." (PX7001 Devitre (Altria) at 106). Despite Complaint Counsel's attempt to downplay the stalled negotiations, as explained above in Respondents' response to CCFF ¶ 735, the record is undisputed that there were no substantive negotiations between Altria and JLI after the August 27 meeting until early October 2018. (*See also* RFF ¶¶ 878-97).

759. On September 10, 2018, Altria's Garnick sent an email to Altria's Willard, Gifford, Crosthwaite, and Reale, writing "I am assuming that given the Tree meeting tomorrow that we are NOT planning to send out the term sheet today." (PX4424 (Altria) (*emphasis in original*)).

Response to Proposed Finding No. 759:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Garnick explained at trial, "if the Tree meeting [referenced in PX4424] meant a meeting with people from JLI, we did not have it. It could have been an internal meeting about Tree, in which case we may or may not have had it, but we had no meetings with JLI people in September." (Garnick (Altria) Tr. 1755 (discussing PX4424 (Altria) at 001)). *Second*, although Altria's outside counsel "could have been doing some preparation work" in September 2018, including revising a draft term sheet, no term sheets were exchanged between the parties that month. (Garnick (Altria) Tr. 1651, 1754-55).

760. An Altria presentation dated September 2018 and titled "Project Tree Board Update," which was circulated on September 10, 2018 to the Altria Board of Directors, included a slide stating "Parties met on August 27th to continue negotiations . . . Further discussions have been on hold due to the availability of a Tree principal . . . Parties are discussing time frames for continuing negotiations." (PX4467 (Altria) at 004).

(PX4467 (Altria) at 004).

Response to Proposed Finding No. 760:

The Proposed Finding is inaccurate, incomplete, and misleading. PX4467 is a *draft* Board update, as Willard explained at trial, and it was never circulated to Altria's Board of Directors. (Willard (Altria) Tr. 1428-31). A later version, PX4416, was the final update circulated to the Board on September 10, 2018. (Willard (Altria) Tr. 1428-29; PX4416 (Altria) at 001 (attachment with cover email noting, "Here's what we posted to the portal just now")).

761. In the same September 2018 Board Update, "Altria non-compete" was listed as one of the "[k]ey terms for further negotiation." (PX4467 (Altria) at 005).

Response to Proposed Finding No. 761:

The Proposed Finding is inaccurate, incomplete, and misleading. As explained above, PX4467 is a *draft* Board update, and it was never circulated to Altria's Board of Directors. (Willard (Altria) Tr. 1428-31). A later version, PX4416, was the final update circulated to the Board on September 10, 2018. (Willard (Altria) Tr. 1428-29; PX4416 (Altria) at 001). [redacted] Willard did not tell the Board that the noncompete was a key issue in the negotiation. (Willard (Altria) Tr. 1431).

To the extent the noncompete was an outstanding issue during the impasse from late August throughout September, the issue was *unrelated* to the treatment of Altria's e-vapor portfolio in the event of a transaction discussion; the issue was whether the noncompete would bind "upstream affiliates" if another entity acquired Altria. (Willard (Altria) Tr. 1431). As Willard explained at trial: "In discussing the noncompete with [JLI] . . . the question had come up that what if Altria, in the future, was acquired by another company, would the noncompete bind that other company to the same level of not competing that Altria experienced? And I think our view was that we were comfortable committing Altria but that it didn't make sense to commit some

unknown future acquire[r] . . . ." (Willard (Altria) Tr. 1431-32; *see also* RRFF ¶ 742; RX1784 (PWP) at 004 (August 22 joint issues list including "upstream affiliates and acquirors" as an outstanding issue)). When the negotiations broke off in late August, the upstream affiliates issue had not yet been resolved. (Willard (Altria) Tr. 1432).

762. On September 11, 2018, Altria scheduled a "Project Tree Meeting" in Altria's "HQ Boardroom." (PX4466 (Altria)).

Response to Proposed Finding No. 762:

Respondents have no specific response except to note that a calendar invite to a meeting is not evidence that a meeting was held, and there was no testimony as to whether this meeting took place. Further, if the meeting was held, it was an internal Altria meeting about Project Tree, not a meeting with JLI. As Garnick testified, Altria "had no meetings with JLI people in September." (Garnick (Altria) Tr. 1755).

763. On September 11, 2018, a cover email shows that Altria internally circulated a revised term sheet for the JLI transaction. (Garnick (Altria) Tr. 1652 (discussing PX1494 (Altria) (attachments not produced))). Altria also prepared a separate document excerpting the revised language regarding "sign and close" and "key antitrust language." (PX1494 (Altria)).

Response to Proposed Finding No. 763:

The Proposed Finding is incomplete and misleading without additional context. *First*, there is no evidence that the "key antitrust language" or "Excerpt of HSR/Anti-trust proposal" mentioned in the cover email to PX1494 had any relation to the treatment of Altria's existing e-vapor portfolio. The record reflects that throughout the course of negotiations, Altria used the terms "antitrust," "antitrust issue," "antitrust proposal," and so on to refer to multiple antitrust-related issues other than the treatment of Altria's e-vapor portfolio in the event of a transaction. (*See, e.g.*, Garnick (Altria) Tr. 1645-46 (describing antitrust issues "related to when the money would be" paid, "when we would file for HSR[,] and other antitrust issues such as upstream

affiliates"); PX7028 Wappler (PWP) Dep. at 75 ("Q. What were you referring to when you say 'this antitrust issue'? A. The notion of the simultaneous sign and close."); PX7032 Valani (JLI) Dep. at 31-33 (explaining his belief that "antitrust risk" in PX2303 referred to the issue of whether Altria would purchase nonvoting stock initially or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained"); PX7036 Garnick (Altria) Dep. at 60 ("Q. What do you recall about the discussions with Tree to resolve the antitrust issues? A. There were many discussions on antitrust issues with our lawyers and with the Tree lawyers in order to ensure that we would comply and understood the antitrust laws.")). To the contrary, as made clear in the August 22 joint issues list, the treatment of Altria's e-vapor portfolio in the event of a transaction was not an outstanding issue in the negotiations even before the impasse began. (RX1784 (PWP) at 002-04; *see also* RRFF ¶ 742).

Second, the attachments to PX1494 were "not produced" because they were withheld as privileged documents drafted by Altria's outside counsel that were never circulated to JLI.

764. Earlier in the day on September 11, 2018, Garnick directed a subordinate to prepare a "document that extracts from the term sheet the provision that says we will make the upfront payment and the antitrust provisions we discussed on HSR clearance. If we decide we want to send just that document it should be ready to go." (PX1555 (Altria)).

Response to Proposed Finding No. 764:

The Proposed Finding is incomplete and misleading without additional context. *First*, there is no evidence that the document described in CCFF ¶ 764 was ever sent to JLI. To the contrary, there were no substantive negotiations between Altria and JLI in September, there were no term sheets exchanged, and there were no meetings between the parties. (Garnick (Altria) Tr. 1753, 1754-55; *see also* [redacted]).

Second, there is no evidence that "the antitrust provisions we discussed on HSR clearance" mentioned in PX1555 had any relation to the treatment of Altria's existing e-vapor portfolio in the

event of a transaction. The record reflects that throughout the course of negotiations, Altria used the terms "antitrust," "antitrust issue," "antitrust proposal," and so on to refer to multiple antitrust-related issues other than the treatment of Altria's e-vapor portfolio in the event of a transaction. (*See, e.g.*, Garnick (Altria) Tr. 1645-46 (describing antitrust issues "related to when the money would be" paid, "when we would file for HSR[,] and other antitrust issues such as upstream affiliates"); PX7028 Wappler (PWP) Dep. at 75 ("Q. What were you referring to when you say 'this antitrust issue'? A. The notion of the simultaneous sign and close."); PX7032 Valani (JLI) Dep. at 31-33 (explaining his belief that "antitrust risk" in PX2303 referred to the issue of whether Altria would purchase nonvoting stock initially or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained"); PX7036 Garnick (Altria) Dep. at 60 ("Q. What do you recall about the discussions with Tree to resolve the antitrust issues? A. There were many discussions on antitrust issues with our lawyers and with the Tree lawyers in order to ensure that we would comply and understood the antitrust laws.")). To the contrary, as made clear in the August 22 joint issues list, the treatment of Altria's e-vapor portfolio in the event of a transaction was not an outstanding issue in the negotiations even before the impasse began. (RX1784 (PWP) at 002-04; *see also* RRFF ¶ 742).

765. On September 11, 2018, Devitre and Valani spoke by phone for 32 minutes. (PX4374 (Altria) at 007 (Devitre phone records)).

Response to Proposed Finding No. 765:

Respondents have no specific response except to note that this is the only call between Devitre and Valani listed for the month of September. (PX4374 (Altria) at 007).

In an email two days later, Wappler reported to a PWP colleague what happened on the call: "[Devitre] spoke with [Valani] on Tuesday night [September 11, 2018] and explained that we have a solution to the simultaneous sign / close issue, and are prepared to send a revised term

sheet. [Valani] indicated that they are focused on a tender over the the [sic] next 2 months and are not interested in additional discussions at this time." (PX3154 (PWP) at 001).

766. On September 12, 2018, the FDA issued letters to the five top-selling e-cigarette manufacturers (Altria, JLI, Reynolds, ITG, and JTI), requesting that each company submit to the FDA within 60 days its plans to address the issue of youth access and use of its e-cigarette products. (Murillo (JLI/Altria) Tr. 2961-62 (discussing RX0704 (Altria) at 001); *see also* PX3179 (PWP) at 002).

Response to Proposed Finding No. 766:

Respondents have no specific response.

767. On September 12, 2018, PWP's Wappler told colleagues that he had spoken with Altria's Crosthwaite and that everyone agreed that the FDA letter "had a profound impact on the Tree discussions." (PX7028 (Wappler (PWP), Dep. at 87-89) (discussing PX3180 (PWP) at 001)).

Response to Proposed Finding No. 767:

The Proposed Finding is incomplete and misleading without additional context. There were no "Tree discussions" between Altria and JLI at the time of FDA's letter on September 12; any discussions about Tree were internal within Altria. (*See* PX7028 Wappler (PWP) Dep. at 87 ("Q. And this email [PX3179] is also dated September 12, so is it fair to say that you were at a stopping point in the negotiation between Altria and [JLI] at the time of this email? A. Yes, we had -- negotiations had broke[n] down. . . . [T]here were no active negotiations, that is correct.")).

768. On September 13, 2018, PWP's Wappler sent a colleague a draft script for if Altria decided to call JLI. (PX3154 (PWP)). Wappler reported that Devitre had spoken with Valani two days earlier to explain that Altria had "a solution to the simultaneous sign/close issue, and [is] prepared to send a revised term sheet," and that Valani indicated that JLI was focused on a tender offer and not interested in additional discussions. (PX3154 (PWP)). In his September 13, 2018 email, Wappler commented that "[i]n hindsight probably a bad move on their part," given the FDA letter. (PX3154 (PWP)).

Response to Proposed Finding No. 768:

Respondents have no specific response except to note that there is no evidence such a call from Altria to JLI for which the draft script was prepared ever took place. To the contrary, due to

the impasse and JLI's decision to pursue a tender offer, negotiations remained stagnant through September and into October, (PX3154 (PWP) at 001; PX7031 Willard (Altria) Dep. at 178-79), and there were no further substantive negotiations after the August 27 meeting until Willard sent a letter to JLI on October 5, (Willard (Altria) Tr. 1418-19).

769. As of September 18, 2018, PWP was preparing some Project Tree-related analysis at the direction of Altria. (PX1623 (Altria) at 001).

Response to Proposed Finding No. 769:

Respondents have no specific response except to note that there is no evidence any resulting "Project Tree-related analysis" was shared with JLI. Indeed, the outline PWP shared in PX1623 refers to "[t]actical considerations for Altria" and "[a]dditional Altria stakeholder considerations," indicating the analysis was intended to be internal to Altria. (PX1623 (PWP) at 002).

Respondents further note that PWP's "Project Tree-related analysis" related to FDA's September 12 letter and how the increased regulatory uncertainty could affect JLI's business. (PX1623 (Altria) at 001-02).

770. On or around September 21, 2018, Altria employees, including Crosthwaite, and Altria's advisers at PWP had discussions and prepared a presentation regarding the potential implications of the FDA's September 12, 2018 letter on Tree negotiations. (PX4273 (Altria) at 001-02). Altria and PWP considered that JLI might have greater strategic rationale for a transaction with Altria in light of the FDA letter. (PX4273 (Altria) at 009-10).

Response to Proposed Finding No. 770:

Respondents have no specific response except to note that the draft presentation makes no mention of the treatment of Altria's e-vapor portfolio in the event of a transaction. (*See* PX4273 (Altria) at 002-19). A slide listing the "[t]op non-value terms for renegotiation" lists "Board Seats," "Voting Stake," and "Exit Terms" among the key terms. (PX4273 (Altria) at 013). Notably, another term mentioned for potential renegotiation was "Non-compete limited to current

and future subsidiaries"—the upstream affiliates issue discussed above, (*see* RRFF ¶ 761)—which had no relation to Altria's e-vapor business. (PX4273 (Altria) at 013).

Moreover, there were no substantive negotiations between Altria and JLI between August 27 and October 5. (Willard (Altria) Tr. 1418-19). Indeed, the draft presentation relied on by Complaint Counsel makes clear that negotiations had stalled—for example, a slide titled "Illustrative pathways" describes various scenarios and potential outcomes surrounding whether Altria should "call Tree" or otherwise attempt to reengage with JLI. (PX4273 (Altria) at 014).

771. Altria General Counsel, Garnick, testified that Altria management continued to some degree to internally discuss the potential Tree deal through the month of September. (Garnick (Altria) Tr. 1655). Garnick testified that he participated in Altria meetings about the potential JLI transaction "all the time" in the latter half of 2018, including some meetings in September 2018. (Garnick (Altria) Tr. 1651).

Response to Proposed Finding No. 771:

Respondents have no specific response except to note that Garnick also testified that none of these internal discussions translated to substantive negotiations, meetings, or term sheets exchanged with JLI between late August and early October. (Garnick (Altria) Tr. 1753, 1754-55; *see also* [redacted]).

772. In late September 2018, Altria executives discussed Project Tree during meetings at the Ranch in Montana. (PX4358 (Altria) at 001). On September 25, 2018, Altria employee Brian Blaylock sent Crosthwaite a deck entitled "Project Tree 10YP" with the [redacted] writing in his cover email: "As conversations progress at the Ranch we thought it would be beneficial to provide you with how Project Tree could impact the current 10YP LE." (PX4358 (Altria) at 001, 003 (*in camera*)).

Response to Proposed Finding No. 772:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel has cited no evidence that "Altria executives discussed Project Tree during meetings at the Ranch in Montana" in late September 2018. [redacted]

[redacted] Accordingly, PX4358 does not support Complaint Counsel's assertion that Altria executives discussed Project Tree at the Ranch in late September 2018.

I. NEGOTIATIONS INTENSIFIED AGAIN IN OCTOBER 2018

1. In Its October 5, 2018 Letter, Altria Reaffirmed Its Commitment Not to Compete in E-cigarettes

773. In early October 2018, several conversations took place between Altria and JLI representatives, and Altria's Willard reached out to JLI's Pritzker to propose revised deal terms. (*See* CCFF ¶¶ 774-87, below). Pritzker thought the revised deal terms were responsive to JLI's concerns, such that it would be beneficial for Altria to send JLI a letter. (*See* CCFF ¶ 775, below). On October 5, 2018, Altria's Willard sent a letter to JLI setting forth the proposed key terms for a deal. (*See* CCFF ¶ 779, below). In that letter, Altria reaffirmed its commitment, "consistent with [] previous discussions," not to compete in e-cigarettes. (*See* CCFF ¶¶ 780-87, below).

Response to Proposed Finding No. 773:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, it is not correct to say Altria "reaffirmed its commitment . . . not to compete in e-cigarettes," (CCFF ¶ 773); Altria had not committed or agreed to do anything—with respect to the noncompete and its e-vapor products, or any other aspect of the potential transaction absent executing a final agreement—and Complaint Counsel has provided no evidence to the contrary. Each of the draft term sheets exchanged by the parties was expressly nonbinding. (PX1300 (Altria) at 002 n.1 (July 30 term sheet); PX2570 (JLI) at 002 n.1 (Aug. 4 term sheet); PX2313 (JLI) at 002 n.1 (Aug. 9 term sheet); PX1432 (Altria) at 004 n.1 (Aug. 19 term sheet); *see also* Pritzker (JLI)

Tr. 814 (explaining terms in a term sheet "are fluid and subject to significant expansion and revision by business and legal teams")). Nor was the October 5 letter itself an agreement; as Pritzker explained at trial, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863).

Second, the Proposed Finding is incomplete and misleading because it omits the necessary context of how JLI understood the phrase "consistent with our previous discussions" in the October 5 letter. Pritzker testified that he understood the reference to mean "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 term sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 863 (noting that "looking at the last term sheet would be instructive" on the meaning of "our previous discussions" in the October 5 letter)). The August 19 term sheet explicitly carved out Altria's existing products from the noncompete pending HSR review, proposing that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22). Thus, the August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to an investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action

with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

Similarly, the August 22 joint issues list demonstrated that the parties had reached consensus (although not a binding agreement) on the treatment of Altria's existing e-vapor business in the event of a transaction. (RX1784 (PWP) at 002, 004; *see also* RFF ¶¶ 834-38). Regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions)). The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

Finally, any suggestion in the Proposed Finding that the reference to the noncompete in the October 5 letter was a "key term[]" that was "responsive to JLI's concerns," (CCFF ¶ 773), is baseless. As Pritzker testified, and as Complaint Counsel admits in CCFF ¶ 780 below, the October 5 letter was a "turning point" because Altria proposed that it acquire a 35 percent economic interest in the company (instead of 45 percent); that it would invest in both JLI's domestic and international business (rather than just the U.S. business); and that it would agree to pay the full amount at closing by purchasing nonvoting shares that would be converted to voting upon antitrust approval, each of which were responsive to JLI's concerns that had caused the impasse in late August. (PX7021 Pritzker (JLI) Dep. at 137-38; *see also* CCFF ¶ 780; RFF ¶¶ 979-84). Pritzker also testified that the "proposed number" (i.e., price) that Willard mentioned in his phone call to Pritzker shortly before sending the letter "indicated a range of consideration that

[Pritzker] thought was sufficiently serious that [they] needed to have the conversation." (PX7021 Pritzker (JLI) Dep. at 137-38).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 774-87, Respondents incorporate their responses to those Proposed Findings herein.

774. On October 1, 2018, Altria board member Devitre and JLI's Valani had a 33-minute phone call. (PX4374 (Altria) at 008 (Devitre phone records)).

Response to Proposed Finding No. 774:

Respondents have no specific response except to note that there is no evidence that Devitre and Valani discussed Altria's existing e-vapor business, or even the potential investment. As Valani explained in his deposition, he and Devitre are "friendly," and their conversations were "not necessarily about Altria and [JLI]." (PX7032 Valani (JLI) Dep. at 96).

775. A few days prior to October 5, 2018, Willard called Pritzker and outlined some proposed terms to see if Pritzker thought it would be constructive for Willard to submit a letter with those terms to JLI. (Pritzker (JLI) Tr. 857-58). Pritzker thought the terms Willard proposed were sufficiently responsive to JLI's concerns that the parties could move forward, and Willard subsequently sent a letter to JLI on October 5, 2018. (Pritzker (JLI) Tr. 857-58).

Response to Proposed Finding No. 775:

Respondents have no specific response except to note that there is no evidence that any of the terms discussed on the call involved the noncompete provision or the treatment of Altria's e-vapor portfolio in the event of a transaction. To the contrary, as Pritzker testified at trial, Willard proposed new terms that "represented a real change from what had been talked about before," (Pritzker (JLI) Tr. 859), which "helped to dislodge" the logjam that caused the impasse in late August, (Pritzker (JLI) Tr. 858). The impasse was caused by disputes around valuation, deal structure, and control; meanwhile, the parties had already reached consensus on what would happen to Altria's existing products before the negotiations stalled. (RFF ¶¶ 834-38, 878-94).

776. On October 3, 2018, JLI's Goldman Sachs adviser Gross texted Altria board member Devitre: "I had a long chat with [JLI's] Riaz [Valani] tonight. I pushed him really hard. I

am speaking with both him and Nick [Pritzker] tomorrow at 9:30 PM PT." (PX4168 (Altria) at 001).

Response to Proposed Finding No. 776:

Respondents have no specific response except to note that there is no evidence that Gross "pushed" Valani on the proposed noncompete or the status of Altria's existing products in the event of a transaction.

777. In notes from October 4, 2018 for an Altria board call, Garnick wrote that [redacted] (PX1010 (Altria) at 004 (*in camera*)). [redacted] (PX1010 (Altria) at 002-03 (*in camera*)). Garnick wrote that [redacted] (PX1010 (Altria) at 003 (*in camera*)).

Response to Proposed Finding No. 777:

The Proposed Finding is incomplete and misleading without additional context. PX1010 is a document listing Garnick's "thoughts about tomorrow's call with the board," written before the Board call took place. (PX1010 (Altria) at 001). As shown in PX1010, [redacted] *see also* RFF ¶¶ 962-70).

Second, [redacted]

[redacted]

Third, [redacted]

778. In the same October 4, 2018 notes for the Altria board call, Garnick also wrote that [redacted] (PX1010 (Altria) at 004 (*in camera*)).

Response to Proposed Finding No. 778:

Respondents have no specific response except to note that Garnick wrote: [redacted]

779. On October 5, 2018, Altria's Willard sent a letter to JLI's Pritzker, Valani, and Burns setting forth eight numbered terms for them to consider. (PX2152 (JLI)). Willard asked to

hear back from JLI as to whether they were willing to more forward by no later than October 12, 2018. (PX2152 (JLI) at 003).

Response to Proposed Finding No. 779:

Respondents have no specific response except to note that Willard asked to hear back from JLI as to whether they were "willing to move forward with re-engagement," evidencing that negotiations were off before Willard's October 5 letter. (PX2152 (JLI) at 003).

780. Among other terms, Willard's letter proposed that Altria would acquire a 35% economic and voting interest in the entire JLI. (PX2152 (JLI) at 002). Previously, Altria had proposed acquiring a 45% interest of only JLI's U.S. business. (Pritzker (JLI) Tr. 825-26). Willard's letter also stated that Altria would make the full investment at closing, at which time Altria would receive non-voting shares, with the parties cooperating to seek regulatory approval to convert those shares into voting shares. (PX2152 (JLI) at 002). Pritzker testified that Altria acquiring a 35% interest (instead of 45%), investing in the entire JLI (not just the U.S. business), and agreeing to pay the full amount at closing addressed JLI's concerns. (PX7021 (Pritzker (JLI), Dep. at 137-38); *see* Pritzker (JLI) Tr. 857-58)).

Response to Proposed Finding No. 780:

Respondents have no specific response.

781. Term 5 of the October 5 letter stated that Altria would "provide support services in the U.S. along the lines previously discussed for a term of six years from closing, which would be renewable for successive three-year terms if mutually agreed. If at the end of any term, we did not mutually agree to extend the support services, Altria would nonetheless provide transition services for a reasonable period." (PX2152 (JLI) at 002-03).

Response to Proposed Finding No. 781:

Respondents have no specific response.

782. Willard's October 5, 2018 letter to JLI also included the following as Term 6:

> 6. Altria would agree that it and its current and future subsidiaries will not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market for any period, exclusive of the aforementioned transition period, during which it provides support services.

(PX2152 (JLI) at 003).

Response to Proposed Finding No. 782:

Respondents have no specific response.

783. Pritzker testified that he and Willard had previous discussions about "the notion of noncompetition and of existing products before this letter." (Pritzker (JLI) Tr. 713-14).

Response to Proposed Finding No. 783:

The Proposed Finding is incomplete and misleading without additional context. Pritzker testified that he understood the reference to "our previous discussions" to mean "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 term sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 863 (noting that "looking at the last term sheet would be instructive" on the meaning of "our previous discussions" in the October 5 letter)).

The August 19 term sheet explicitly carved out Altria's existing products from the noncompete pending HSR review, proposing that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22).

The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

784. Discussing the October 5 letter, Pritzker explained that the "noncompetition provision was the least of my concerns," and that he thought the previous discussions on the issue were

"pretty clear or at least moving towards something that we both believed was not going to be an issue." (PX7021 (Pritzker (JLI), Dep. at 140-41)).

Response to Proposed Finding No. 784:

The Proposed Finding is incomplete and misleading without additional context to the extent Complaint Counsel implies that "the previous discussions on the issue" meant something other than what is reflected in the August 19 term sheet (PX1432 (Altria)) and the August 22 joint issues list (RX1784 (PWP)). Pritzker testified that he understood the reference to "our previous discussions" in the October 5 letter to mean "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 term sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 863 (noting that "looking at the last term sheet would be instructive" on the meaning of "our previous discussions" in the October 5 letter)). As Pritzker explained at trial, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863).

The August 19 term sheet explicitly carved out Altria's existing products from the noncompete pending HSR review, proposing that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22).

The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

Similarly, the August 22 joint issues list demonstrated that the parties had reached consensus on the treatment of Altria's existing e-vapor business in the event of a transaction. (RX1784 (PWP) at 002, 004; *see also* RFF ¶¶ 834-38). Regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions)). The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

785. Pritzker understood Term 6 in the October 5 letter to be referring to "all of the discussions that we had" and that to him, what Term 6 suggested "was there was an agreement on that, on those points." (PX7021 (Pritzker (JLI), Dep. at 204)). Pritzker did not see Term 6 as a game changer, but saw it as Altria simply saying, "we'll do the thing with the noncompete that we previously exchanged views on." (PX7021 (Pritzker (JLI), Dep. at 204)).

Response to Proposed Finding No. 785:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Contrary to Complaint Counsel's assertion, Pritzker did not testify that he understood Term 6 in the October 5 letter to be referring to "all of those discussions that we had" or that there was "an agreement" on Term 6. (*See* PX7021 Pritzker (JLI) Dep. at 204). Instead, Pritzker was explaining what the specific phrase "during which it provides support services" meant:

> Q. One thing I want to ask you about this. I don't think it came up earlier. The clause at the end, "during which it provides support services," how did you understand that? Did that mean that they were agreeing to not compete as long as they were providing the support services?
>
> A. No, that's not quite how I read it.
>
> Q. I don't want to take you off-course. I'm not asking --
>
> A. No, I can tell you what I mean. The transition period that I understood was the period between the closing of the deal and approval by the -- of the FTC of the conversion to vote towards and so on. And during that transition period, that support services would be given, but that those -- the MarkTen or MarkTen Elite would continue to be on the market.
>
> Q. Okay. All right. That's what I –
>
> A. All -- I don't mean to try to be inclusive. It was all of those discussions that we had. To me, what this suggested was there was an agreement on that, on those points.

(PX7021 Pritzker (JLI) Dep. at 203-04).

Further, as Pritzker explained at trial, he understood the reference to "our previous discussions" in Term 6 of the October 5 letter to mean "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 term sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 863 (noting that "looking at the last term sheet would be instructive" on the meaning of "our previous discussions" in the October 5 letter)). As Pritzker explained at trial, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863).

The August 19 term sheet explicitly carved out Altria's existing products from the noncompete pending HSR review, proposing that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their

contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22).

The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

Similarly, the August 22 joint issues list demonstrated that the parties had reached consensus on the treatment of Altria's existing e-vapor business in the event of a transaction. (RX1784 (PWP) at 002, 004; *see also* RFF ¶¶ 834-38). Regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions)). The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

786. The October 5 letter set forth a deal construct that was close to the deal that was actually executed between Altria and JLI. (PX7011 (Valani (JLI), IHT at 115-16)).

Response to Proposed Finding No. 786:

Respondents have no specific response except to note that after the October 5 letter, JLI and Altria exchanged two more draft term sheets, multiple draft agreements, and engaged in extensive negotiations until the deal was executed on December 20, 2018.

787. Pritzker acknowledged receipt of Willard's October 5, 2018 letter and promised to reply before October 12, 2018 as requested. (PX4400 (Altria)).

Response to Proposed Finding No. 787:

Respondents have no specific response.

2. Negotiations Continued to Progress in Mid-October 2018

788. In mid-October 2018, negotiations continued to progress towards a deal based on the terms outlined in Altria's October 5, 2018 letter. (*See* CCFF ¶¶ 789-810, below). On October 15, 2018, Altria sent JLI a revised term sheet reflecting the terms outlined in its October 5, 2018 letter. (*See* CCFF ¶¶ 797-804, below). The October 15, 2018 term sheet obligated Altria to dispose of its e-cigarette products either by contributing them to JLI or by divesting them as necessary to obtain antitrust approval. (*See* CCFF ¶ 798, below). In its October 15, 2018 term sheet, Altria added language tying its provision of certain services to the earlier of the date it contributed its e-cigarette assets to JLI, or when it "otherwise exit[ed]the marketing and sale of [e-cigarettes]." (*See* CCFF ¶¶ 798-803, below). Altria's October 15, 2018 term sheet also contained a non-compete clause. (*See* CCFF ¶ 804, below). After receiving the October 15, 2018 term sheet, JLI indicated it was "ready to do a deal." (*See* CCFF ¶ 805, below).

Response to Proposed Finding No. 788:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the October 15 term sheet did not "obligate[] Altria to dispose of" its products; to the contrary, it explicitly provided for Altria to continue competing against JLI with these products until the transaction received antitrust approval and the FTC had the opportunity to weigh in on what, if anything, should happen with Altria's existing products. (*See* PX1269 (Altria) at 006-07). Specifically, the October 15 term sheet continued to propose that both parties would "use reasonable best efforts to seek Antitrust Clearance" and would "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business."

(PX1269 (Altria) at 006-07). "[I]f necessary to obtain Antitrust Clearance," Altria would offer to divest its e-vapor assets, and if those assets were not otherwise transferred to a third party, Altria would contribute such assets to JLI upon receipt of antitrust clearance. (PX1269 (Altria) at 006-07; *see also* Pritzker (JLI) Tr. 868). Relatedly, like every term sheet before it, the October 15 term sheet's noncompete provision contained a carve-out for MarkTen cig-a-like and MarkTen Elite "prior to their contribution or divestiture." (PX1269 (Altria) at 008).

Second, the Proposed Finding omits necessary context regarding the October 15 term sheet's provisions related to enhanced services. (*See* RFF ¶¶ 1062-73). The October 15 term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1269 (Altria) at 007-08; PX7036 Garnick (Altria) Dep. at 193-94). The October 28 and October 30 term sheets similarly contained this distinction. (PX2503 (JLI) at 008-09 (Oct. 28 term sheet); RX0285 (Altria) at 022-23 (Oct. 30 term sheet)).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1269 (Altria) at 007); *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 022-23). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution"; providing "display and in-store support"; and providing JLI with access to Altria's "best in class infrastructure (including distribution)." (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

As a result of this distinction between certain services, Altria's counsel added a provision to the term sheet to clarify when the enhanced services could begin. Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). The October 28 and October 30 term sheets contained similar language but replaced "contribution" with "Antitrust Clearance." (PX2503 (JLI) at 009; RX0285 (Altria) at 023).

These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 008). For JLI's part, Pritzker does not recall noticing this language when it was added to the October 15 term sheet, and he does not know why it was added. (Pritzker (JLI) Tr. 872).

Finally, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 789-810, Respondents incorporate their responses to those Proposed Findings herein.

789. On October 9, 2018, Pritzker requested a call with Willard and Gifford for Thursday, October 11, 2018. (PX4401 (Altria) (Email exchange between Pritzker, Willard, and Gifford)).

Response to Proposed Finding No. 789:

Respondents have no specific response except to note that an email requesting a call is not evidence that the call took place, and there is no testimony that this call occurred.

790. On October 11, 2018, JLI's Valani talked to Altria board member Devitre. (PX2385 (JLI) (Email from Valani noting, "Just talked to Dinny [Devitre]")).

Response to Proposed Finding No. 790:

Respondents have no specific response except to note that there is no evidence in the record regarding what was discussed.

791. On the evening of October 11, 2018, Altria's Willard had a conversation with JLI's Pritzker. (Willard (Altria) Tr. 1227-28).

Response to Proposed Finding No. 791:

Respondents have no specific response except to note that there is no evidence regarding what was discussed on the call, beyond Willard's belief that this was the "next communication" following the October 5 letter. (*See* Willard (Altria) Tr. 1228).

Additionally, according to Willard's phone records, the call lasted for just five minutes. (PX4376 (Altria) at 004; *see also* RRFF ¶ 795).

792. On October 11, 2018, Altria's PWP adviser Wappler reported to colleagues: "Pritzker called back this evening and said the [JLI] Board is supportive of moving forward on the terms outlined by Howard [Willard]. They are going to have a call tomorrow to confirm all of the specifics . . .." (PX3198 (PWP)).

Response to Proposed Finding No. 792:

Respondents have no specific response.

793. On October 12, 2018, Willard told Devitre via text: "Spoke to Nick [Pritzker] last night | Tentative agreed to a call on Monday to agree on terms | Agreed on term in the letter." (PX4167 (Altria) at 007).

Response to Proposed Finding No. 793:

The Proposed Finding is inaccurate and misleading to the extent it suggests the deal was complete and all of the terms had been agreed to in October. To the contrary, the companies had not even begun conducting due diligence or drafting definitive deal documents, and among other issues, the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be a . . . mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also, e.g.*, PX4167 (Altria) at 005 (text from Devitre to Willard stating, "I have reported highlights of my discussion with Riaz to Billy. Conclusion: Riaz would very much like to do a topco deal. Some negotiations required for valuation . . . . He said he would revert. No chance of agreement before October 15"); RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130).

794. Late in the evening on October 11, 2018, Pritzker emailed Willard, Gifford, and Valani to confirm a call for 11:00pm ET the next day (October 12). (PX2023 (JLI) at 002). On the morning of October 12, 2018, Altria's Willard responded to Pritzker and Valani: "I have a revised proposal. I think it would be more productive if we send you a revised term sheet early next week and then meet or have a call next Friday or on a day that works for you." (PX2023 (JLI) at 002).

Response to Proposed Finding No. 794:

Respondents have no specific response.

795. On October 11, 2018, Willard and Pritzker spoke by phone. (PX4376 (Altria) at 004 (Willard phone records)).

Response to Proposed Finding No. 795:

Respondents have no specific response except to note that the call lasted for just five minutes, (PX4376 (Altria) at 004), and that there is no evidence regarding what was discussed on the call, beyond Willard's belief that this was the "next communication" following the October 5 letter, (*see* Willard (Altria) Tr. 1228).

796. In an October 12 draft letter to the Altria board updating them on the status of Project Tree, Willard characterized his October 5 letter as "propos[ing] a modification" of the terms the two companies had been exchanging and the negotiations as "on-going." (PX4292 (Altria) at 002).

Response to Proposed Finding No. 796:

Respondents have no specific response except to note that the letter explains what Willard meant by "modification": "For example, we insisted upon a 35% stake in the entire company, both U.S. and international. We emphasized that we were not willing to negotiate on these matters." (PX4292 (Altria) at 002).

Additionally, PX4292 is a draft letter containing redlined revisions; this is not the final document that went to Altria's Board. PX1350 contains the final letter sent to the Board. (*See* PX1350 (Altria) at 001; RFF ¶ 993).

797. On October 15, 2018, Willard sent Pritzker, Valani, and Burns a revised term sheet that reflected Altria's edits to the preceding August 18, 2018 term sheet. (PX2147 (JLI)).

Response to Proposed Finding No. 797:

Respondents have no specific response except to note that the redlined version of this term sheet, indicating Altria's revisions in color and without redactions, is better seen at PX1269 (Altria) at 002-017. In addition, the August 18 term sheet was more often referred to as the August 19 term sheet at trial, reflecting the date it was sent. (*See* Pritzker (JLI) Tr. 847; *see also* RFF ¶ 824).

798. The October 15, 2018 revised term sheet included a term requiring Altria to contribute its existing e-cigarette business to JLI upon antitrust clearance, if it had not already divested the assets in order to achieve antitrust clearance:

> - If Richard has not otherwise transferred its interests in its e-vapor assets to a third party, then Richard agrees that it will contribute, upon receipt of Antitrust Clearance, to Jack 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 as of [●], 2018 (in each case to the extent it has the legal right to make such contribution) and Jack shall pay Richard $[●] million in respect of such contribution.
>
> - Richard will offer to divest all such Richard assets relating to the Field if necessary to obtain Antitrust Clearance, to the extent Richard has the legal right to do so, no later than within 9 months after application for HSR clearance of the Purchase if the parties have not received Antitrust Clearance at that point. To the extent Richard does not have the legal right to divest of any asset relating to the Field within 9 months after application for the HSR clearance of the Purchase, but obtains such a legal right subsequently when the parties have not received Antitrust Clearance, Richard will offer to divest of such assets at that time.

(PX2147 (JLI) at 022-23). In both cases, the term sheet stated that contribution and divestiture were subject to Altria's legal right to take those actions. (PX2147 (JLI) at 022-23).

Response to Proposed Finding No. 798:

Respondents have no specific response except to note that the Antitrust Clearance Matters section of the term sheet also continued to propose that both parties would "use reasonable best efforts to seek Antitrust Clearance" and would "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2147 (JLI) at 023).

799. The October 15, 2018 term sheet specified that Altria "shall elect the time (not to exceed two years from closing of the Purchase) when the parties initiate the HSR clearance process." (PX2147 (JLI) at 023).

Response to Proposed Finding No. 799:

Respondents have no specific response except to note that Altria added this term to make sure that it could divest or contribute its e-vapor portfolio, if requested by the FTC to obtain antitrust clearance, without potentially impacting a preexisting agreement with PMI. (*See* RFF ¶¶ 1050-61).

800. In its October 15, 2018 term sheet, Altria added language referring to Altria "otherwise exiting the marketing and sale of [e-cigarette products]":

- 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"):
  - assist with direct marketing programs, including inserts and/or onserts;
  - fully support Jack's efforts to gain distribution, display and in-store support for Jack's products, including support of point of sale prominence for Jack's products alongside Richard's; and
  - grant Jack access to Richard's best in class infrastructure (including distribution) to maximize the growth of Jack.

(PX2147 (JIL) at 024).

Response to Proposed Finding No. 800:

The Proposed Finding is incomplete and misleading without additional context. The October 15 term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1269 (Altria) at 007-08 (same term sheet as PX2147 (JLI)); PX7036 Garnick (Altria) Dep. at 193-94). The October 28 and October 30 term sheets similarly contained this distinction. (PX2503 (JLI) at 008-09 (Oct. 28 term sheet); RX0285 (Altria) at 022-23 (Oct. 30 term sheet)).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1269 (Altria) at 007); *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 022-23). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution"; providing "display and in-store support"; and providing JLI with access to

Altria's "best in class infrastructure (including distribution)." (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

As a result of this distinction between certain services, Altria's counsel added a provision to the term sheet to clarify when the enhanced services could begin. (*See* RFF ¶¶ 1062-67). Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). The October 28 and October 30 term sheets contained similar language but replaced "contribution" with "Antitrust Clearance." (PX2503 (JLI) at 009; RX0285 (Altria) at 023).

These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 007-08).

801. The underlined language in this term was added by Altria, including the reference to Altria "otherwise exiting the marketing and sale of products in the Field." (PX2147 (JLI) at 008 (redline version showing changes against August 18 term sheet), 024 (clean copy reflecting Altria's edits); Pritzker (JLI) Tr. 726-27).

Response to Proposed Finding No. 801:

Respondents have no specific response except to clarify that these revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194; *see also* RRFF ¶ 800; RFF ¶¶ 1062-67). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be

provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 007-08 (same document as PX2147 (JLI))).

802. As edited by Altria, this term meant that Altria could start providing certain services to JLI, such as direct marketing programs targeting Altria smokers, upon the earlier of Altria contributing its e-cigarette assets to JLI, or Altria "otherwise exiting the marketing and sale of [e-cigarettes]." (PX2147 (JLI) at 008 (redline version), 024 (clean version); PX7031 (Willard (Altria) Dep. at 235-37) (discussing PX1269 (Altria) at 023) ("Q. And, Mr. Willard, do you have an understanding of what the reference to Richard otherwise exiting the marketing and sale of products in the field as it's used in this term? A. (Document review.) Yeah, I don't -- sounds like it's talking about providing the services if either point 1 happens or -- or point 2 happens. And it sounds like point 2 is a general description of a variety of ways that Altria could exit the marketing and sale of products in the field other than contribution, which is listed in point 1.")). Altria would not begin providing these services, such as inserts or onserts, to JLI while the two companies were competing. (Garnick (Altria) Tr. 1,668-69).

Response to Proposed Finding No. 802:

The Proposed Finding is incomplete and misleading without additional context. *First*, these revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194; *see also* RRFF ¶ 800; RFF ¶¶ 1062-67). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 007-08 (same document as PX2147 (JLI))). For JLI's part, Pritzker does not recall noticing this language when it was added to the October 15 term sheet, and he does not know why it was added. (Pritzker (JLI) Tr. 872).

Second, to the extent Complaint Counsel implies that Altria withdrew its e-vapor products so it could provide enhanced services (including direct marketing programs) quicker, it provides no evidence to support this theory. To the contrary, the record reflects that neither JLI nor Altria

was concerned about the timing for Altria providing enhanced services. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13).

It was in fact the regulatory support services, which *could* be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI. (Pritzker (JLI) Tr. 820; PX7025 Burns (JLI) Dep. at 211-12). Pritzker stated that it was Altria's PMTA support services that were critical, because "getting PMTA approval is literally existential for the company. You cannot operate without PMTA approval . . . . Altria's team was the best in the country, and [] their willingness to provide services through that team was invaluable." (Pritzker (JLI) Tr. 820). Similarly, as then-CEO Kevin Burns testified, the support services were "incredibly important," to JLI, "especially things like support around PMTA submission and FDA support," as those showed that Altria was "going to come out and support [JLI's] mission." (PX7025 Burns (JLI) Dep. at 212).

By contrast, Pritzker viewed the enhanced services as "valuable services but not the critical service." (Pritzker (JLI) Tr. 871). He "would not have seen [delaying the start of enhanced services] as a problem," and he agreed that he was not "concerned about what the trigger date would be for starting them." It was "important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer [the enhanced] services, but when they started would not have been consequential to [him]." (Pritzker (JLI) Tr. 871-72). Willard's memory was the same. He recalled that JLI wanted Altria's services, but both sides understood that "there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that." (Willard (Altria) Tr. 1213). He did not "recall that the timing of those services was an important part of what [JLI was] expecting." (Willard (Altria) Tr. 1213; *see also* RFF ¶¶ 1062-73).

803. The services that Altria would not begin providing to JLI until the two companies were no longer competing included placing JUUL coupons in (inserts) or on (onserts) Altria

cigarette packs. (PX2147 (JLI) at 024; Willard (Altria) Tr. 1,232-33; Garnick (Altria) Tr. 1,668-69).

Response to Proposed Finding No. 803:

Respondents have no specific response except to note that to the extent Complaint Counsel implies that Altria withdrew its e-vapor products so it could provide enhanced services (including direct marketing programs) quicker, it provides no evidence to support this theory. To the contrary, the record reflects that neither JLI nor Altria was concerned about the timing for Altria providing enhanced services. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13).

It was in fact the regulatory support services, which *could* be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI. (Pritzker (JLI) Tr. 820; PX7025 Burns (JLI) Dep. at 211-12). Pritzker stated that it was Altria's PMTA support services that were critical, because "getting PMTA approval is literally existential for the company. You cannot operate without PMTA approval . . . . Altria's team was the best in the country, and [] their willingness to provide services through that team was invaluable." (Pritzker (JLI) Tr. 820). Similarly, as then-CEO Kevin Burns testified, the support services were "incredibly important," to JLI, "especially things like support around PMTA submission and FDA support," as those showed that Altria was "going to come out and support [JLI's] mission." (PX7025 Burns (JLI) Dep. at 212).

By contrast, Pritzker viewed the enhanced services as "valuable services but not the critical service." (Pritzker (JLI) Tr. 871). He "would not have seen [delaying the start of enhanced services] as a problem," and he agreed that he was not "concerned about what the trigger date would be for starting them." It was "important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer [the enhanced] services, but when they started would not have been consequential to [him]." (Pritzker (JLI) Tr. 871-72). Willard's memory was the same. He recalled

that JLI wanted Altria's services, but both sides understood that "there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that." (Willard (Altria) Tr. 1213). He did not "recall that the timing of those services was an important part of what [JLI was] expecting." (Willard (Altria) Tr. 1213; *see also* RFF ¶¶ 1062-73).

804. The October 15, 2018 term sheet also included a non-compete term:

> • Richard agrees to refrain, and to cause its current and future subsidiaries to refrain, from competing in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above). Richard will, and will cause its current and future subsidiaries to, coordinate any e-vapor business efforts through Jack and Jack will be the vehicle through which Richard participates in the e-vapor business. The non-compete will terminate upon the termination of the Services Term.

(PX2147 (JLI) at 024-25).

Response to Proposed Finding No. 804:

Respondents have no specific response except to note that the October 15 term sheet contained an identical carve-out as the August 19 term sheet for MarkTen cig-a-like and MarkTen Elite "prior to their contribution or divestiture." (PX2147 (JLI) at 024-25 (Oct. 15 term sheet); PX1432 (Altria) at 024 (Aug. 19 term sheet)). Additionally, and as better shown in the redline at PX1269, Altria revised portions of the noncompete unrelated to the treatment of its existing products, including by removing JLI's proposals from the August 19 term sheet that the noncompete apply "anywhere in the world" or to "current and future affiliates" (rather than subsidiaries), undermining any assertion that the parties had already formed an agreement on the noncompete term. (PX1269 (Altria) at 008; *see also* PX1432 (Altria) at 024 (Aug. 19 term sheet)).

805. On Saturday October 20, 2018, JLI's Valani and Altria board member Devitre had a breakfast meeting in New York, and Valani indicated that JLI was "ready to do a deal." (PX1313 (Altria) (email from Willard to Crosthwaite, Gifford, and Garnick); PX7001 (Devitre (Altria), IHT at 127-28)).

Response to Proposed Finding No. 805:

Respondents have no specific response except to note that as Devitre explained in his deposition, Valani's indication that JLI was "ready to do a deal" did not mean the terms were settled:

> [M]y recollection is that he gave me the impression that [JLI was] 90 percent there to do a deal. There were still outstanding matters. And we had experience that the [JLI] people could change their mind at any time, and sometimes when they said, okay, we are done, this is it, we are very happy, in fact, we have had celebration dinners with them two or three times. So that has to be born[e] in mind when I said 90 percent that they were there for a deal. That's the impression I got, that this time he was quite serious about moving ahead with the deal, but I still felt that we hadn't agreed on all terms.

(PX7001 Devitre (Altria) IHT at 127-28).

806. At the breakfast meeting, Valani suggested the two sides meet the following Monday (October 22). (PX1313 (Altria) (email from Willard to Crosthwaite, Gifford, and Garnick); PX7001 (Devitre (Altria), IHT at 128)). Meeting on Monday would not work for Altria, but Willard suggested internally that Altria should be prepared to meet with JLI on Friday (October 26). (PX1313 (Altria)).

Response to Proposed Finding No. 806:

Respondents have no specific response.

807. On Monday, October 22, 2018, Devitre emailed Altria's Willard and Gifford and told them that JLI's Valani was open to meeting that Friday or Saturday for negotiations. (PX1312 (Altria)). Devitre suggested that he host a dinner the night before negotiations, and asked Willard to invite Valani and Pritzker. (PX1312 (Altria)). Due to an Altria conflict, Willard proposed to JLI's Valani, Pritzker, and Burns that they meet on Monday (October 29) and do dinner the night before. (PX2364 (JLI) at 002).

Response to Proposed Finding No. 807:

Respondents have no specific response.

808. On October 22, 2018, Altria and JLI's legal teams had a call. (PX2364 (JLI) at 002)).

Response to Proposed Finding No. 808:

Respondents have no specific response.

809. An Altria document entitled "Summary of Issues Raised by Tree on October 22, 2018 Lawyers' Call" included the following chart reflecting the positions in Altria's October 15, 2018 term sheet and JLI's comments on those positions, including an Altria term saying: "Altria will not compete in the e-vapor business for six years."

No.	Topic	Altria Term Sheet	Tree Comments[1]
4.	**Antitrust Filing**	• Altria will file for antitrust clearance within two years.	• Tree proposed that this deadline coincide with the termination date of the PMI agreements (July 15, 2020).
5.	**Non-Compete and Support Services**	• Support Services last for six years from closing.	• Tree stated that the full support services and non-compete effectively may only last for 3 1/2 years due to antitrust delay. Tree proposed a support services term of six years from either the date of the antitrust filing or antitrust clearance. [***Note**: Altria's Oct. 5 letter provided for a term of six years from closing, although Tree's counterproposal here does not seem unreasonable.*]
		• Reasonable transition period at end of support services term.	• Tree wants to specify a transition term in the term sheet, and floated one year as a possibility
		• Altria will not compete in the e-vapor business for six years. An acquirer of Altria is not bound by the non-compete agreement, even if it is a competitor of Tree.	• Tree stated that they were not trying to effectively block an acquisition or change of control of Altria. However, they are concerned about a competitor to gaining a material position in Tree while continuing to compete with Tree. • Tree raised the issue of whether Altria should retain its board seats and voting rights if it starts to compete.

(PX1270 (Altria) at 024).

Response to Proposed Finding No. 809:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 10), or in any deposition.

Second, contrary to the Proposed Finding, there was no "term" in the October 15 term sheet stating that "Altria will not compete in the e-vapor business for six years." (CCFF ¶ 809). Instead, the October 15 term sheet explicitly carved out Altria's existing products from the noncompete pending HSR review, as did every term sheet and deal document exchanged between the parties, from the initial July 30 term sheet through the final agreement. (*See* PX2147 (JLI) at 024-25 (Oct. 15 term sheet); RFF ¶ 1192). By contrast, the language cited by Complaint Counsel in PX1270 is from an internal document created by Altria's outside counsel intended to summarize—in a

shorthand fashion—various terms from the October 15 term sheet, with JLI counsel's comments on each term in the adjacent column. It was not sent to JLI. (*See* PX1270 (Altria) at 001, 024). This internal chart created by outside counsel does not supersede the term sheet, nor does it reflect how the parties understood the noncompete. (*See* RFF ¶¶ 1189-207).

Third, as demonstrated by JLI's counsel's comments in the "Tree Comments" column, the issue related to the noncompete provision under discussion was not related to the treatment of Altria's existing products, but on whether upstream affiliates or future acquirers of Altria would be bound by the noncompete—making the term sheet's carve-out for MarkTen cig-a-like and MarkTen Elite irrelevant to the issue the parties' counsel were discussing. (*See* PX1270 (Altria) at 024 ("Tree stated that they were not trying to effectively block an acquisition or change of control of Altria. However, they are concerned about a competitor . . . gaining a material position in Tree while continuing to compete with Tree."); *see also* RRFF ¶ 761 (explaining the upstream affiliates issue)).

Finally, Complaint Counsel's baseless insinuation that these call summary notes by Altria's outside counsel indicate a noncompete agreement that exists nowhere else in the record is further undermined by the fact that it did not ask a single witness at trial or in deposition about the meaning of this bullet point or document.

Respondents also note that Complaint Counsel relies on this Proposed Finding in its brief in support of the claim that JLI "expressed concern . . . that the full support services and non-compete 'effectively may last only 3½ years due to antitrust delay' in making HSR filings." (CC Opening Br. 46). In so doing, Complaint Counsel omits that the parties addressed this issue in the final term sheet by modifying the Services Agreement's six-year term to expire upon "the sixth anniversary *of the filing date of the HSR application*." (RX0285 (Altria) at 008).

810. On October 23, 2018, Altria's Garnick emailed JLI's outside counsel and suggested that they could resolve a number of issues by having an informal chat by phone. (PX2363 (JLI) at 001-02). JLI counsel responded that he thought having further conversations would be helpful, and proposed a time for that afternoon. (PX2363 (JLI) at 001). He also noted that JLI General Counsel Jerry Masoudi would be available. (PX2363 (JLI) at 001).

Response to Proposed Finding No. 810:

Respondents have no specific response except to note that emails scheduling a call are not evidence that the call occurred, and there was no testimony that this call took place.

J. ALTRIA AND JLI REACHED AGREEMENT ON A FINAL TERM SHEET JUST DAYS AFTER ALTRIA DISCONTINUED ITS POD-BASED E-CIGARETTE PRODUCTS

811. On October 25, 2018, Altria announced that it was pulling its pod-based e-cigarettes from the market, due to a purported concern that pod-based products significantly contribute to youth e-cigarette use. (*See* CCFF ¶ 812, below). Only days later, Altria and JLI, whose market-leading JUUL products are pod-based, reached material agreement on a final term sheet. (*See* CCFF ¶¶ 813-25, below). The final term sheet required Altria to contribute or divest its e-cigarette products, and included a non-compete prohibiting Altria from participating in the e-cigarette business except through JLI. (*See* CCFF ¶¶ 825-30, below).

Response to Proposed Finding No. 811:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, in response to FDA's September 12 letter demanding manufacturers take prompt action to address youth vaping, Altria discontinued not only its pod products, but also its nontraditionally flavored cig-a-like products. (PX2022 (JLI) at 003). Altria discontinued these products because it did "not want to risk contributing" to the youth issue. (PX2022 (JLI) at 003).

Second, Altria leadership internally decided to discontinue its pod-based products and non-traditional flavors on September 26, 2018. (RFF ¶¶ 938-51). Contemporaneous documents show that Altria resolved to take these actions regardless of what came of its negotiations with JLI, which had broken down at the end of August. (RFF ¶¶ 878-81). A slide presented by Quigley on September 26 summarized that, "in response to FDA," Altria would "[r]emove Elite & Apex from the Marketplace." (RX1176 (Altria) at 024; *see also* RX0314 (Altria) at 003-04 (October 1 outline

for FDA meeting explaining that Altria would discontinue Elite and nontraditional flavored cig-a-likes)). And Altria leadership communicated this decision to its Board on October 4. (PX1010 (Altria) at 002-03; PX7036 Garnick (Altria) Dep. at 242-43). The company only delayed the announcement so it could first discuss its plans with FDA at an October 18 meeting and then time the announcement to coincide with the company's third quarter earnings call on October 25. (RFF ¶¶ 952, 997-1007; *see also* Quigley (Altria) Tr. 2082 (management "didn't think it would be appropriate to announce [the decision] before telling the FDA"); Willard (Altria) Tr. 1238 ("[W]e thought the cleanest way to communicate this set of actions to the investment community was to time it on the same day that we sent the letter to coincide with our earnings call, so if investors had questions, Mr. Gifford and I would be on the phone with them . . . ."); Gifford (Altria) Tr. 2814 (explaining that Altria based the timing of its announcement on considerations related to the timing of "SEC filings")).

Third, Altria's decision to discontinue its own pod and nontraditional flavored products in response to FDA's September 12 letter is not inconsistent with its investment in JLI. In its October 25 letter, Altria recognized the "long-term promise of e-vapor products and harm reduction" for "adult smokers to switch from combustible cigarettes," (PX2022 (JLI) at 002); however, Altria concluded that its particular products did not provide enough of a countervailing benefit to adult smokers to balance the risk of youth access. As Garnick explained at trial, Altria removed these products because in addition to concerns about youth usage of these types of products, they were "not converting smokers, losing money, not . . . going anywhere, [and] wouldn't get a PMTA." (Garnick (Altria) Tr. 1771; *see also* Garnick (Altria) Tr. 1758 ("[I]t was my immediate response [to the FDA letter] that enough is enough. This is yet another compelling reason to stop selling these products . . . .")).

JUUL, by contrast, was the most effective product on the market at converting smokers, so although it was also a pod product, Altria believed JUUL was converting adult smokers and was a worthwhile potential harm reduction investment as long as the youth issue was addressed. (Garnick (Altria) Tr. 1771). "The youth issue absolutely had to be addressed," but Altria believed it could help JLI address it. (Garnick (Altria) Tr. 1771). Accordingly, even after discontinuing its own failed pod and nontraditionally flavored cig-a-like products, Altria believed there was value in continuing negotiations with JLI. (*See* RFF ¶¶ 1008-19, 1026-41).

Fourth, Altria and JLI did not "reach material agreement" in October, as the Proposed Finding posits. To the contrary, the companies had not even begun conducting due diligence or drafting definitive deal documents, and among other issues, the most fundamental term of any purchase—price—had not yet been resolved. (*See* Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

Fifth, the October 30 nonbinding term sheet, like every term sheet before it, explicitly provided for Altria to continue competing against JLI with Nu Mark's e-vapor products until the transaction received antitrust approval and the FTC had the opportunity to weigh in on what, if anything, should happen with Altria's e-vapor portfolio products. (*See* PX1271 (Altria) at 024). Specifically, the October 30 term sheet continued to propose that both parties would "use

reasonable best efforts to seek Antitrust Clearance" and would "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX1271 (Altria) at 022). "[I]f necessary to obtain Antitrust Clearance," Altria would offer to divest its e-vapor assets, and if those assets were not otherwise transferred to a third party, Altria would contribute such assets to JLI at JLI's election upon receipt of antitrust clearance. (PX1271 (Altria) at 022). Relatedly, like every term sheet before it, the October 30 term sheet's noncompete provision contained a carve-out for MarkTen cig-a-like and MarkTen Elite "prior to their contribution or divestiture." (*See* PX1271 (Altria) at 024).

Finally, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 812-30, Respondents incorporate their responses to those Proposed Findings herein.

812. On October 25, 2018, Altria informed the FDA via letter (and announced publicly) that it was removing its pod-based products MarkTen Elite and Apex by MarkTen from the market due to a stated concern that "pod-based products significantly contribute to the rise in youth use of e-vapor products." (PX2022 (JLI) at 003).

Response to Proposed Finding No. 812:

The Proposed Finding is incomplete and misleading without additional context. In its October 25 letter to FDA, Altria announced that it was taking three actions: (1) removing its pod products, MarkTen Elite and Apex by MarkTen, from the market "until [Altria] receive[d] a market order from FDA or the youth issue [was] otherwise addressed"; (2) discontinuing all flavors of its cig-a-like products other than tobacco, menthol, and mint "until [Altria] receive[d] a market order from FDA or the youth issue [was] otherwise addressed"; and (3) announcing its support for federal legislation to "establish 21 as the minimum age to purchase any tobacco product." (PX2022 (JLI) at 002-03). As Altria explained, although it did not believe its pod and nontraditionally flavored cig-a-like products had a current issue with youth use or access, it "d[id] not want to risk contributing to the issue." (PX2022 (JLI) at 003-04).

813. Early in the morning on October 25, 2018, Willard forwarded Altria's FDA letter to JLI's Pritzker, Valani, and Burns. (PX2022 (JLI) at 001).

Response to Proposed Finding No. 813:

Respondents have no specific response except to clarify that Willard forwarded Altria's FDA letter after it had already been sent to FDA and posted publicly on Altria's website. (PX2022 (JLI) at 001; Willard (Altria) Tr. 1237-39; Pritzker (JLI) Tr. 873). Further, the timestamp shown on PX2022 is shown in pacific time, not eastern time. Willard forwarded the letter to JLI at 8:25 AM eastern time. (Willard (Altria) Tr. 1451-53).

814. Later on the morning of October 25, 2018, Altria's Willard and Gifford spoke to JLI's Pritzker, Valani, and Burns by phone. During that call, Willard said that, despite what Altria had told the FDA about pod-based products, Altria still wanted to move forward with acquiring an interest in JLI. (Pritzker (JLI) Tr. 728-30; Valani (JLI) Tr. 945).

Response to Proposed Finding No. 814:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, JLI understood that the October 25 letter was Altria's response to FDA's September 12 letter. (Pritzker (JLI) Tr. 883-84). FDA's September 12 letter had demanded that the manufacturers take "prompt action" to address FDA's concerns related to youth vaping. (RX1120 (FDA) at 002, 003; *see also* RFF ¶¶ 917-37). One of the options FDA specifically listed in the letter as a step manufacturers could take as part of its plan to address youth vaping was "[r]emoving flavored products from the market until those products can be reviewed by FDA as part of a PMTA." (RX1120 (FDA) at 003). Altria understood this comment to "strongly suggest[]" that it should remove nontraditionally flavored products from the market pending FDA review, (Willard (Altria) Tr. 1441), which is what it did.

Second, JLI viewed the announcements in Altria's October 25 letter as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874; Valani (JLI) Tr. 944-45; PX7021 Pritzker (JLI) Dep. at 150; *see also* RFF ¶¶ 1008-19). Indeed, the undisputed evidence—both from testimony and

contemporaneous documents—demonstrates JLI was "shocked" to learn of Altria's decision and viewed the letter as a "hostile action towards JUUL." (PX7011 Valani (JLI) IHT at 124-26; *see also, e.g.*, PX2473 (JLI) at 001). This was a response Altria anticipated, particularly because the letter, as Garnick explained, said that Altria "believed that pod products substantially contributed to the youth epidemic." (Garnick (Altria) Tr. 1765; *see also* PX2022 (Altria) at 003 (Altria letter to FDA stating: "Based on the publicly available information from FDA and others, we believe that pod-based products significantly contribute to the rise in youth use of e-vapor products."); Gifford (Altria) Tr. 2830 (agreeing that Altria did not expect that discontinuing Elite and nontraditionally flavored cig-a-like products would "increase [the] chances of doing a final deal with JLI").

Given the tenor of Altria's letter, Pritzker was "very skeptical that [Altria was] sincere in wanting to invest in [JLI]." (PX7021 Pritzker (JLI) Dep. at 155). To smooth the waters, Willard and Gifford called Pritzker, Valani, and Burns to explain why Altria was still interested in pursuing a transaction with JLI. (*See* RFF ¶ 1018). This was because, as Garnick testified at trial, Altria's products were "not converting smokers, losing money, not . . . going anywhere, [and] wouldn't get a PMTA." (Garnick (Altria) Tr. 1771; *see also* PX7021 Pritzker (JLI) Dep. at 148)). JUUL, by contrast, was the most effective product on the market at converting smokers, and a worthwhile potential harm reduction investment if the youth issue were addressed. (Garnick (Altria) Tr. 1771). "The youth issue absolutely had to be addressed," but Altria believed it could help JLI address it. (Garnick (Altria) Tr. 1771).

815. On the October 25, 2018 phone call, Willard explained that Altria was removing Elite because they had concluded it was not as good as JUUL's product. (PX7021 (Pritzker (JLI), Dep. at 148)).

Response to Proposed Finding No. 815:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, as JLI understood, in response to FDA's September 12 letter demanding manufacturers take prompt action to address youth vaping, Altria discontinued not only its pod products, but also its nontraditionally flavored cig-a-like products. (Pritzker (JLI) Tr. 883-84; RX1120 (FDA) at 002, 003; *see also* RFF ¶¶ 917-37). Altria discontinued these products because it did "not want to risk contributing" to the youth issue. (PX2022 (JLI) at 003). However, in its letter, Altria also recognized the "long-term promise of e-vapor products and harm reduction" for "adult smokers to switch from combustible cigarettes." (PX2022 (JLI) at 003).

Second, as Garnick testified at trial, Altria's products were "not converting smokers, losing money, not . . . going anywhere, [and] wouldn't get a PMTA." (Garnick (Altria) Tr. 1771; *see also* PX7021 Pritzker (JLI) Dep. at 148). JUUL, by contrast, was the most effective product on the market at converting smokers, and Altria believed it was a worthwhile potential harm reduction investment if the youth issue were addressed. (Garnick (Altria) Tr. 1771). "The youth issue absolutely had to be addressed," but Altria believed it could help JLI address it. (Garnick (Altria) Tr. 1771).

816. Willard told Pritzker, Valani, and Burns that "he was anxious to continue conversations and to try to do the investment as we had discussed." (Pritzker (JLI) Tr. 875-76). Therefore, Valani, Pritzker, and Burns went forward with the prior plan to meet with Altria on October 29, 2018. (Pritzker (JLI) Tr. 875-76; PX2364 (JLI) at 002 (email dated October 22, 2018 referring to proposed meeting with Altria the following Monday, October 29)).

Response to Proposed Finding No. 816:

Respondents have no specific response except to note that Altria remained interested in pursuing the transaction because unlike Altria's e-vapor products, JUUL was successful at converting adult smokers, and therefore provided an important benefit to adult consumers in line with FDA's continuum of risk. (Garnick (Altria) Tr. 1771; *see also* RX0159 (FDA) at 002 (Oct.

31, 2018 statement by Commissioner Scott Gottlieb) ("We still believe that new innovations that don't use combustion, such as many e-cigarettes, may offer an important opportunity for adults to transition off combustible tobacco. We still believe that non-combustible forms of nicotine delivery may be less harmful alternatives for currently addicted adult smokers who still seek nicotine, without the risks associated with combustible cigarettes. And we want to keep this option for adults open.")). As Garnick explained, Altria believed it could help JLI address the youth issue, and "we thought once we could get past the youth issue, it would be an incredibly rewarding market" with a product that could successfully convert adult smokers. (Garnick (Altria) Tr. 1771).

As Pritzker explained at trial, he "was highly skeptical that [the October 29 meeting with Altria] would be productive given the phone call and the letter," but "to [his] surprise," the meeting left him with the "feeling that actually there was a road to actually getting something done," although the parties had not reached a binding agreement. (Pritzker (JLI) Tr. 875-76).

817. On October 28, 2018, Altria board member Devitre hosted a dinner at his apartment in New York. (Valani (JLI) Tr. 946-47); PX1358 (Altria) (e-mail invitation from Devitre). The attendees of the dinner were Pritzker, Burns, and Valani from JLI, and Devitre, Willard, Gifford, and Crosthwaite from Altria. (Valani (JLI) Tr. 946-47).

Response to Proposed Finding No. 817:

Respondents have no specific response except to note that there is no evidence that the parties discussed the proposed noncompete or the treatment of Altria's existing products in the event of the transaction during dinner. To the contrary, as Devitre testified, the dinner was a "social" event where the parties "talked broadly about issues," but "the Altria Group and the [JLI] group went to the office of Wachtell Lipton the next day to start the hard negotiations of the issues that were still open." (PX7001 Devitre (Altria) at 132-33).

818. Also on the evening of October 28, 2018, Altria attorneys met with JLI attorneys. (PX4264 (Altria) (Garnick e-mail referencing meeting with JLI attorneys)).

Response to Proposed Finding No. 818:

Respondents have no specific response except to note that on the evening of October 28, JLI's outside counsel circulated a revised term sheet. (PX2503 (JLI) at 001; *see also* RFF ¶¶ 1042-45 (describing the Oct. 28 term sheet)).

819. On October 28, 2018, Valani texted Devitre after dinner: "Thank you Dinny. Very nice, and very helpful." (PX2411 (JLI) at 001 (Valani text messages). Devitre responded: "I think both sides have become friends. That is important for the future. BTW, I won't be there tomorrow. I think it is important that Howard should be the only speaker from the Altria side at this stage. Good luck tomorrow. I'd love to hear that the deal is done by midday!" (PX2411 (JLI) at 001; Valani (JLI) Tr. 947-48).

Response to Proposed Finding No. 819:

Respondents have no specific response.

820. On October 29, 2018 the Altria and JLI negotiators met at the office of Altria's counsel, Wachtell. (Valani (JLI) Tr. 945-46). The attendees included Willard, Gifford, Garnick, and Crosthwaite from Altria, and Pritzker, Burns, and Valani from JLI. (Valani (JLI) Tr. 945-46).

Response to Proposed Finding No. 820:

Respondents have no specific response.

821. Around 7:30 p.m. on October 29, 2018, Willard texted Devitre: "We have reached agreement on terms." (PX4167 (Altria) at 008 (text exchanges between Willard and Devitre)).

Response to Proposed Finding No. 821:

Respondents have no specific response except to note that negotiations were not completed in October, and the parties had not reached a final agreement. To the contrary, the companies had not even begun conducting due diligence or drafting definitive deal documents, and among other issues, the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg,

> and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

822. On the evening of October 29, 2018, Devitre texted JLI's Valani: "Congratulations on reaching agreement." (PX2411 (Altria) at 001 (Valani text messages); Valani (JLI) Tr. 948-49)). Valani responded: "Amazing that both sides got there." (PX2411 (Altria) at 001; Valani (JLI) Tr. 948-49)). Valani's response was referring to the JLI/Altria meeting at Wachtell, where for the first time there was alignment on terms in a term sheet. (Valani (JLI) Tr. 948-49).

Response to Proposed Finding No. 822:

Respondents have no specific response except to note that Valani explained at trial that negotiations were not complete and the parties did not have a final agreement after the October 29 meeting: "Of course, you know, there was . . . a term sheet, and following that there still needed to be due diligence and documentation, et cetera, but I think it was a rare event that we actually had a productive meeting where there was alignment." (Valani (JLI) Tr. 949).

In addition to the need to conduct due diligence and draft definitive deal documents, the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

823. Also on the evening of October 29, 2018, JLI's Pritzker emailed Devitre: "Dinny: thanks so much for hosting last night and for all you have done to make this partnership done!" (PX4157 (Altria)). Devitre responded that he "look[ed] forward to a very bright future!" (PX4157 (Altria)).

Response to Proposed Finding No. 823:

Respondents have no specific response except to note that Pritzker explained in his deposition that although he was "encouraged" that a deal "might" happen after the October 29

meeting, he was "absolutely . . . not confident that it would happen." (PX7021 Pritzker (JLI) Dep. at 153-54).

Negotiations were not completed in October, and the parties had not reached a final agreement. To the contrary, the companies had not even begun conducting due diligence or drafting definitive deal documents, and among other issues, the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
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> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec.17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

824. Pritzker emailed Willard and Gifford on the night of October 29, 2018, writing: "Howard/Billy: thanks so much for your tenacity, flexibility and creativity. We couldn't be more excited at the prospect of a partnership with you and your team." (PX2322 (JLI)).

Response to Proposed Finding No. 824:

Respondents have no specific response except to note that Pritzker explained in his deposition that although he was "encouraged" that a deal "might" happen after the October 29 meeting, he was "absolutely . . . not confident that it would happen." (PX7021 Pritzker (JLI) Dep. at 153-54).

Negotiations were not completed in October, and the parties had not reached a final agreement. To the contrary, the companies had not even begun conducting due diligence or drafting definitive deal documents, and among other issues, the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

825. On the morning of October 30, 2018, JLI's outside counsel sent Altria the "final term sheet." (PX1271 (Altria) at 001).

Response to Proposed Finding No. 825:

Respondents have no specific response except to note that the October 30 term sheet was explicitly "not binding on any party." (PX1271 (Altria) at 018 n.1).

826. Like the October 15, 2018 term sheet, the October 30, 2018 term sheet included a term requiring Altria to contribute its existing e-cigarette business to JLI upon antitrust clearance, if it had not already divested the assets in order to achieve antitrust clearance:

> If Richard has not otherwise transferred its interests in its e-vapor assets to a third party, then Richard agrees that it will contribute, upon receipt of Antitrust Clearance, to Jack at Jack's election, all Richard assets relating to the Field in the U.S., including all vapor-based electronic nicotine delivery systems and components thereof it acquired, developed or has under development as of the date of the contribution (in each case to the extent it has the legal right to make such contribution) and Jack shall pay Richard an amount to be mutually agreed.
>
> Richard will offer to divest all such Richard assets relating to the Field if necessary to obtain Antitrust Clearance, to the extent Richard has the legal right to do so, no later than within 9 months after application for HSR clearance of the Purchase if the parties have not received Antitrust Clearance at that point. To the extent Richard does not have the legal right to divest of any asset relating to the Field within 9 months after application for the HSR clearance of the Purchase, but obtains such a legal right subsequently when the parties have not received Antitrust Clearance, Richard will offer to divest of such assets at that time.

(PX1271 (Altria) at 022). In both cases, the final term sheet stated that contribution and divestiture were subject to Altria's legal right to take those actions. (PX1271 (Altria) at 022).

Response to Proposed Finding No. 826:

Respondents have no specific response except to note that the Antitrust Clearance Matters section of the term sheet also continued to propose that the parties "would be required to use reasonable best efforts to seek Antitrust Clearance" and to "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX1271 (Altria) at 022).

827. The October 30, 2018 final term sheet also stated that Altria "shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process." (PX1271 (Altria) at 022).

Response to Proposed Finding No. 827:

Respondents have no specific response except to note that the purpose of this term was to make sure that Altria could divest or contribute its e-vapor portfolio, if requested by the FTC to obtain antitrust clearance, without potentially impacting a preexisting agreement with PMI. (*See* RFF ¶¶ 1050-61). JLI circulated the October 28 and October 30 term sheets containing this provision, demonstrating that it was not concerned with Nu Mark's products remaining on the market following the transaction. (*See* RFF ¶¶ 1057-59).

828. The October 30, 2018 final term sheet contained the same language as the October 15, 2018 term sheet referring to Altria "otherwise exiting the marketing and sale of [e-cigarette products]":

> Extended services provided upon earlier of (i) Antitrust Clearance or (ii) Richard otherwise exiting the marketing and sale of products in the Field ("Extended Services Date"). Richard agrees, effective from the Extended Services Date and thereafter during the Services Term to provide the following services, at Jack's request, in the U.S. (the "Extended Services," and together with the Purchase Date Services, the "Services"):
>
> - assist with direct marketing programs, including inserts and/or onserts;
> - fully support Jack's efforts to gain distribution, display and in-store support for Jack's products, including support of point of sale prominence for Jack's products alongside Richard's; and
> - grant Jack access to Richard's best in class infrastructure (including distribution) to maximize the growth of Jack.

(PX1271 (Altria) at 023).

Response to Proposed Finding No. 828:

The Proposed Finding is incomplete and misleading without additional context. Like the October 15 and October 28 term sheets, the October 30 term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1271 (Altria) at 022-23 (Oct.

30 term sheet); *see also* PX1269 (Altria) at 007-08 (Oct. 15 term sheet); PX2503 (JLI) at 008-09 (Oct. 28 term sheet); PX7036 Garnick (Altria) Dep. at 193-94).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1271 (Altria) at 022-23). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution"; providing "display and in-store support"; and providing JLI with access to Altria's "best in class infrastructure (including distribution)." (PX1271 (Altria) at 023).

As a result of this distinction between certain services, beginning with the October 15 term sheet, Altria's counsel inserted a provision to clarify when the enhanced services could begin. (*See* RFF ¶¶ 1062-67). Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). The October 30 term sheet contained similar language but replaced "contribution" with "Antitrust Clearance." (PX1271 (Altria) at 023).

These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1271 (Altria) at 023).

829. This term meant that Altria could start providing certain services to JLI, such as direct marketing programs targeting Altria smokers, upon the earlier of Altria contributing its e-

cigarette assets to JLI, or Altria "otherwise exiting the marketing and sale of [e-cigarettes]." (PX1271 (Altria) at 023).

Response to Proposed Finding No. 829:

The Proposed Finding is incomplete and misleading without additional context. *First*, these revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194; *see also* RRFF ¶ 800; RFF ¶¶ 1062-67). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1271 (Altria) at 023). For JLI's part, Pritzker does not recall noticing this language in the term sheet, and he does not know why it was added. (Pritzker (JLI) Tr. 872).

Second, to the extent Complaint Counsel implies that Altria withdrew its e-vapor products so it could provide enhanced services (including direct marketing programs) quicker, it provides no evidence to support this theory. To the contrary, the record reflects that neither JLI nor Altria was concerned about the timing for Altria providing enhanced services. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13).

It was in fact the regulatory support services, which *could* be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI. (Pritzker (JLI) Tr. 820; PX7025 Burns (JLI) Dep. at 211-12). Pritzker stated that it was Altria's PMTA support services that were critical, because "getting PMTA approval is literally existential for the company. You cannot operate without PMTA approval . . . . Altria's team was the best in the country, and [] their willingness to provide services through that team was invaluable." (Pritzker (JLI) Tr. 820). Similarly, as then-CEO Kevin Burns testified, the support services were "incredibly important,"

to JLI, "especially things like support around PMTA submission and FDA support," as those showed that Altria was "going to come out and support [JLI's] mission." (PX7025 Burns (JLI) Dep. at 212).

By contrast, Pritzker viewed the enhanced services as "valuable services but not the critical service." (Pritzker (JLI) Tr. 871). He "would not have seen [delaying the start of enhanced services] as a problem," and he agreed that he was not "concerned about what the trigger date would be for starting them." It was "important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer [the enhanced] services, but when they started would not have been consequential to [him]." (Pritzker (JLI) Tr. 871-72). Willard's memory was the same. He recalled that JLI wanted Altria's services, but both sides understood that "there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that." (Willard (Altria) Tr. 1213). He did not "recall that the timing of those services was an important part of what [JLI was] expecting." (Willard (Altria) Tr. 1213; *see also* RFF ¶¶ 1062-73).

830. As did prior term sheets, the October 30, 2018 final term sheet also contained a non-compete:

> Richard agrees to refrain, and to cause its current and future subsidiaries and controlled affiliates to refrain, from competing (or preparing to compete, including through research and development activities) in the e-vapor business, other than (i) with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above and (ii) basic research not directed toward the e-vapor business and not undertaken with the intent (primarily or in part) of developing or commercializing technology or products in the e-vapor business. Richard will, and will cause its current and future subsidiaries and controlled affiliates to, coordinate any e-vapor business efforts through Jack and Jack will be the vehicle through which Richard participates in the e-vapor business. Notwithstanding the foregoing, Richard may prepare to compete (including through research and development activities), beginning on the delivery of the Non-Compete Termination Notice.

(PX1271 (Altria) at 024).

Response to Proposed Finding No. 830:

Respondents have no specific response except to note that the noncompete provision continued to explicitly exempt "MarkTen and MarkTen Elite prior to their contribution or divestiture as described above." (PX1271 (Altria) at 024).

K. DUE DILIGENCE AND FINALIZATION OF DEFINITIVE DEAL DOCUMENTS TOOK PLACE IN NOVEMBER AND DECEMBER 2018, CULMINATING IN THE DECEMBER 20, 2018 TRANSACTION

831. Due diligence and the drafting and finalization of long-form transaction documents took place in November and December 2018. (*See* CCFF ¶¶ 832-57, below). On December 7, 2018, Altria announced that it was discontinuing all of its remaining e-cigarette products. (*See* CCFF ¶ 848, below). On December 20, 2018, Altria and JLI closed on the transaction whereby Altria acquired a 35% interest in JLI. (*See* CCFF ¶¶ 859-61, below).

Response to Proposed Finding No. 831:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel does not—and cannot—cite any evidence that Altria discontinued its remaining cig-a-like products on December 7 due to any agreement with JLI. To the contrary, the evidence shows that Altria withdrew the MarkTen cig-a-like, Green Smoke cig-a-like, and Verve oral nicotine-containing product for independent business reasons. As Altria's December 7 press release explained, Altria's decision was "based on the current and expected financial performance of these products, coupled with regulatory restrictions that burden Altria's ability to quickly improve these products. The company will refocus its resources on more compelling reduced-risk tobacco product opportunities." (PX9080 (Altria) at 001). Altria decided to stop making these products due to poor market performance and a need for cost savings to fund either the Growth Teams or, if the parties came to an agreement, the JLI investment. (*See* RFF ¶¶ 1074-98).

But Altria did not make this decision in response to any demand from or agreement with JLI, (*see* Gifford (Altria) Tr. 2774, 2844)—to the contrary, it was done for "separate, independent business reasons," (Gifford (Altria) Tr. 2850). As Willard explained, "[Altria] was making hard

decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products" because "[it was] not in the business of losing money, [it was] in the business of making money." (Willard (Altria) Tr. 1460; *see also* Gifford (Altria) Tr. 2841 ("[L]et's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space."); PX7024 Crosthwaite (Altria/JLI) Dep. at 283 (recalling Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform"); PX7031 Willard (Altria) Dep. at 281 (recalling Altria discontinued its e-vapor products "for [its] own business reasons because [it was] spending a lot of money on a set of products that had pretty thoroughly convinced [senior management] that they were either not successful in the marketplace or were not going to be successful and profitable in the future"); *see also* [redacted]). And JLI's principal negotiators did not even notice Altria's announcement—indeed, neither Pritzker nor Valani could recall learning prior to this litigation that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. (RFF ¶¶ 1101-02).

Second, the transaction remained uncertain throughout November and December 2018. (*See* RFF ¶¶ 1111-25). For example, on December 8, Garnick wrote to his JLI counterpart, Masoudi, that Willard believed the principals needed to discuss "10 or so outstanding issues . . . in order to close by Dec. 21." (RX1591 (JLI) at 001). Similarly, as Devitre testified, the two sides had not yet "hammered" out all of the terms even as late as mid-December; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). And the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue"

that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 832-57 and 859-61, Respondents incorporate their responses to those Proposed Findings herein.

832. At the October 29, 2018 meeting, Altria and JLI reached the point where drafting of definitive deal documentation could begin. (Pritzker (JLI) Tr. 801-02). From the beginning of November 2018 until the deal was signed, the documentation going between Altria and JLI consisted of long drafts of the corporate deal documents. (Pritzker (JLI) Tr. 802).

Response to Proposed Finding No. 832:

Respondents have no specific response.

833. Due diligence began shortly after the October 29, 2018 meeting. (PX2118 (JLI) at 003 (e-mail correspondence on Altria's preliminary diligence list); PX2383 (JLI) at 001). On October 29, 2018, Altria sent JLI a draft clean team agreement prior to due diligence starting. (PX2362 (JLI) at 001).

Response to Proposed Finding No. 833:

Respondents have no specific response except to clarify that due diligence occurred in November and December. (PX7036 Garnick (Altria) Dep. at 112 ("Our due diligence occurred in November and December, which is why, even as late as November and December, it was far from clear that the JUUL deal was going to get done . . . .")).

834. On October 30, 2018, Altria sent JLI a preliminary list of due diligence requests. (PX2118 (JLI) at 003). On Wednesday, November 7, 2018, Altria board member Devitre mentioned to JLI's Valani that due diligence would start the following Monday. (PX2383 (JLI) at 001).

Response to Proposed Finding No. 834:

Respondents have no specific response.

835. A draft purchase agreement dated November 15, 2018 included a clause that required Altria to divest, dispose of, or contribute its e-vapor assets to JLI:

> (f) Notwithstanding the foregoing, if Antitrust Clearance has not been obtained at such time, the Investor shall, on or prior to the date that is nine (9) months following the filing of the Notification and Report Form pursuant to the HSR Act with respect to the Antitrust Conversion described in Section 4.1(a) (the "**Divestiture Date**"), to the extent permitted by Antitrust Laws, divest or otherwise dispose of the e-Vapor Business of the Investor and any of its Affiliates and, if such divestiture or disposition is not permitted by Antitrust Laws as of the Divestiture Date but subsequently becomes permitted thereunder, the Investor shall as promptly as practicable thereafter provide written notice to the Company that such divestiture or other disposition is permissible and shall divest or otherwise dispose of such e-Vapor Business as promptly as practicable after receipt of confirmation by the Company to do the same. If Antitrust Clearance has been obtained, as promptly as practicable following the Investor's receipt of written request by the Company to do the same, the Investor shall, and shall cause each applicable Affiliate to, take all necessary and appropriate actions including making any filings, notices, notification, requests or applications necessary and appropriate to obtain any permit, clearance, approval or consent from any necessary Governmental Bodies or other third-parties to sell, transfer and assign to the Company any and all right, title and interest in, to and under all of the assets, properties and rights of any e-Vapor Business in the United States of the Investor and any of its Affiliates, including all such assets, properties and rights acquired, developed or under development) as of the date of such sale, transfer or assignment at a purchase price to be calculated based on an aggregate value of $[•].

(PX2182 (JLI) at 302 (Section 4.1(f) of draft Purchase Agreement)).

Response to Proposed Finding No. 835:

The Proposed Finding is incomplete and misleading without additional context. The "Reasonable Best Efforts" section (Section 4.1) of the draft Purchase Agreement describes the parties' proposals for seeking HSR clearance in compliance with the antitrust laws following a transaction, and the full section should be read in context. (*See* PX2182 (JLI) at 299-303).

First, Section 4.1(a) states that Altria shall file for HSR clearance on or before July 15, 2020. (*See* RFF ¶¶ 1050-61). It further states that each party "shall use its reasonable best efforts" to obtain all necessary clearances "pursuant to applicable Antitrust Laws, relating to the Antitrust Conversion." (PX2182 (JLI) at 299).

Second, to that end, Section 4.1(e) states that Altria shall offer to divest or take any other remedial action regarding its e-vapor business as required by the FTC in order to obtain antitrust clearance. (PX2182 (JLI) at 301-02 ("[Altria] shall, and shall cause its Affiliates to, propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect) . . . the sale, ***divestiture***, license, disposition, or hold separate of such assets or businesses of [Altria] or

any of its Affiliates . . . or otherwise offer to take or offer to commit to take any action . . . as may be required in order to avoid the entry of any decree, judgment, injunction or other order . . . that would restrain, prevent or delay the Antitrust Conversion . . . ." (emphasis added))).

Third, Section 4.1(f), excerpted by Complaint Counsel, proposes a more specific obligation in addition to the above: In the event that antitrust clearance is not obtained within nine months after the HSR filing, Altria would then "divest or otherwise dispose of" its e-vapor business "*to the extent permitted by Antitrust Laws*," in order to obtain antitrust clearance. (PX2182 (JLI) at 302 (emphasis added) ("Notwithstanding the foregoing, if Antitrust Clearance has not been obtained at such time, [Altria] shall, on or prior to the date that is nine (9) months following the filing of the Notification and Report Form pursuant to the HSR Act . . . to the extent permitted by Antitrust Laws, divest or otherwise dispose of the e-Vapor Business of [Altria] and any of its Affiliates . . . .")).

Finally, Section 4.1(f) states that upon antitrust approval of the transaction, if Altria had not already divested or taken other actions required by the FTC with respect to its e-vapor business, it would contribute its e-vapor portfolio to JLI at JLI's election. (PX2182 (JLI) at 302 ("If Antitrust Clearance has been obtained, as promptly as practicable following [Altria's] receipt of written request by [JLI] to do the same, [Altria] shall, and shall cause each applicable Affiliate to, take all necessary and appropriate actions . . . to sell, transfer and assign to [JLI] any and all right, title and interest in . . . any e-Vapor Business in the United States of [Altria] and any of its Affiliates . . . .")).

836. The broad non-compete clause in the mid-November 2018 draft transaction documents only permitted the operation of Mark Ten and Mark Ten Elite until their divestiture or contribution to JLI:

> Section 3.1. Direct Non-Compete
>
> (a) Until the six (6) month anniversary of the Non-Compete Termination Notice Date, the Investor shall not, and shall cause its Subsidiaries and controlled Affiliates not to, directly or indirectly, anywhere in the world: (i) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business; (ii) prepare to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities or otherwise; or (iii) own any equity interest in any Person, other than an aggregate of less than four and nine-tenths percent (4.9%) of the equity interests of any Person which is publicly-listed on a national stock exchange, that engages directly or indirectly in a the e-Vapor Business (other than (x) as a result of the Investor's ownership of Shares or (y) engagement in, or sponsorship of, basic research activities not directed toward the e-Vapor Business and not undertaken with any intent of developing or commercializing technology or products in the e-Vapor Business) (all such actions set forth in clauses (i) through (iii), to "Compete" or "Competition"). Notwithstanding the foregoing, the Investor and its Subsidiaries and controlled Affiliates may engage in the business relating to its [M10] and [M10E] brands as such business is presently conducted, subject to Section [4.1] of the Purchase Agreement.

(PX2182 (JLI) at 385 (Section 3.1(a) of draft Relationship Agreement)).

Response to Proposed Finding No. 836:

Respondents have no specific response except to note that the term of the noncompete is expressly tied to the pendency of the Services Agreement, and thus is narrowly tailored to the purpose of the noncompete. Once the Services Agreement expires, the noncompete does as well. (RFF ¶ 1129; *see also* RRFF ¶¶ 995, 999).

Further, like all of the term sheets, the noncompete provision in the November 15 draft Relationship Agreement contained a carve-out exempting MarkTen cig-a-like and MarkTen Elite. (PX2182 (JLI) at 385). As written, the November 15 draft permitted Altria to "engage in the business relating to its [MarkTen] and [MarkTen Elite] brands as such business is presently conducted, subject to Section [4.1] of the Purchase Agreement." (PX2182 (JLI) at 385 (last brackets in original); *see also* RRFF ¶ 835 (explaining Section 4.1 of the Purchase Agreement)). JLI understood this language to mean that both MarkTen cig-a-like and Elite were exempted from the noncompete provision prior to HSR approval: Pritzker's understanding was that even though Altria had announced that it was withdrawing MarkTen Elite and nontraditional flavored MarkTen cig-a-likes from the market, it could have put these products "back on the market if [it] wished."

(Pritzker (JLI) Tr. 879). And Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84; *see also* RFF ¶¶ 1128, 1130).

837. There was a call scheduled for November 27, 2018 between Altria (Crosthwaite, Willard, Garnick, and Gifford) and JLI (Pritzker, Valani, Burns, Masoudi, and CFO Timothy Danaher). (PX2431 (JLI) at 002).

Response to Proposed Finding No. 837:

Respondents have no specific response except to note that a calendar invite scheduling a call is not evidence that the call occurred, and there was no testimony that this call took place or of the contents of any such call. (*See* PX7032 Valani (JLI) Dep. at 115-16 (Valani stating he had no recollection of participating in a call with these attendees around this time)).

838. On November 28, 2018, Altria's Garnick reached out to JLI's Masoudi to inform him that Altria's Crosthwaite was trying to reach JLI CEO Burns with an "off the record" suggestion "as to how to accelerate things next week." (PX4412 (Altria)).

Response to Proposed Finding No. 838:

The Proposed Finding is incomplete and misleading without additional context. As Garnick testified at trial, Crosthwaite's suggestion did not relate to the noncompete or the status of Altria's existing products. Rather, it related to due diligence and offering suggestions on this process to allow the deal to "close on time": "[A]t this point in time, we're doing due diligence, and there was a lot of due diligence to be done, and it was a -- a buggy process." (Garnick (Altria) Tr. 1673-74).

839. As of late November 2018, the targeted closing date for the transaction was prior to Christmas, 2018. (PX7032 (Valani (JLI), Dep. at 119 (discussing PX2429 (JLI))). That target was met. (PX7032 (Valani (JLI), Dep. at 119)).

Response to Proposed Finding No. 839:

Respondents have no specific response.

840. On December 1, 2018, Garnick informed Altria's Joe Murillo via email of Altria's decision to stop making e-cigarette products altogether and Altria's transition to a post-Tree Altria. (Garnick (Altria) Tr. 1,675; PX4277 (Altria)).

Response to Proposed Finding No. 840:

The Proposed Finding is incomplete and misleading without additional context. *First*, Garnick also informed Murillo of Altria's decision to stop making Verve, an oral nicotine-containing (not e-vapor) product that, like MarkTen cig-a-like, was not doing well in the market. (PX4277 (Altria) at 001; PX7036 Garnick (Altria) Dep. at 221). Altria decided to stop making these products due to poor market performance and a need for cost savings to fund either the Growth Teams or, if the parties came to an agreement, the JLI investment. (*See* RFF ¶¶ 1074-98).

But Altria did not make this decision in response to any demand from or agreement with JLI, (*see* Gifford (Altria) Tr. 2774, 2844)—to the contrary, it was done for "separate, independent business reasons," (Gifford (Altria) Tr. 2850). As Willard explained, "[Altria] was making hard decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products" because "[it was] not in the business of losing money, [it was] in the business of making money." (Willard (Altria) Tr. 1460).

Second, negotiations were not complete in early December, and there was no agreement between the parties. (*See* RFF ¶¶ 1111-25). For example, on December 8, Garnick wrote to his JLI counterpart that Willard believed the principals needed to discuss "10 or so outstanding issues . . . in order to close by Dec. 21." (RX1591 (JLI) at 001). Similarly, as Devitre testified, the two sides had not yet "hammered" out all of the terms even as late as mid-December; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). And the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue" that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre:

"We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")).

841. By December 4, 2018, JLI was working on a joint JLI/Altria press release to announce the transaction. (PX2130 (JLI); PX7011 (Valani (JLI), IHT at 133)).

Response to Proposed Finding No. 841:

The Proposed Finding is incomplete and misleading without additional context. Negotiations were not complete in early December, and there was no agreement between the parties. (*See* PX7021 Pritzker (JLI) Dep. at 158-59; PX7025 Burns (JLI) Dep. at 178-81; *see also* RFF ¶¶ 1111-25). As late as December 15, disputes over drafting the press release cited by Complaint Counsel threatened to derail the deal: Garnick advised his colleagues that the "deal may not survive the day" in light of a dispute over how to present the companies' posture toward cigarettes in the draft press release, which was a "walk away point" for Altria. (RX0910 (Altria) at 001-02; *see also* PX4167 (Altria) at 010 (Dec. 15 text message from Willard to Devitre mentioning the press release and other disputes and stating, "[i]f they do not give . . . the deal will not proceed.")).

Other issues also remained unsettled. In fact, the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue" that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). Further, as Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130).

842. As of December 5, 2018, the draft purchase agreement still included a provision requiring Altria to divest its e-cigarette assets or contribute them to JLI. (PX1500 (Altria) at 167 (Section 4.1(e) of draft Purchase Agreement)).

Response to Proposed Finding No. 842:

The Proposed Finding is incomplete and misleading without additional context. Section 4.1(e) of the draft December 5 Purchase Agreement included a provision requiring Altria to divest its e-cigarette assets, or take other identified actions, consistent with the parties' overall effort to obtain HSR clearance. (PX1500 (Altria) at 164-67). However, the requirement to divest, or take other action consistent with the HSR process, existed in the final agreement as well. (PX2141 (JLI) at 036; *see also* RRFF ¶ 862).

Like the November 15 draft agreement, (*see* RRFF ¶ 835), the "Reasonable Best Efforts" section (Section 4.1) of the draft December 5 Purchase Agreement describes the parties' proposals for seeking HSR clearance in compliance with the antitrust laws following a transaction, and the full section should be read in context, (*see* PX1500 (Altria) at 164-68).

Section 4.1(a) states that Altria shall file for HSR clearance on or before July 15, 2020. (PX1500 (Altria) at 164; *see also* RFF ¶¶ 1050-61). It further states that each party "shall use its reasonable best efforts" to obtain all necessary clearances "pursuant to applicable Antitrust Laws, relating to the Antitrust Conversion." (PX1500 (Altria) at 165).

To that end, Section 4.1(f) explains the parties' proposed process for obtaining antitrust review and approval of the transaction related to Altria's existing e-vapor business. (PX1500 (Altria) at 167). *First*, Section 4.1(f) states that within nine months after the HSR filing, if antitrust clearance has not been obtained, then Altria shall offer to divest or take any other remedial action regarding its e-vapor business as required by the FTC in order to obtain antitrust clearance. (PX1500 (Altria) at 167 ("[Altria] on or prior to the date that is nine (9) months following the filing of the Notification and Report Form pursuant to the HSR Act . . . to the extent permitted by the

applicable Laws . . . shall and, shall cause its Affiliates to, (i) propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect) . . . the sale, ***divestiture***, license, disposition, or hold separate of such assets or businesses of [Altria] or any of its Affiliates . . . or (ii) otherwise offer to take or offer to commit to take any action . . . as may be required in order to avoid the entry of any decree, judgment, injunction or other order . . . that would restrain, prevent or delay the Antitrust Conversion . . . ." (emphasis added))).

Second, Section 4.1(f) states that upon antitrust approval of the transaction, if Altria had not already divested or taken other actions required by the FTC with respect to its e-vapor business, it would contribute its e-vapor portfolio to JLI at JLI's election. (PX1500 (Altria) at 167 ("If Antitrust Clearance has been obtained, as promptly as practicable following [Altria's] receipt of written request by [JLI] to do the same, [Altria] and [JLI] shall, and shall cause each respective applicable Affiliate to, take all necessary and appropriate actions . . . to sell, transfer and assign to [JLI] any and all right, title and interest in . . . any e-Vapor Business in the United States of [Altria] and any of its Affiliates . . . .")).

843. The December 5, 2018, draft purchase agreement stated that Altria must file for HSR clearance on or before July 15, 2020. (PX1500 (Altria) at 164-65 (Section 4.1(a) of draft Purchase Agreement)).

Response to Proposed Finding No. 843:

Respondents have no specific response except to note that this term was also included in the November 15 draft Purchase Agreement, (PX2182 (JLI) at 299), as well as in the October 28 and October 30 term sheets. (*See* RFF ¶¶ 1050-61). Similarly, the October 15 term sheet proposed that Altria would file for HSR clearance within two years of the closing of the transaction. (RFF ¶ 1055).

844. At a meeting on December 5, 2018, Altria board member Devitre told JLI's Valani that Altria was "all systems go" on proceeding with the transaction. (PX2418 (JLI); PX7032 (Valani (JLI), Dep. at 125)).

Response to Proposed Finding No. 844:

Respondents have no specific response except to note that negotiations were not complete in early December, and there was no agreement between the parties. (*See* RFF ¶¶ 1111-25). For example, on December 8, Garnick wrote to his JLI counterpart that Willard believed the principals needed to discuss "10 or so outstanding issues . . . in order to close by Dec. 21." (RX1591 (JLI) at 001). Similarly, as Devitre testified, the two sides had not yet "hammered" out all of the terms even as late as mid-December; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). And the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue" that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec.17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

845. On December 5, Willard spoke to Valani by phone. (PX4376 (Altria) at 005 (Willard phone records)).

Response to Proposed Finding No. 845:

Respondents have no specific response except to note that the call lasted for seven minutes, and there is no evidence in the record as to what was discussed.

846. In reviewing a December 5, 2018 draft joint press release announcing the transaction, JLI's Pritzker asked that it be much more specific in terms of what Altria will do for JLI by way of providing commitments and services. (PX2554 (JLI) at 001).

Response to Proposed Finding No. 846:

Respondents have no specific response except to note that, as Pritzker explained at trial, JLI believed "[i]t was important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer" services, (Pritzker (JLI) Tr. 871-72), in part to demonstrate to JLI's customers, employees, and other stakeholders how the partnership with Altria would support JLI's mission to end combustible cigarettes, (*see, e.g.*, PX7011 Valani (JLI) IHT at 69-70 (explaining that "mission alignment" was "very much top of mind" for JLI); PX7021 Pritzker (JLI) Dep. at 206-08 (explaining why Altria would support JLI's mission); PX7005 Danaher (JLI) IHT at 154 ("[W]e knew that this was going to be a complicated transaction to be able to communicate internally to our team and externally.")). As Burns explained, it was important to JLI "to make sure the message and the positioning" in the press releases were correct, and to make sure that Altria's release included a "strong series of statements . . . around their support of the mission for our company and its mission of reducing smoking." (PX7025 Burns (JLI) Dep. at 179). But as Pritzker testified, when certain services started "would not have been consequential." (Pritzker (JLI) Tr. 872).

847. On December 7, 2018, JLI General Counsel Masoudi reached out to Altria General Counsel Garnick via text, asking to discuss PMI. (PX2515 (JLI); JX0002 at 041).

Response to Proposed Finding No. 847:

Respondents have no specific response except to note that there is also no testimony that the call discussed in PX2515 actually occurred. In any event, although it is not clear from PX2515 what Masoudi wanted to discuss related to PMI, the record reflects that a new PMI-related issue arose in the negotiations around this time in December that was unrelated to the status of Altria's existing e-vapor products: JLI expressed concern that under the proposed transaction, JLI might be considered a controlled affiliate of Altria pursuant to the JRDTA, which would require Altria to share all of JLI's IP with PMI. (*See* PX2494 (JLI) at 001; PX7035 Masoudi (JLI) Dep. at 98-

102). On December 14, Garnick informed JLI that Altria was "not willing to give up voting or board rights" to address this remote potentiality, adding that "as a matter of practical reality, we both can point to other facts/circumstances in this deal that demonstrate without doubt that this deal does not give us either 51% ownership or the power to control [JLI]. Indeed, not only do we not control [JLI], but we have agreed never to control [JLI] without board consent." (PX2494 (JLI) at 001 (underlining in original)).

848. On December 7, 2018, Altria announced the "discontinuation of production and distribution of all *MarkTen* and *Green Smoke* e-vapor products." (PX9080 at 001 (Altria press release) (italics in original)). Altria stated that its subsidiaries would "begin working with their retailers, wholesalers, contract manufacturers and suppliers to ensure an orderly [wind down] process." (PX9080 at 001 (Altria press release)).

Response to Proposed Finding No. 848:

The Proposed Finding is incomplete and misleading without additional context. Altria announced the discontinuation of not just its e-vapor products, but also its oral nicotine-containing product, Verve, which would not have been included in the noncompete under discussion between the parties. (PX9080 (Altria) at 001; *see also* PX7036 Garnick (Altria) Dep. at 221)).

As the press release explained, Altria's decision was "based on the current and expected financial performance of these products, coupled with regulatory restrictions that burden Altria's ability to quickly improve these products. The company will refocus its resources on more compelling reduced-risk tobacco product opportunities." (PX9080 (Altria) at 001). Altria decided to stop making these products due to poor market performance and a need for cost savings to fund either the Growth Teams or, if the parties came to an agreement, the JLI investment. (*See* RFF ¶¶ 1074-98).

But Altria did not make this decision in response to any demand from or agreement with JLI, (*see* Gifford (Altria) Tr. 2774, 2844)—to the contrary, it was done for "separate, independent business reasons," (Gifford (Altria) Tr. 2850). As Willard explained, "[Altria] was making hard

decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products" because "[it was] not in the business of losing money, [it was] in the business of making money." (Willard (Altria) Tr. 1460; *see also* Gifford (Altria) Tr. 2841 ("[L]et's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space."); PX7024 Crosthwaite (Altria/JLI) Dep. at 283 (recalling Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform"); PX7031 Willard (Altria) Dep. at 281 (recalling Altria discontinued its e-vapor products "for [its] own business reasons because [it was] spending a lot of money on a set of products that had pretty thoroughly convinced [senior management] that they were either not successful in the marketplace or were not going to be successful and profitable in the future"); *see also* [redacted]).

849. On December 8, 2018, JLI's outside counsel wrote to Altria's outside counsel: "[G]iven Richard's press release this morning and the expedited schedule for obtaining antitrust clearance, we would suggest that the period in which Richard can commence making confidential buyout offers to Jack's board begin 4 years following the closing (instead of the earlier of 5 years after the closing or 2 years after obtaining antitrust clearance)." (PX2605 (JLI) at 010).

Response to Proposed Finding No. 849:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel has never asked any witnesses about PX2605, either in a deposition or at trial. As a result, there is no testimony in the record to put it in context.

There is also no evidence that the quoted statement, written in an email between outside counsel, reflected the understanding of the parties as opposed to an assumption from a lawyer. In fact, Garnick's December 9 email in PX1734, suggesting to Masoudi that Altria could file for HSR

within 90 days of closing (quoted by Complaint Counsel in CCFF ¶ 851), suggests that the parties had not reached an understanding about accelerating the timeline to file for HSR clearance by the time of the December 8 email in PX2605. (*See* PX1734 (Altria) at 001).

In addition, Complaint Counsel has offered no evidence that the timeline for filing for HSR played any role in Altria's decision to discontinue its remaining e-vapor products, much less any evidence that JLI knew about it in advance. The parties developed the HSR filing workaround specifically to avoid any potential complication with Altria divesting its existing products while the PMI agreement was in effect, which was an acceptable solution to both parties. (Garnick (Altria) Tr. 1671, 1677-78; *see also* RFF ¶¶ 1050-61). The record reflects that neither party was concerned about delaying the HSR filing generally, or the start of enhanced services specifically. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13; *see also* RFF ¶¶ 1068-73).

Moreover, JLI did not have any prior notice of Altria's December 7 withdrawal, nor had anyone at JLI requested that it take that action. (Pritzker (JLI) Tr. 884-85; Valani (JLI) Tr. 957; *see also* PX7021 Pritzker (JLI) Dep. at 164, 169; PX7032 Valani (JLI) Dep. at 151-52; PX7025 Burns (JLI) Dep. at 217-18; PX7035 Masoudi (JLI) Dep. at 89, 128-29). Indeed, neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. (Pritzker (JLI) Tr. 877-78; Valani (JLI) Tr. 951-52, 957; PX7021 Pritzker (JLI) Dep. at 163-64 ("[The announcement] was of no consequence because [Pritzker] didn't think that [the products] were particularly competitive to Juul . . . ."); PX7011 Valani (JLI) IHT at 134 (calling the decision "irrelevant")).

850. On the evening of December 8, 2018, Altria's Garnick and JLI's Masoudi spoke by phone for 30 minutes. (PX4375 (Altria) at 003 (Garnick phone records)).

Response to Proposed Finding No. 850:

Respondents have no specific response except to note that earlier that afternoon, Garnick had emailed Masoudi that there were "10 or so outstanding issues" in the negotiations: "I want to give you a head's up. We met here today on the 10 or so outstanding issues. Howard is trying to call Kevin. Howard believes that the principals need to discuss these issues together and does not see that a discussion among lawyers will be fruitful." (RX1591 (JLI) at 001).

851. On December 9, 2018, Altria's Garnick emailed JLI's Masoudi,

> "I thought while on the plane I would see if we could resolve an issue or two: [. . .] Pre-antitrust do not compete – How about if we agree to file within 90 days (we intend to file within 30 days, but I would like a cushion for unforeseen events). Would that resolve this? Alternatively, if the businesses want to start enhanced services right way, the do not compete provision could start running based on when providing enhanced services begins and tied to that. This is of course a nonissue, since we are not in the market anymore and we can't get back into the market without getting a PMTA. But do not compete cannot start simply with closing for antitrust reasons – section 1 issue."
>
> (PX1734 (Altria)).

Response to Proposed Finding No. 851:

The Proposed Finding is incomplete and misleading without additional context. Contrary to Complaint Counsel's insinuation, there is simply no evidence that JLI pushed for a shorter deadline for the HSR filing or to begin enhanced services sooner—as Garnick explained, he did not "recall any desire or concern from JLI about reducing the time period before filing HSR." (Garnick (Altria) Tr. 1677; *see also* Pritzker (JLI) Tr. 871-72 (timing of enhanced services was not "consequential"); Willard (Altria) Tr. 1213 (recalling both Altria and JLI were "fairly flexible" on timing for enhanced services)). Garnick's email merely addressed the fact that when certain services could be provided depended on whether Altria had a product in the market. (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria) Dep. at 222-23; PX1734 (Altria) at 001; *see also* RFF ¶¶ 1050-73).

While Complaint Counsel suggests in its brief that this email supports its claim that Altria shut down Nu Mark in order to speed up the provision of services to JLI, the plain text of the email itself demonstrates otherwise. In the email, which was sent *after* Altria discontinued Nu Mark's remaining products, Garnick advised JLI's Masoudi that "*if* the businesses want to start enhanced services right way [sic], the do not compete provision could start running based on when providing enhanced services begins." (PX1734 (Altria) at 001 (emphasis added)). In other words, Garnick did not know whether the companies would want to commence the enhanced services right away or not. [redacted]

852. Garnick testified that in his December 9, 2018 email to Masoudi, "agree to file" referred to making the HSR filing. (Garnick (Altria) Tr. 1,676-77). Pursuant to the October 30, 2020 final draft term sheet, Altria had until July 2020 to file HSR. (Garnick (Altria) Tr. 1676-77; PX1271 (Altria) at 022).

Response to Proposed Finding No. 852:

Respondents have no specific response.

853. On December 9, 2018, Altria and JLI had a principals meeting in connection with the transaction. (PX1553 (Altria) at 013; PX1735 (Altria)).

Response to Proposed Finding No. 853:

Respondents have no specific response.

854. On December 10, 2018, an internal Altria schedule reflected a series of internal Altria meetings and reviews of deal documents, culminating in the transaction closing on December 20, 2018. (PX1553 (Altria) at 013).

Response to Proposed Finding No. 854:

Respondents have no specific response except to note that future meetings shown on an internal calendar are not evidence that such meetings took place.

855. On December 10, 2018, Altria board member Devitre texted JLI's Valani: "Congratulations! Very good days are ahead for both sides." (PX2438 (JLI)).

Response to Proposed Finding No. 855:

Respondents have no specific response except to note that negotiations were not complete at the time of Devitre's text, and there was no agreement between the parties. (*See* RFF ¶¶ 1111-25). For example, at the December 11 Board meeting, Altria's leadership advised the Board that the deal remained [redacted] as the parties continued "working out issues," (PX7028 Wappler (PWP) Dep. at 130). Similarly, as Devitre testified, the two sides had not yet "hammered" out all of the terms even as late as mid-December; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). And the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue" that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")).

856. On December 10, 2018, Altria's Crosthwaite sent an email to Garnick and Gifford asking, "Given the progress last night, should we been seeking BOD approval on Tree? The current presentation is not set up to do this." (PX1508 (Altria)).

Response to Proposed Finding No. 856:

Respondents have no specific response except to note that [redacted]. Additionally, Respondents note that negotiations were not complete at the time of Crosthwaite's email, and there was no agreement between the parties. (*See* RFF ¶¶ 1111-25). For example, at the December 11 Board meeting, Altria's leadership advised the Board that the deal remained [redacted] as the parties continued "working out issues,"

(PX7028 Wappler (PWP) Dep. at 130). Similarly, as Devitre testified, the two sides had not yet "hammered" out all of the terms even as late as mid-December; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). And the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue" that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")).

857. On December 12, 2018, Altria planned to meet with JLI in New York regarding "PMI docs." (PX1553 (Altria) at 013).

Response to Proposed Finding No. 857:

Respondents have no specific response except to note that future meetings shown on an internal calendar are not evidence that such meetings took place, and there was no testimony that the planned meeting on December 12 occurred.

858. On December 13, 2018, Altria sent an email to MarkTen customers stating that pursuant to Altria's December 7, 2018 announcement, MarkTen products would only be available online until 11:59pm December 18, 2018, and at retailers as long as supplies lasted. (PX2459 (JLI) at 001 (JLI copy of email from MarkTen)).

Response to Proposed Finding No. 858:

Respondents have no specific response.

859. [redacted] (PX1347 (Altria) at 001-017 (Altria Board minutes) (*in camera*)); PX2604 (JLI) at 001-08 (JLI Board minutes)).

Response to Proposed Finding No. 859:

Respondents have no specific response.

860. [redacted] (PX1347 (Altria) at 017-18 (*in camera*)).

Response to Proposed Finding No. 860:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]

861. On December 20, 2018, Altria and JLI executed the transaction whereby Altria purchased a 35% interest in JLI for $12.8 billion. (PX2141 (JLI) (Altria/JLI Purchase Agreement); PX9081 (Altria press release)).

Response to Proposed Finding No. 861:

Respondents have no specific response.

862. The final Purchase Agreement no longer included a provision requiring Altria to divest or contribute its e-cigarette products. (PX2141 (JLI) (Altria/JLI Purchase Agreement)). By December 20, 2018, the date the Purchase Agreement was executed, Altria had already discontinued the production and distribution of all of its e-cigarette products. (Willard (Altria) Tr. 1,274; PX2022 at 002-03 (JLI copy of Altria's October 25, 2018 letter to FDA announcing removal of pod-based products and certain flavored cigalikes); PX9080 at 001 (December 7, 2018 Altria press release announcing discontinuation of all e-cigarette products); *see also* CCFF ¶¶ 848, 858, above).

Response to Proposed Finding No. 862:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Like all of the draft agreements and term sheets, the final Purchase Agreement *did* include a provision requiring Altria to divest its e-vapor assets as needed to obtain HSR approval: "[Altria], to the extent permitted by the applicable Laws . . . shall, and shall cause its Affiliates to,

(i) propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect) . . . the sale, ***divestiture***, license, disposition or hold separate of such assets or businesses of [Altria] or any of its Affiliates . . . in each case, as may be required in order to avoid the entry of any decree, judgment, injunction or other order . . . that would restrain, prevent or delay the Antitrust Conversion . . . ." (PX2141 (JLI) at 036 (Section 4.1(e) of the Purchase Agreement) (emphasis added); *see also* RRFF ¶ 835 (Nov. 15 draft Purchase Agreement), ¶ 842 (Dec. 5 draft Purchase Agreement)). Similarly, the same section of the final Purchase Agreement, Section 4.1, stated that each party "shall use its reasonable best efforts" to take all necessary actions and do "all things reasonably necessary, proper or advisable" to obtain all necessary clearances "pursuant to all applicable Antitrust Laws, relating to the Antitrust Conversion." (PX2141 (JLI) at 034).

To date, the FTC has never asked Altria to divest or otherwise sell off its e-vapor assets. (Garnick (Altria) Tr. 1784-87). If the FTC had ever made such a request, nothing in the parties' deal would have prevented Altria from complying. (Garnick (Altria) Tr. 1787 (agreeing that FTC never inquired to see whether Altria could divest "at any time," and "[c]ertainly" nothing would have prevented Altria from complying with an FTC divestiture request after July 2020); *see also* Valani (JLI) Tr. 935 ("I believe that the actual transaction documents still referred to the possibility of divestiture. I believe the term sheets after [Altria discontinued Elite and non-traditional cig-a-like flavors in response to FDA's letter] still talk about divestment. I think, indeed, the assets that are there today could still be divested.")).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 848 and 858, Respondents incorporate their responses to those Proposed Findings herein.

863. The final executed transaction documents did contain a non-compete barring Altria from participating in all aspects of the e-cigarette business, including R&D, for an initial term of 6 years. (PX1276 (Altria) at 025-27 (Dec. 20, 2018 Relationship Agreement); PX1275 (Altria) at 005, 014) (Dec. 20, 2018 Services Agreement)).

Response to Proposed Finding No. 863:

The Proposed Finding is incomplete and misleading without additional context. Consistent with JLI's concern that those services would provide Altria with access to proprietary information about JUUL, the final Relationship Agreement included a noncompete provision: Altria agreed "not to, directly or indirectly[,] . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" while the service agreement remained in effect. (PX1276 (JLI) at 025 § 3.1(a)). Consistent with the term sheets, however, the noncompete provision included a carve-out permitting Altria to "engage in the business relating to [its MarkTen, MarkTen Elite, and Green Smoke brands] . . . as such business is presently conducted," pending HSR approval. (PX1276 (JLI) at 026 § 3.1(a); Willard (Altria) Tr. 1194-95).

The noncompete provision was limited to Altria's activities in "the e-Vapor Business," and therefore did not limit Altria's ability to market other inhalable alternatives such as IQOS and oral alternatives such as the On! product. (*See* PX1276 (JLI) at 025 § 3.1(a); Willard (Altria) Tr. 1195; Gifford (Altria) Tr. 2709-10).

Additionally, the term for the noncompete in the final Relationship Agreement was specifically tied to the length of the Services Agreement. (PX1276 (JLI) at 025 § 3.1(a) (Relationship Agreement) (noting the noncompete provision terminates at "the termination or expiration of the Term (as set forth in the Services Agreement)")). Because the Services Agreement provided for a six-year initial term length, that meant both the Services Agreement and the noncompete provision were set to expire on December 20, 2024, unless extended by the parties. (*See* PX1275 (JLI) at 005, 014 (Services Agreement) (defining the "Initial Discretionary Termination Date" for the Services Agreement as "the date that is the sixth (6^{th}) anniversary of the date hereof"); PX1276 (JLI) at 025 § 3.1(a) (Relationship Agreement)).

864. The final non-compete included a provision allowing Altria to engage in the e-cigarette business relating to MarkTen, MarkTen Elite, and Green Smoke, in each case, "as such business is presently conducted." (PX1276 (Altria) at 026; Garnick (Altria) Tr. 1,682). But by that date, Altria had already removed MarkTen Elite from the market, and had discontinued the production and distribution of its remaining MarkTen and Green Smoke e-cigarette products. (Garnick (Altria) Tr. 1,682; PX2022 at 002-03 (JLI copy of Altria's October 25, 2018 letter to FDA); PX9080 at 001 (Altria press release); *see also* CCFF ¶¶ 812, 848, 858, above). As of December 20, 2018, Altria was not actively marketing or selling MarkTen, MarkTen Elite or Green Smoke, though the MarkTen cigalike products were still "selling through in the marketplace" at retailers that retained unsold inventory. (Willard (Altria) Tr. 1,274-75).

Response to Proposed Finding No. 864:

The Proposed Finding is incomplete and misleading without additional context. The carve-out from the noncompete permitting Altria to engage in business related to its e-vapor products "as such business is presently conducted" was included in every draft of the deal documents the parties exchanged, starting with the November 15 initial draft Relationship Agreement. (*See* PX2182 (JLI) at 385 (Nov. 15 draft agreement); Garnick (Altria) Tr. 1781-83 (explaining that the phrase "as such business is presently conducted" did not change between November 15 draft and the December 20 final agreement); RFF ¶¶ 1106-10; RRFF ¶ 835).

Valani testified that he did not know where the "as such business is presently conducted" language came from. (PX7011 Valani (JLI) IHT at 140). As of November 15, however, Altria's business was selling MarkTen cig-a-likes in traditional flavors. Thus, at the time the language was added into the document, this provision would have unquestionably permitted Altria to keep MarkTen cig-a-like on the market through the antitrust review process with the FTC. (Garnick (Altria) Tr. 1782-83; Gifford (Altria) Tr. 2831).

And even after Altria withdrew its products, Garnick explained that Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84). Accordingly, JLI understood the carve-out to mean that both MarkTen cig-a-like and Elite were exempted from the noncompete provision prior to HSR approval: Pritzker's

understanding was that even though Altria had announced that it was withdrawing its e-vapor products from the market, it could have put these products "back on the market if [it] wished." (Pritzker (JLI) Tr. 879).

Moreover, the phrase "as such business is presently conducted" is consistent with the purposes of the noncompete provision, which was to protect JLI's information from potential misuse, particularly the improvement or development of *new* products. (*See, e.g.*, Pritzker (JLI) Tr. 668-69, 674-75, 821-22; Valani (JLI) Tr. 908; PX7021 Pritzker (JLI) Dep. at 70 ("[I]f there was going to be a situation where Altria was going to own a significant portion of -- of Juul, then we did not want them using our information to improve or develop new products."); PX7009 Burns (JLI) IHT at 138 (noncompete was necessary because Altria "want[ed] to have a significant stake in the company, have transparency on all the major strategic and operational priorities, which are undoubtedly going to be around IP roadmap and product development"); PX7035 Masoudi (JLI) Dep. at 129-30; *see also* PX7031 Willard (Altria) Dep. at 229 ("[JLI's] real interest in -- in this provision not to compete was really more related to the future. They didn't want us to invest in JUUL, learn a whole lot about their product and what made it successful, and then, separate from our investment in JUUL, go out and create an e-vapor business based on their information, and that was a fairly reasonable expectation on their part."); RFF ¶¶ 1178-88).

While JLI was concerned about Altria using JLI confidential information to develop new products, JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market prior to HSR approval. (Pritzker (JLI) Tr. 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 812, 848, and 858, Respondents incorporate their responses to those Proposed Findings herein.

865. The final Purchase Agreement no longer gave Altria through July 15, 2020 to make its HSR filing, but instead required both Altria and JLI to make their HSR filings within 90 days. (PX2141 (JLI) at 034 (Altria/JLI Purchase Agreement, Section 4.1(a)); *see also* CCFF ¶¶ 843, 852, above).

Response to Proposed Finding No. 865:

The Proposed Finding is incomplete and misleading without additional context. As Garnick explained, after Altria unilaterally withdrew MarkTen cig-a-like from the market for budgetary reasons, Altria and JLI were no longer competing in the e-vapor market. (Garnick (Altria) Tr. 1678). This complicated some of the terms the parties had otherwise resolved, including when Altria should file for HSR clearance, which the parties had previously decided to delay until July 15, 2020. (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria) Dep. at 222-23; *see also* RFF ¶¶ 1050-73). "When [Altria], for other reasons, really budgetary reasons, decided to discontinue MarkTen cigalike and [it was] no longer in the e-vapor market, then there was no reason to wait until July 2020, and so [it was] trying to deal with the realities . . . ." (Garnick (Altria) Tr. 1678).

As Garnick explained, however, this change to the final Purchase Agreement was not made because JLI pushed for a shorter deadline for the HSR filing or to begin enhanced services sooner—to the contrary, Garnick did not "recall any desire or concern from JLI about reducing the time period before filing HSR." (Garnick (Altria) Tr. 1677; *see also* Pritzker (JLI) Tr. 871-72 (timing of enhanced services was not "consequential"); Willard (Altria) Tr. 1213 (recalling both Altria and JLI were "fairly flexible" on timing for enhanced services)). Instead, the parties were trying to "address the reality" of Altria's unilateral withdrawal:

> [W]e had made the announcement already by this time that we were pulling our MarkTen cigalike from the market. And so the term sheet assumed that we would still be in the market, but we had pulled, unilaterally, the MarkTen from the market.
>
> And so the idea would be, let's take into account the reality of the current situation and make sure that the deal documents address the reality.

(PX7036 Garnick (Altria) Dep. at 223).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 843 and 852, Respondents incorporate their responses to those Proposed Findings herein.

866. Altria submitted its HSR filing seeking antitrust clearance on February 4, 2019. (Willard (Altria) Tr. 1,472-73 (discussing PX0027 (Altria) at 011 (Answers and Defenses of Respondent Altria)).

Response to Proposed Finding No. 866:

Respondents have no specific response.

L. JLI DEMANDED THAT ALTRIA EXIT THE E-CIGARETTE BUSINESS AS PART OF THE TRANSACTION

1. Restricting Altria's Ability to Compete in E-Cigarettes Now and in the Future Was Critical to JLI

867. JLI's lead negotiators, Valani, Pritzker, and Burns testified that it was critical that Altria not be able to compete with JLI in e-cigarettes post-transaction. (*See* CCFF ¶¶ 868-79, below).

Response to Proposed Finding No. 867:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. It was not "critical" to JLI that "Altria not be able to compete" as part of the transaction, (CCFF ¶ 867); to the contrary, JLI "was perfectly happy" for Altria to continue competing with its existing products until the FTC reviewed the transaction, (Pritzker (JLI) Tr. 874), at which time JLI "fully expected" the FTC would require Altria to divest the products so they could remain in the market, (Pritzker (JLI) Tr. 852; *see also* Pritzker (JLI) Tr. 821-23; PX7032 Valani (JLI) Dep. at 49-51).

The Proposed Finding mischaracterizes JLI witnesses' testimony about the noncompete. Valani, Pritzker, Burns, and other JLI witnesses testified that *if* Altria was going to have access to JLI's proprietary and confidential information through its seats on JLI's Board and its provision of services to JLI, *then* a noncompete agreement was necessary to protect JLI's information from potential misuse. (*See, e.g.*, Pritzker (JLI) Tr. 668-69, 674-75, 821-22; Valani (JLI) Tr. 908; PX7021 Pritzker (JLI) Dep. at 70 ("[I]f there was going to be a situation where Altria was going to own a significant portion of -- of Juul, then we did not want them using our information to improve or develop new products."); PX7009 Burns (JLI) IHT at 138 (noncompete was necessary because Altria "want[ed] to have a significant stake in the company, have transparency on all the major strategic and operational priorities, which are undoubtedly going to be around IP roadmap and product development"); PX7035 Masoudi (JLI) Dep. at 129-30; *see also* PX7031 Willard (Altria) Dep. at 229 ("[JLI's] real interest in -- in this provision not to compete was really more related to the future. They didn't want us to invest in JUUL, learn a whole lot about their product and what made it successful, and then, separate from our investment in JUUL, go out and create an e-vapor business based on their information, and that was a fairly reasonable expectation on their part."); RFF ¶¶ 1178-88).

As Burns explained in his deposition, the noncompete was necessary because of the deal structure and access that Altria sought: "If, in fact, they were a minority, passive investor, had no governance rights over the company, and no access to our confidential information, I remember the discussions being that we would be far less concerned about them continuing to compete head to head against us in the marketplace." (PX7025 Burns (JLI) Dep. at 122-23).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop new e-vapor products. But the provision

explicitly *permitted* Altria to continue competing against JLI with Nu Mark's existing products until the FTC could review the transaction and determine what should be done with Altria's e-vapor portfolio. (Pritzker (JLI) Tr. 821-23). JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market prior to HSR approval, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

JLI "expected the FTC would likely require a divestiture of existing products." (Pritzker (JLI) Tr. 674; *see also* PX7032 Valani (JLI) Dep. at 52-53). As Pritzker explained, divestiture would achieve the goal of Altria not competing with JLI post-HSR approval once it had access to JLI's proprietary information, "and at the same time maintain those products in the marketplace." (PX7021 Pritzker (JLI) Dep. at 70). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As Pritzker explained, Altria's "unilaterally taking products off the market, I thought, was complicating. I thought that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Accordingly, Respondents note that nothing in this section or elsewhere in these Proposed Findings supports the assertion in Complaint Counsel's section subheading that at the time of the negotiations, JLI sought to restrict Altria's *current* ability to compete: "*Now* and in the Future." Complaint Counsel has not even attempted to provide evidence showing that JLI wanted Altria to

do anything with its existing products prior to HSR review of the transaction, nor that it demanded Altria shelve its existing products prior to executing the agreement.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 868-79, Respondents incorporate their responses to those Proposed Findings herein.

868. On April 20, 2018, JLI CEO Burns sent a letter to Willard contemplating Altria acquiring a 50.1% interest in JLI. (PX2026 (JLI) at 003; s*ee also* CCFF ¶ 650, above). Burns wrote that antitrust counsel would develop a plan to obtain regulatory approval, "including the treatment of any competitive products owned by Altria." (PX2026 (JLI) at 003; PX7011 (Valani (JLI), IHT at 62-63); *see also* CCFF ¶ 651, above).

Response to Proposed Finding No. 868:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 650-51, Respondents incorporate their responses to those Proposed Findings herein.

869. When asked about the reference to "any competitive products owned by Altria," Valani testified that a "precept" of any potential transaction with JLI was that Altria could not compete in e-cigarettes:

> I would just say as 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, and [] they did have, I guess, directly competitive – I meant –I should be clear – e-vapor offering of their own and so – or e-cigarette offering, [] and so, [] we had said that [] if you were going to work with us, you'd need to be exclusive, because we couldn't have you selling some product you own 100 percent of competing on the shelf with something that [] you own less percentage of."
>
> (Valani (JLI) Tr. 910-11; PX7011 (Valani (JLI), IHT at 62-63)).

Response to Proposed Finding No. 869:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the Proposed Finding inaccurately cites the excerpted quote as being Valani's trial testimony, when it is not—it is an out-of-context quote from Valani's investigational hearing,

which Complaint Counsel read during the trial. (*Compare* Valani (JLI) Tr. 910-11, *with* PX7011 Valani (JLI) IHT at 63).

Second, the Proposed Finding is incomplete and misleading because it omits the context Valani provided about this quote, both at trial and in his depositions, which makes it clear that JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology:

> I went back and looked at my two previous depositions that we did with you, and I think that I have given a lot of context about the notion that, you know, once Altria -- or for that matter any large company or investor -- you know, was inside our boardroom and then particularly providing services to us that were vitally strategic in nature, that there would be very large access to proprietary information, which as I explained earlier, you can imagine, is highly sensitive for us given the fact that we're one of the few groups in the industry to design our own products, and I believe that we have the most cutting-edge technologies of any group in the world. And so the idea that an investor would have access to those technologies and processes and be competing with their own products at the same time is of major concern to us.

(Valani (JLI) Tr. 908; *see also* PX7032 Valani (JLI) Dep. at 49; RFF ¶¶ 1178-88).

JLI was not concerned about competition from Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71). The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23), but that this was the outcome JLI expected, (*See* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49-51). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the

product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Finally, Valani testified that as important as it was to protect JLI's proprietary information from potential misuse by Altria, it was "equally foundational" that Altria took the "appropriate[,] legally sanctioned route with the regulator to get there." (Valani (JLI) Tr. 912).

870. Valani explained that Altria could not have a partial ownership interest in JLI and also have its own competing e-cigarette products because "a natural incentive could be for someone to push a product that they own a hundred percent of." PX7011 (Valani (JLI), IHT at 64-65)). JLI "felt that it was a risk we shouldn't take, [] being [] in bed with [Altria] in any way and having the ability for them to have something that they have a greater incentive to sell that directly [] in market next to our product as a similar offering." (PX7011 (Valani (JLI), IHT at 64-65)).

Response to Proposed Finding No. 870:

The Proposed Finding is incomplete and misleading without additional context. JLI was not concerned about competition from Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87). This is why every term sheet and deal document exchanged between the parties explicitly excluded Altria's existing products from the noncompete provision, (RFF ¶ 1192); as Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop new products using JLI's technology. (*See* Valani (JLI) Tr. 908 ("[O]nce Altria . . . was inside our boardroom and then particularly providing services to us that were vitally strategic in nature, . . . there would be very large access to proprietary information . . . . [T]he idea

that an investor would have access to those technologies and processes and be competing with their own products at the same time is of major concern to us."); PX7032 Valani (JLI) Dep. at 54 ("[I]f they were developing products, if they had access to all of the JLI . . . product roadmap, technology roadmap, . . . and they were a major shareholder of JLI and supporting JLI with . . . services, then it's kind of a risky position for JLI to be in . . . ."); RFF ¶¶ 1178-88).

JLI also understood that any request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; PX7032 Valani (JLI) Dep. at 51 ("But, to be clear . . . the entire intent behind . . . all the structuring [of the Antitrust Clearance Matters section of the draft term sheet] was that the companies would cooperate with the regulator to make sure that all of these efforts . . . were blessed by the regulator.")).

At trial, Valani agreed that neither he nor anyone else he knows at JLI ever "reach[ed] any kind of agreement with anyone at Altria about withdrawing products" before the transaction was executed. (Valani (JLI) Tr. 956-57). Specifically, he "absolutely [did] not" ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his knowledge. (Valani (JLI) Tr. 956). He had no prior notice "whatsoever" that Altria would be discontinuing any products, and no one from Altria had given him an "indication" that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria's December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

871. At trial, Valani acknowledged that if Altria still had e-vapor products post-deal, it could have a greater incentive to support its products than to support JUUL. (Valani (JLI) Tr. 912-13). Valani also testified that Altria having access to proprietary JLI information that it could then use to develop its own products was a concern. (Valani (JLI) Tr. 912-13).

Response to Proposed Finding No. 871:

The Proposed Finding is incomplete and misleading without additional context. JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop new products using JLI's technology. (*See* Valani (JLI) Tr. 908; Pritzker (JLI) Tr. 674-75, 821-22; PX7032 Valani (JLI) Dep. at 49-54; RFF ¶¶ 1178-88). JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134).

To the contrary, every term sheet and deal document exchanged between the parties explicitly permitted Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval. (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23). And the undisputed record demonstrates that this was the outcome JLI expected. (*See* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

JLI also understood that any request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934; *see also* PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator" as part of the FTC review process)). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12). Valani agreed that neither he nor anyone else he knows at JLI ever "reach[ed] any kind of agreement with anyone at Altria about withdrawing products" before the

transaction was executed. (Valani (JLI) Tr. 956-57). Valani testified that he "absolutely [did] not" ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his knowledge. (Valani (JLI) Tr. 956). He had no prior notice "whatsoever" that Altria would be discontinuing any products, and no one from Altria had given him an "indication" that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria's December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

872. Valani testified that "it was almost like it was a prerequisite" that Altria would have to divest its e-cigarette assets post-transaction, and that JLI's negotiators "assumed that [Altria] would be the expert at what to do with it." PX7011 (Valani (JLI), IHT at 102-03)).

Response to Proposed Finding No. 872:

The Proposed Finding is incomplete and misleading without additional context. Valani and other JLI witnesses repeatedly testified that JLI was not concerned with Altria's existing products remaining in the market after the transaction, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator" as part of the FTC review process); PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

As Valani explained at trial, the draft term sheets' proposed treatment of Altria's existing products in the event of a transaction "was all in the context of it being done under the sanction of the regulator" as part of the FTC review process. (Valani (JLI) Tr. 918). And as Pritzker explained, JLI "was perfectly happy" for Altria's existing products to remain on the market post-transaction pending FTC review. (Pritzker (JLI) Tr. 874). Accordingly, at all times in the negotiations, the contemplated noncompete provision explicitly *permitted* Altria to continue

competing against JLI with Nu Mark's existing products after the transaction, until the FTC determined what should be done with such products as part of the HSR clearance process. (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23, 853-54). As Valani testified, "[t]he prevailing assumption from antitrust counsel" was that the FTC would require Altria to divest the products so they could remain in the market, (Valani (JLI) Tr. 918), which JLI "fully expected," (Pritzker (JLI) Tr. 852; *see also* Pritzker (JLI) Tr. 821-23; PX7032 Valani (JLI) Dep. at 49-51).

JLI also understood that any request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934; *see also* PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator" as part of the FTC review process)). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12). Valani agreed that neither he nor anyone else he knows at JLI ever "reach[ed] any kind of agreement with anyone at Altria about withdrawing products" before the transaction was executed. (Valani (JLI) Tr. 956-57). Valani testified that he "absolutely [did] not" ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his knowledge. (Valani (JLI) Tr. 956). He had no prior notice "whatsoever" that Altria would be discontinuing any products, and no one from Altria had given him an "indication" that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria's December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

873. Pritzker's position was that if Altria was "going to acquire a significant position in [JLI] where they would have potential access to data or trade secrets of JUUL, then yes, there would need to be a noncompete." (Pritzker (JLI) Tr. 668-69).

Response to Proposed Finding No. 873:

The Proposed Finding is incomplete and misleading without additional context. Although it is true that the purpose of the noncompete was to protect JLI's proprietary information from potential misuse, (*see* PX7021 Pritzker (JLI) Dep. at 151-52), the provision explicitly excluded Altria's existing products from the noncompete, (Pritzker (JLI) Tr. 821-23; RFF ¶ 1192). This carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874). JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134).

Rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop new products using JLI's technology. (*See* Valani (JLI) Tr. 908 ("[O]nce Altria . . . was inside our boardroom and then particularly providing services to us that were vitally strategic in nature, . . . there would be very large access to proprietary information . . . . [T]he idea that an investor would have access to those technologies and processes and be competing with their own products at the same time is of major concern to us."); PX7032 Valani (JLI) Dep. at 54 ("[I]f they were developing products, if they had access to all of the JLI . . . product roadmap, technology roadmap, . . . and they were a major shareholder of JLI and supporting JLI with . . . services, then it's kind of a risky position for JLI to be in); RFF ¶¶ 1178-88).

Pritzker's "expectation [was] that the FTC would require a divesture and that the product[s] would then stay in the market with a different ownership." (Pritzker (JLI) Tr. 681). As Pritzker

explained, this would achieve the goal of Altria not competing with JLI after receiving JLI's proprietary information, "and at the same time maintain those products in the marketplace." (PX7021 Pritzker (JLI) Dep. at 70). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Prizker (JLI) Tr. 874-75). As he explained, Altria's "unilaterally taking products off the market, I thought, was complicating. I thought that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Pritzker is "absolutely not" aware of any agreement "that JLI had with Altria that Altria would take any particular action" with respect to its e-vapor products prior to a transaction. (Pritzker (JLI) Tr. 884). As he testified, Complaint Counsel's allegation to the contrary "is absolutely incorrect. I had zero knowledge or any idea that any product would be withdrawn from the market prior to the time it was ruled upon by the FTC, nor desired that any product be removed prior to that time or any inclination that it would be removed. It was neither known to me nor desired by me." (Pritzker (JLI) Tr. 885). Pritzker further testified that to his knowledge, no one at JLI had prior notice that Altria would withdraw its products on either October 25 or December 7, and he never requested Altria take these actions. (Pritzker (JLI) Tr. 884).

874. Pritzker's view was that for a transaction where Altria would have access to JLI's data or proprietary information, "it would be unacceptable for Altria to be in a position to use that information to compete against JLI . . ." (Pritzker (JLI) Tr. 673-74). Pritzker testified that the process would be overseen by the FTC and that he expected the FTC would require a divestiture of existing Altria products. (Pritzker (JLI) Tr. 673-74).

Response to Proposed Finding No. 874:

Respondents have no specific response.

875. Pritzker testified, "I began to recognize [] that if there was going to be [] some kind of minority investment by Altria in Juul, it would give them access to data and information that was proprietary to Juul that it was not going to be viable for them to be spending their energies on other e-cigarette products or to use information they were getting from Juul to be able to enhance their product or develop new products that would be injurious to Juul's business." (PX7021 (Pritzker (JLI), Dep. at 82-83)).

Response to Proposed Finding No. 875:

The Proposed Finding is incomplete and misleading without additional context. Pritzker has repeatedly testified that JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (Pritzker (JLI) Tr. 674-75, 821-22; PX7021 Pritzker (JLI) Dep. at 70; RFF ¶¶ 1178-88). JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134).

To the contrary, every term sheet and deal document exchanged between the parties explicitly permitted Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval. (Pritzker (JLI) Tr. 821-23; RFF ¶ 1192). And the undisputed record demonstrates that this was the outcome JLI expected. (*See* Pritzker (JLI) Tr. 821-23, 853-54, 874-75; PX7021 Pritzker (JLI) Dep. at 154-55). JLI included the carve-out because it "wanted [Altria] to keep [its] products on the market until they could be presented to the FTC for divestiture." (Pritzker (JLI) Tr. 853; *see also* Pritzker (JLI) Tr. 853 (the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]")). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Pritzker's "expectation [was] that the FTC would require a divesture and that the product would then stay in the market with a different ownership." (Pritzker (JLI) Tr. 681). As Pritzker

explained, divestiture would achieve the goal of Altria not competing with JLI post-HSR approval after receiving JLI's proprietary information, "and at the same time maintain those products in the marketplace." (PX7021 Pritzker (JLI) Dep. at 70). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As he explained, Altria's "unilaterally taking products off the market, I thought, was complicating. I thought that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Pritzker is "absolutely not" aware of any agreement "that JLI had with Altria that Altria would take any particular action" with respect to its e-vapor products prior to a transaction. (Pritzker (JLI) Tr. 884). As he testified, Complaint Counsel's allegation to the contrary "is absolutely incorrect. I had zero knowledge or any idea that any product would be withdrawn from the market prior to the time it was ruled upon by the FTC, nor desired that any product be removed prior to that time or any inclination that it would be removed. It was neither known to me nor desired by me." (Pritzker (JLI) Tr. 885). Pritzker further testified that to his knowledge, no one at JLI had prior notice that Altria would withdraw its products on either October 25 or December 7, and he never requested Altria take these actions. (Pritzker (JLI) Tr. 884).

876. Pritzker testified that "[i]t would not have been acceptable" for Altria to have continued to participate in the e-cigarette business following its investment in JLI "if they continued to insist, as they had, that they have a very significant ownership position and that they have board seats and—and therefore potential access to Juul information." (PX7021 (Pritzker (JLI), Dep. at 125-26)).

Response to Proposed Finding No. 876:

The Proposed Finding is incomplete and misleading without additional context. JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no

value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). Rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (Pritzker (JLI) Tr. 674-75, 821-22; PX7021 Pritzker (JLI) Dep. at 70; RFF ¶¶ 1178-88).

The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23), but that this was the outcome JLI expected, (*see* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Pritzker's "expectation [was] that the FTC would require a divesture and that the product would then stay in the market with a different ownership." (Pritzker (JLI) Tr. 681). As Pritzker explained, divestiture would achieve the goal of Altria not competing with JLI post-HSR approval after receiving JLI's proprietary information, "and at the same time maintain those products in the marketplace." (PX7021 Pritzker (JLI) Dep. at 70). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As he explained, Altria's "unilaterally taking products off the market, I thought, was complicating. I thought that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required

to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Pritzker is "absolutely not" aware of any agreement "that JLI had with Altria that Altria would take any particular action" with respect to its e-vapor products prior to a transaction. (Pritzker (JLI) Tr. 884). As he testified, Complaint Counsel's allegation to the contrary "is absolutely incorrect. I had zero knowledge or any idea that any product would be withdrawn from the market prior to the time it was ruled upon by the FTC, nor desired that any product be removed prior to that time or any inclination that it would be removed. It was neither known to me nor desired by me." (Pritzker (JLI) Tr. 885). Pritzker further testified that to his knowledge, no one at JLI had prior notice that Altria would withdraw its products on either October 25 or December 7, and he never requested Altria take these actions. (Pritzker (JLI) Tr. 884).

877. Pritzker testified that he would have resisted any agreement that would have allowed Altria to market its MarkTen and MarkTen Elite e-cigarettes indefinitely. (Pritzker (JLI) Tr. 895-96). He did not care if the products stayed on the market, but he did not want them marketed by Altria. (Pritzker (JLI) Tr. 895-96).

Response to Proposed Finding No. 877:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As Pritzker explained at trial, "I would not have been worried about competition from MarkTen or MarkTen Elite *as they were at that time* but would have been concerned about *changes that might be made* to those products," specifically using JLI's proprietary information. (Pritzker (JLI) Tr. 895 (emphases added)). JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). Rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's

technology. (Pritzker (JLI) Tr. 674-75, 821-22; PX7021 Pritzker (JLI) Dep. at 70; RFF ¶¶ 1178-88).

The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23), but that this was the outcome JLI expected. (*See* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

As Pritzker explained, divestiture would achieve the goal of Altria not competing with JLI post-HSR approval after receiving JLI's proprietary information, "and at the same time maintain those products in the marketplace." (PX7021 Pritzker (JLI) Dep. at 70). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As he explained, Altria's "unilaterally taking products off the market, I thought, was complicating. I thought that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Pritzker is "absolutely not" aware of any agreement "that JLI had with Altria that Altria would take any particular action" with respect to its e-vapor products prior to a transaction. (Pritzker (JLI) Tr. 884). As he testified, Complaint Counsel's allegation to the contrary "is

absolutely incorrect. I had zero knowledge or any idea that any product would be withdrawn from the market prior to the time it was ruled upon by the FTC, nor desired that any product be removed prior to that time or any inclination that it would be removed. It was neither known to me nor desired by me." (Pritzker (JLI) Tr. 885). Pritzker further testified that to his knowledge, no one at JLI had prior notice that Altria would withdraw its products on either October 25 or December 7, and he never requested Altria take these actions. (Pritzker (JLI) Tr. 884).

878. JLI's Burns testified: "It was a topic we talked about that said how can we [JLI] allow you guys [Altria] to be a major shareholder and have access to all of our confidential information and IP and product development, and you guys in parallel are competing with us in a marketplace. [. . .] It seems like a basic premise that's in conflict." (PX7009 (Burns (JLI), IHT at 137-38)).

Response to Proposed Finding No. 878:

The Proposed Finding is incomplete and misleading without additional context. JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). Rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (Pritzker (JLI) Tr. 674-75, 821-22; PX7021 Pritzker (JLI) Dep. at 70; RFF ¶¶ 1178-88).

As Burns explained, if Altria was privy to JLI's confidential information, then JLI needed the noncompete to protect itself. But if Altria chose to forgo this access and information, JLI had no problem with it continuing to compete:

> Q. Mr. Burns, in the final deal document, did Altria ultimately agree to a noncompete provision in the e-vapor space?
>
> A. No, not exclusively. They have the ability to compete in the e-vapor space. They lose some of their rights as a result of that per the agreement. They are basically given an option: You can . . . not compete, and you can maintain your board ownership and all the privileges that are with that. Or if you choose to

> compete, for whatever reason, you retain your economic ownership, but you have none of your governance and board ownership, and therefore, you won't be privileged to any of the IP or confidential information that we'll have.
>
> So we basically gave them a choice to allow them to compete, but there are conditions associated with them if they choose to compete.

(PX7009 Burns (JLI) IHT at 143-44).

As Burns explained, this noncompete was necessary because of the deal structure and access that Altria sought: Altria "want[ed] to have a significant stake in the company, have transparency on all the major strategic and operational priorities, which are undoubtedly going to be around IP roadmap and product development." (PX7009 Burns (JLI) IHT at 138). "If, in fact, they were a minority, passive investor, had no governance rights over the company, and no access to our confidential information, I remember the discussions being that we would be far less concerned about them continuing to compete head to head against us in the marketplace." (PX7025 Burns (JLI) Dep. at 122-23).

Additionally, at all times in the negotiations, the contemplated noncompete provision explicitly *permitted* Altria to continue competing against JLI with Nu Mark's existing products after the transaction until the FTC determined what should be done with them as part of the HSR clearance process. (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23). And the undisputed record demonstrates that this was the outcome JLI expected. (*See* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Complaint Counsel did not call Burns to testify at trial, but in his deposition he agreed that there was not "any kind of agreement" between Altria and JLI that Altria would take the actions it

announced on October 25 or December 7. (PX7025 Burns (JLI) Dep. at 216-18). Burns had no prior notice about either announcement, and JLI did not ask Altria "for any kind of commitment" to take the actions it took on October 25 or December 7. (PX7025 Burns (JLI) Dep. at 215-18).

879. JLI CFO Timothy Danaher testified that JLI "had always contemplated that Altria would be subject to a noncompete in the e-vapor category as part of any transaction with us," and explained that if Altria was "going to become a 35 percent owner in our business, we didn't want them competing with any product in the e-vapor business against us." (PX7005 (Danaher (JLI), IHT at 164-65)).

Response to Proposed Finding No. 879:

The Proposed Finding is incomplete and misleading without additional context. JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). As Danaher testified, "[W]e didn't think that Markten was a significant competitive threat to us." (PX7005 Danaher (JLI) IHT at 165). Rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (Pritzker (JLI) Tr. 674-75, 821-22; PX7021 Pritzker (JLI) Dep. at 70; RFF ¶¶ 1178-88). As Danaher explained:

> [T]he support services were always an important part of the transaction. And in those support services, in order for them to be actioned and carried out appropriately, JLI was going to need to provide proprietary, confidential, and, I would say, highly confidential information to Altria.
>
> And so, given the nature of the information that JLI was going to be providing to Altria, it was important that Altria would not be able to take that information and use it to either modify an existing product that they had, of course assuming that they were complying with FDA regulations, or to create a new product that could compete against JLI, in addition to, obviously, Altria was going to be 35 percent owner in the business and was going to [have] board representation upon antitrust clearance.

(PX7042 Danaher (JLI) Dep. at 153-54).

JLI was not concerned with MarkTen cig-a-like and MarkTen Elite remaining in the market. The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending FTC's review and approval, (Pritzker (JLI) Tr. 821-23; RFF ¶ 1192), but that this was the outcome JLI expected. (*See* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Danaher further testified that he was completely unaware that Altria would withdraw any of its e-vapor products before its October and December public announcements, and that Altria never told anyone at JLI that they intended to do so. (PX7005 Danaher (JLI) IHT at 175; PX7042 Danaher (JLI) Dep. at 159-60).

2. JLI Clearly Communicated to Altria—and Altria Understood—That a Condition of the Transaction Was That Altria Exit E-cigarettes

a) JLI's Negotiators Told Altria That It Could Not Compete in E-Cigarettes Post-Transaction

880. JLI's negotiators told Altria's negotiators that Altria could not compete in e-cigarettes post-transaction with its own products, but that instead it would need to participate in e-cigarettes only through JLI. (*See* CCFF ¶¶ 881-91, below). JLI's negotiators discussed with Altria's negotiators the topic of what Altria would do with its existing e-cigarette products. (*See* CCFF ¶¶ 881-91, below).

Response to Proposed Finding No. 880:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. JLI did not tell Altria that it "could not compete in e-cigarettes post-transaction with its own products," (CCFF ¶ 880); to the contrary, JLI "was perfectly happy" for Altria's existing products to remain on the market until the FTC reviewed the transaction, (Pritzker (JLI) Tr. 874).

At all times in the negotiations, the contemplated noncompete provision explicitly *permitted* Altria to continue competing against JLI with Nu Mark's existing products until the FTC determined what should be done with them as part of the HSR clearance process. (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23). As Valani testified, "[t]he prevailing assumption from antitrust counsel" was that the FTC would require Altria to divest the products so they could remain in the market, (Valani (JLI) Tr. 918), which JLI "fully expected," (Pritzker (JLI) Tr. 852; *see also* Pritzker (JLI) Tr. 821-23; PX7032 Valani (JLI) Dep. at 49, 51).

JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (*See* RFF ¶¶ 1178-88). But the noncompete did not prevent Altria from competing with its existing products pending HSR review; to the contrary, every draft term sheet and deal document exchanged by the parties included a carve-out exempting MarkTen cig-a-like and MarkTen Elite from the noncompete, as did the final agreement. (RFF ¶ 1192). Moreover, JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market after the transaction, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

JLI "expected the FTC would likely require a divestiture of existing products." (Pritzker (JLI) Tr. 674; *see also* PX7032 Valani (JLI) Dep. at 52-53). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As he explained, Altria's "unilaterally

taking products off the market, I thought, was complicating. I thought that that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Finally, there is no evidence whatsoever that any discussions between Altria and JLI regarding "the topic of what Altria would do with its existing e-cigarette products," (CCFF ¶ 880), involved JLI demanding or Altria agreeing to pull any products prior to the transaction. To the contrary, all discussions involving the treatment of Altria's e-vapor portfolio in the event of a transaction were in anticipation of FTC review of the transaction. (Pritzker (JLI) Tr. 823 ("[A]nticipating regulatory review and defining terms such that the regulatory review would be anticipated and the chances for approval optimized legally, that's exactly what I would expect any transaction would -- would accomplish."); PX7032 Valani (JLI) Dep. at 51 (similar)).

At every step of the negotiations, the parties intended—and the term sheets proposed—that any actions taken with respect to Altria's existing products as a result of the transaction would be "subject to scrutiny by the FTC in the course of its regulatory review." (Pritzker (JLI) Tr. 821-22). "It was clear that if we were going to pursue a transaction of this nature, that it would be closely scrutinized by regulatory agencies, and that antitrust counsel would have to be brought in at an early stage so that any conversations around control, board seats, existing products, all of that would be structured in a way so as to be above-board and to optimize the chance for a successful regulatory outcome." (Pritzker (JLI) Tr. 784).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 881-91, Respondents incorporate their responses to those Proposed Findings herein.

881. Starting around the time that the notion of Altria buying less than a 100% interest in JLI arose, Altria and JLI negotiators had conversations about what Altria would do with its existing e-cigarette products. (PX7021 (Pritzker (JLI), Dep. at 64-65)). Pritzker testified that the notion of Altria purchasing less than a 100% interest in JLI came up around April 2018. (PX7021 (Pritzker (JLI), Dep. at 64-65) (discussing PX2026 (JLI) (April 2018 letter from Burns to Willard))).

Response to Proposed Finding No. 881:

Respondents have no specific response except to note that Pritzker explained, "We were aware that anything we did was going to be subject to regulatory scrutiny, and we wanted to make sure that anything we did was -- would be acceptable." (PX7021 Pritzker (JLI) Dep. at 68).

882. During negotiations, JLI was clear on the importance of Altria not competing post-transaction. (Valani (JLI) Tr. 917).

Response to Proposed Finding No. 882:

The Proposed Finding is inaccurate, incomplete and misleading without additional context. JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop *new* products using JLI's technology. (*See* RFF ¶¶ 1178-88).

JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). Indeed, JLI witnesses repeatedly testified that JLI was not concerned with Altria's existing products remaining in the market after the transaction, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator"); PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

As Valani explained at trial, the draft term sheets' proposed treatment of Altria's existing products in the event of a transaction "was all in the context of it being done under the sanction of the regulator." (Valani (JLI) Tr. 918). And as Pritzker explained, JLI "was perfectly happy" for Altria's existing products to remain on the market post-transaction pending FTC review. (Pritzker (JLI) Tr. 874). Accordingly, at all times in the negotiations, the contemplated noncompete provision explicitly *permitted* Altria to continue competing against JLI with Nu Mark's existing products after the transaction, until the FTC determined what should be done with such products as part of the HSR clearance process. (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23). As Valani testified, "[t]he prevailing assumption from antitrust counsel" was that the FTC would require Altria to divest the products so they could remain in the market, (Valani (JLI) Tr. 918), which JLI "fully expected," (Pritzker (JLI) Tr. 852; *see also* Pritzker (JLI) Tr. 821-23; PX7032 Valani (JLI) Dep. at 49, 51).

883. Valani testified that JLI's negotiators told Altria that if JLI was going to do a transaction with Altria, Altria could not compete in e-cigarettes with its own products, but instead would have to participate in e-cigarettes exclusively through JLI. (Valani (JLI) Tr. 910-12; PX7011 (Valani (JLI), IHT at 63)).

Response to Proposed Finding No. 883:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23), but that this was the outcome JLI expected, (*see* Pritzker (JLI) Tr. 821-23, 853, 874). JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep.

at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (*See* RFF ¶¶ 1178-88).

JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). JLI witnesses repeatedly testified that JLI was not concerned with Altria's existing products remaining in the market after the transaction, and it believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator"); PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

At trial, Valani agreed that neither he nor anyone else he knows at JLI ever "reach[ed] any kind of agreement with anyone at Altria about withdrawing products" before the transaction was executed. (Valani (JLI) Tr. 956). Valani testified that he "[a]bsolutely [did] not" ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his knowledge. (Valani (JLI) Tr. 956). He had no prior notice "whatsoever" that Altria would be discontinuing any products, and no one from Altria had given him an "indication" that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria's December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

884. Valani testified that he thinks Altria realized "probably pretty early on" in negotiations that JLI was not going to do a transaction unless Altria agreed that it would not sell its own e-

cigarette products but instead would participate in e-cigarettes exclusively through JLI. (PX7011 (Valani), IHT at 63-64)).

Response to Proposed Finding No. 884:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (RFF ¶ 1192; Pritzker (JLI) Tr. 821-23), but that this was the outcome JLI expected. (*See, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (*See* RFF ¶¶ 1178-88).

JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). JLI witnesses repeatedly testified that JLI was not concerned with Altria's existing products remaining in the market after the transaction, and it believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator" as part of the FTC review process); PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-

64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

Valani agreed that neither he nor anyone else he knows at JLI ever "reach[ed] any kind of agreement with anyone at Altria about withdrawing products" before the transaction was executed. (Valani (JLI) Tr. 956). Valani testified that he "[a]bsolutely [did] not" ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his knowledge. (Valani (JLI) Tr. 956). He had no prior notice "whatsoever" that Altria would be discontinuing any products, and no one from Altria had given him an "indication" that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria's December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

Similarly, it was never Altria's understanding that "JLI was not going to do a transaction unless Altria agreed" to discontinue its existing e-vapor products. (CCFF ¶ 884). To the contrary, as every Altria negotiator testified, at no point in the negotiations did Altria understand that it had to pull any or all of Nu Mark's existing e-vapor products to invest in JLI, nor did anyone from JLI suggest as much. (Gifford (Altria) Tr. 2850; Garnick (Altria) Tr. 1763 (testifying that JLI never suggested that Altria should shut down any of its e-vapor products before it could invest in JLI); PX7031 Willard (Altria) Dep. at 279-80 ("The principals at [JLI] had never expressed a concern about the impact our existing products might have on JUUL's performance in the marketplace."); PX7024 Crosthwaite (Altria/JLI) Dep. at 281 (testifying that he was not aware of JLI ever asking Altria or demanding that Altria discontinue its e-vapor products as a condition to the transaction)).

885. JLI's Pritzker testified that when it became apparent that the transaction would include Altria having board seats and providing services to JLI, JLI's negotiators made clear to Altria that Altria would need to agree not to compete in e-cigarettes. (Pritzker (JLI) Tr. 674-76; PX7021 (Pritzker (JLI), Dep. at 88-89)).

Response to Proposed Finding No. 885:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Pritzker has repeatedly testified that JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop *new* products using JLI's technology. (Pritzker (JLI) Tr. 674-75, 821-22; PX7021 Pritzker (JLI) Dep. at 70, 151-52). JLI was not concerned about competition from Altria's *existing* products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134).

To the contrary, at all times in the negotiations, the proposed noncompete provision explicitly excluded Altria's existing products, permitting them to remain on the market pending HSR review. (Pritzker (JLI) Tr. 821-23, 853-54, 874-75; RFF ¶ 1192). JLI included the carve-out because it "wanted [Altria] to keep [its] products on the market until they could be presented to the FTC for divestiture." (Pritzker (JLI) Tr. 853; *see also* Pritzker (JLI) Tr. 853 (the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]")). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

Pritzker's "expectation [was] that the FTC would require a divesture and that the product would then stay in the market with a different ownership." (Pritzker (JLI) Tr. 681). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874). As he explained, Altria's "unilaterally taking products off the market . . . was complicating. I thought that that seemed inconsistent with our conversations that they would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products.

I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

Pritzker is "[a]bsolutely not" aware of any agreement "that JLI had with Altria that Altria would take any particular action" with respect to its e-vapor products prior to a transaction. (Pritzker (JLI) Tr. 884). As he testified, Complaint Counsel's allegation to the contrary "is absolutely incorrect. I had zero knowledge or any idea that any product would be withdrawn from the market prior to the time it was ruled upon by the FTC, nor desired that any product be removed prior to that time or any inclination that it would be removed. It was neither known to me nor desired by me." (Pritzker (JLI) Tr. 885). Pritzker further testified that, to his knowledge, no one at JLI had prior notice that Altria would withdraw its products on either October 25 or December 7, and he never requested Altria take these actions. (Pritzker (JLI) Tr. 884).

Similarly, it was never Altria's understanding that "Altria would need to agree not to compete" with its existing e-vapor products as a precondition to the transaction. (CCFF ¶ 885). To the contrary, as every Altria negotiator testified, at no point in the negotiations did Altria understand that it had to pull any or all of its existing e-vapor products to invest in JLI, nor did anyone from JLI suggest as much. (Gifford (Altria) Tr. 2850; Garnick (Altria) Tr. 1763 (testifying that JLI never suggested that Altria should shut down any of its e-vapor products before it could invest in JLI); PX7031 Willard (Altria) Dep. at 279-80 ("The principals at [JLI] had never expressed a concern about the impact our existing products might have on JUUL's performance in the marketplace."); PX7024 Crosthwaite (Altria/JLI) Dep. at 281 (testifying that he was not aware of JLI ever asking Altria or demanding that Altria discontinue its e-vapor products as a condition to the transaction)).

886. Pritzker discussed with Altria's Willard and Gifford that if Altria was going to own a significant portion of JLI, then JLI did not want them using JLI's information to improve or develop new e-vapor products. (PX7021 (Pritzker (JLI), Dep. at 70-71)).

Response to Proposed Finding No. 886:

Respondents have no specific response.

887. JLI CEO Burns explained: "It was a topic we talked about that said how can we [JLI] allow you guys [Altria] to be a major shareholder and have access to all of our confidential information and IP and product development, and you guys in parallel are competing with us in a marketplace. [. . .] It seems like a basic premise that's in conflict." (PX7009 (Burns (JLI), IHT at 137-38); *see also* CCFF ¶ 878, above).

Response to Proposed Finding No. 887:

Respondents have no specific response except to note that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874).

JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (*See* RFF ¶¶ 1178-88).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 878, Respondents incorporate their response to that Proposed Finding herein.

888. Burns testified that Altria "understood [a non-competition commitment] was an important issue we needed to work through throughout the dialogues." (PX7009 (Burns (JLI), IHT at 139)).

Response to Proposed Finding No. 888:

The Proposed Finding is inaccurate and misleading without context. Burns's testimony did not relate to a "non-competition commitment." Rather, the cited excerpt of Burns's testimony was in response to questioning about a term under the "Antitrust Clearance Matters" section of the July 30 term sheet, which proposed a ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR clearance process. (PX7009 Burns (JLI) IHT at 136-37; PX1300 (Altria) at 004-05). Burns testified that he did not know whether he conveyed the importance of the term to Willard and Gifford at the August 1 meeting, but that he believed Willard and Gifford "understood it was an important issue we needed to work through throughout the dialogues." (PX7009 Burns (JLI) IHT at 139).

889. JLI General Counsel Masoudi recalls "general discussions regarding whether Richard would be able to compete against JLI with vapor assets while receiving information as a shareholder and/or board member of JLI." (PX7035 (Masoudi (JLI), Dep. at 52)).

Response to Proposed Finding No. 889:

The Proposed Finding is incomplete and misleading without additional context. As Masoudi's quote illustrates, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop new products using JLI's technology. (*See* PX7035 Masoudi (JLI) Dep. at 52; *see also* Valani (JLI) Tr. 908; PX7032 Valani (JLI) Dep. at 49, 54).

JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after

the transaction pending FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). Indeed, as Masoudi explained, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction. (PX7035 Masoudi (JLI) Dep. at 73; *see also* RFF ¶¶ 1189-210).

Masoudi testified that he is not aware of any agreement between Altria and JLI that Altria would take its products off the market as a precondition to the transaction. (PX7035 Masoudi (JLI) Dep. at 127-29). To Masoudi's knowledge, no one at JLI asked that Altria take the actions described in the October 25 and December 7 announcements, and Masoudi had no prior notice that Altria would do so. (PX7035 Masoudi (JLI) Dep. at 126-28).

890. JLI General Counsel Masoudi testified that JLI "express[ed] to Altria at various times [. . .] [that] we were very concerned about Altria getting sensitive information about our company and/or sitting on our board of directors at the same time as they were competing with vapor products against us," and told Altria that "we were concerned about [Altria] getting information about our -- for example, our product development plans or geographic expansion plans or any of our competitive -- competitively sensitive information and then them using it to compete against us." (PX7035 (Masoudi (JLI), Dep. at 41-42)).

Response to Proposed Finding No. 890:

The Proposed Finding is incomplete and misleading without additional context. As Masoudi's quote makes clear, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop new products using JLI's technology. (*See* PX7035 Masoudi (JLI) Dep. at 52; *see also* Valani (JLI) Tr. 908; PX7032 Valani (JLI) Dep. at 49, 54). But JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at

134). The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected. (*See, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). Indeed, as Masoudi explained, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction. (PX7035 Masoudi (JLI) Dep. at 73; *see also* RFF ¶¶ 1189-210).

Masoudi testified that he is not aware of any agreement between Altria and JLI that Altria would take its products off the market as a precondition to the transaction. (PX7035 Masoudi (JLI) Dep. at 127-29). To Masoudi's knowledge, no one at JLI asked that Altria take the actions described in the October 25 and December 7 announcements, and Masoudi had no prior notice that Altria would do so. (PX7035 Masoudi (JLI) Dep. at 126-28).

891. Howard Willard acknowledged that the non-compete provision was important enough to make the list of eight terms that he conveyed to the senior JLI negotiators in his October 5, 2018 letter. (Willard (Altria) Tr. 1214; (PX1391 at 003 (Altria); *see also* CCFF ¶¶ 779-82, above).

Response to Proposed Finding No. 891:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Willard explained, he included the reference to the noncompete provision in his October 5 letter to JLI because "it was probably helpful in that at least some of what was in here was not a point of disagreement." (PX7031 Willard (Altria) Dep. at 227-28). "[C]ompetition in the future was not typically a contentious term," and it had not caused the negotiations to break down. (PX7031 Willard (Altria) Dep. at 228; *see also* PX7025 Burns (JLI) Dep. at 160 ("[P]oint number 6 was not, frankly, a priority point for us. So I don't recall specifically how we reacted to this point.")).

Second, the Proposed Finding is incomplete and misleading because it omits the necessary context of how JLI understood the phrase "consistent with our previous discussions" in the October 5 letter. (*See* RRFF ¶¶ 784, 964). Pritzker testified at trial that he understood the reference to "our previous discussions" in the October 5 letter to mean "consistent with [the] prior draft of the term sheets," which was the August 19 term sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 862-63 (noting that "looking at the last term sheet" was "instructive" on the meaning of "our previous discussions" in the October 5 letter); RFF ¶¶ 985-86). As Pritzker explained, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863).

The August 19 term sheet explicitly carved out Nu Mark's existing products from the noncompete pending HSR review, proposing that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "[i]n the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22).

The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action with

regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

Similarly, the August 22 joint issues list demonstrated that the parties had reached consensus on the treatment of Altria's existing e-vapor business in the event of a transaction. (RX1784 (PWP) at 002, 004 (summarizing parties' positions regarding "Antitrust Clearance Matters" and "Non-Compete"); *see also* RFF ¶¶ 834-38). Regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions)). The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

Respondents further note that the referenced testimony occurred on page 1224 of the trial transcript, not page 1214. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 779-82, Respondents incorporate their responses to those Proposed Findings herein.

b) <u>JLI's Initial July 30, 2018 Term Sheet Made Clear That Altria Would Have to Get Rid of Its Existing E-Cigarette Business through Divestiture, Contribution, or Ceasing to Operate It</u>

892. JLI's July 30, 2018 term sheet made clear that a requirement of the transaction was that Altria must get rid of its existing e-cigarette business, by either divesting, contributing, or ceasing to operate it. (*See* CCFF ¶¶ 893-97, below). JLI's negotiators testified that they were concerned with the "end state" of Altria not competing in e-cigarettes, and that they did not care how Altria achieved that end state. (*See* CCFF ¶¶ 898-906, below). JLI included the "cease to operate" option as a "fail safe" to ensure that Altria did not have any outs in its commitment not to compete in e-cigarettes. (*See* CCFF ¶¶ 907-09, below). The July 30, 2018 term sheet also included a non-competition clause. (*See* CCFF ¶¶ 910-13, below).

Response to Proposed Finding No. 892:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the July 30 term sheet was an initial draft of a nonbinding term sheet. (PX1300 (Altria) at 002 n.1 (July 30 term sheet stating "[t]he transactional structure presented in this term sheet as the means for effecting [Altria's] investment is illustrative but not definitive"); Pritzker (JLI) Tr. 692-93 (calling the initial term sheet "a nonbinding letter of intent")). It was quickly superseded by revised term sheets as the parties continued negotiations, (RFF ¶¶ 800-09, 824-33), and the divest/contribute/"cease to operate" provision that Complaint Counsel relies on is not contained in the final agreement nor in any subsequent term sheet after Altria struck it on August 9, (*see* RFF ¶¶ 804, 807).

Second, the July 30 term sheet did not "make clear that a requirement of the transaction was that Altria must get rid of its existing e-cigarette business." (CCFF ¶ 892). To the contrary, the proposed noncompete provision in the July 30 term sheet contained a carve-out specifically exempting Nu Mark's existing products, (PX1300 (Altria) at 006; *see also* RFF ¶¶ 787-91), contemplating that after the transaction, Altria would continue competing against JLI with Nu Mark's existing products "until the FTC ruled on what would happen to them," (Pritzker (JLI) Tr. 692). JLI believed Nu Mark's existing e-vapor products "would be scrutinized by the FTC" as part of the FTC clearance process for the transaction, and JLI intended for the carve-out to "allow Altria to keep those products on the market" as that process unfolded. (Pritzker (JLI) Tr. 822).

In furtherance of this anticipated FTC review, the July 30 term sheet contained a section titled "Antitrust Clearance Matters," which proposed steps to facilitate the required FTC clearance for the transaction. (PX1300 (Altria) at 004-05). Contrary to Complaint Counsel's assertion, this provision was not a demand for Altria to "get rid" of its existing products—it simply proposed a

ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR clearance process. (PX1300 (Altria) at 005; *see also* RFF ¶¶ 772-86).

This provision proposed that in connection with filing for HSR clearance, Altria would divest its existing e-vapor products. (PX1300 (Altria) at 005). JLI's "expectation" was "that the FTC would require a divestiture and that the product would then stay in the market with a different ownership." (Pritzker (JLI) Tr. 681; *see also* Valani (JLI) Tr. 918 ("[T]he prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process)).

Every JLI witness who was asked testified that at the time JLI sent the July 30 term sheet, they "had no reason to think" that divestiture might not be practicable. (Pritzker (JLI) Tr. 814; *see also* PX7032 Valani (JLI) Dep. at 52; PX7035 Masoudi (JLI) Dep. at 54-55). Nevertheless, the term sheet proposed as an alternative, only "if divestiture [were] not reasonably practicable," that Altria would "contribute" its products to JLI. (PX1300 (Altria) at 005). Under this scenario, Altria would "sell or grant to JLI" its e-vapor products, and "JLI would operate them or do something with them," if required by the FTC. (Pritzker (JLI) Tr. 690). Pritzker's "understanding [was] that [JLI] had attributed no value to owning any of [Altria's] products." (PX7021 Pritzker (JLI) Dep. at 87; *see also* PX7035 Masoudi (JLI) Dep. at 55-56 (recalling that divestiture was JLI's "first choice" because "the Altria products were not particularly good competitors that [JLI] would be interested in having")).

Only if contribution also were impracticable did the term sheet propose as a last resort that Altria would "cease to operate" its e-vapor business within nine months following the transaction. (PX1300 (Altria) at 005). As Valani testified, "the notional concept of 'cease to operate' was meant to be a sort of fail-safe if the other options had been exhausted." (Valani (JLI) Tr. 918-19).

In any event, "this was all in the context of it being done under the sanction of the regulator," as part of the FTC review process. (Valani (JLI) Tr. 918). As Pritzker testified, the "primary purpose" of the nine-month provision "was to give the regulators enough time to determine what they would allow or require as part of the [HSR] process." (Pritzker (JLI) Tr. 692). Nothing about the divestiture/contribution/"cease to operate" provision was "intended to describe an obligation or something Altria would do before they even had a transaction with JLI," or prior to FTC review of that transaction. (Pritzker (JLI) Tr. 815; PX1300 (Altria) at 004-05; *see also* Pritzker (JLI) Tr. 854).

In the same Antitrust Clearance Section, the July 30 term sheet also required that both parties would use "reasonable best efforts to seek Antitrust Clearance for a period of at least nine months after the Purchase" and would "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005). Pritzker explained that JLI wanted assurances that "if the FTC required anything of Altria," including divestiture, Altria "would agree to those things and that they would not be able to, for example, walk away from the deal because of concessionary requirements." (Pritzker (JLI) Tr. 818). "[W]e needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace . . . at the requirement of the FTC or anything else the FTC would require, for that matter." (Pritzker (JLI) Tr. 811).

Additionally, it is not true that JLI was "concerned with the 'end state' of Altria not competing in e-cigarettes, and that [it] did not care how Altria achieved that end state." (CCFF ¶ 892). JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop *new* products using JLI's technology. (*See* Pritzker (JLI) Tr. 674-75, 821-22; Valani (JLI)

Tr. 908; PX7032 Valani (JLI) Dep. at 49, 54). JLI was not concerned about competition from Altria's *existing* products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). JLI witnesses repeatedly testified that JLI was not concerned with Altria's existing products remaining in the market after the transaction, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 821-23, 853, 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55; *see also* PX7025 Burns (JLI) Dep. at 126-27; RFF ¶¶ 1189-210). As Masoudi testified, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction. (PX7035 Masoudi (JLI) Dep. at 73).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 893-913, Respondents incorporate their responses to those Proposed Findings herein.

893. JLI's Pritzker testified that JLI's business people would discuss concepts and then instruct JLI's lawyers to put those into term sheets. (Pritzker (JLI) Tr. 789-90). Pritzker reviewed term sheets once they were prepared. (Pritzker (JLI) Tr. 789-90).

Response to Proposed Finding No. 893:

Respondents have no specific response.

894. The July 30, 2018 Summary of Terms that JLI's Pritzker sent to Altria's Willard contained the following term requiring Altria to dispose of its existing e-cigarette business:

> Promptly and in no event later than nine months following the Purchase, subject to the license referenced above, Richard [Altria] will divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, then cease to operate), all Richard [Altria] assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed or has under development.
>
> (PX1300 (Altria) at 005); PX2173 (JLI) at 005; (Pritzker (JLI) Tr. 688-89).

Response to Proposed Finding No. 894:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The "Antitrust Clearance Matters" section of the term sheet, (PX1300 (Altria) at 004-05), did not require Altria to "dispose of" its products, (CCFF ¶ 894). To the contrary, JLI believed Altria's existing e-vapor products "would be scrutinized by the FTC" as part of the FTC clearance process for the transaction. (Pritzker (JLI) Tr. 822). In furtherance of this anticipated FTC review, the term sheet proposed steps to facilitate the required FTC clearance for the transaction. (PX1300 (Altria) at 004-05). This provision was not a demand for Altria to "dispose of" its e-vapor business—it simply proposed a ranked process for the treatment of these existing products as part of the HSR clearance process. (PX1300 (Altria) at 005; Pritzker (JLI) Tr. 689 ("The goal of this provision was that -- that Altria agree, as we would, that if the FTC were to require any of the above, that it would agree to do so as part of an FTC process following an acquisition."); *see also* RFF ¶¶ 772-86).

This provision proposed that in connection with filing for HSR clearance, Altria would divest Nu Mark's existing e-vapor products. (PX1300 (Altria) at 005). JLI's "expectation" was "that the FTC would require a divestiture and that the product would then stay in the market with a different ownership." (Pritzker (JLI) Tr. 681; *see also* Valani (JLI) Tr. 918 ("[T]he prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process)).

Every JLI witness who was asked testified that at the time JLI sent the July 30 term sheet, they "had no reason to think" that divestiture might not be practicable. (Pritzker (JLI) Tr. 814; *see also* PX7032 Valani (JLI) Dep. at 52; PX7035 Masoudi (JLI) Dep. at 54-55). Nevertheless, the term sheet proposed as an alternative, only "if divestiture [were] not reasonably practicable," that

Altria would "contribute" Nu Mark's products to JLI. (PX1300 (Altria) at 005). Under this scenario, Altria would "sell or grant to JLI" Nu Mark's e-vapor products, and "JLI would operate them or do something with them," if required by the FTC. (Pritzker (JLI) Tr. 690). Pritzker's "understanding [was] that [JLI] had attributed no value to owning any of [Altria's] products." (PX7021 Pritzker (JLI) Dep. at 87; *see also* PX7035 Masoudi (JLI) Dep. at 55-56 (recalling that divestiture was JLI's "first choice" because "the Altria products were not particularly good competitors that [JLI] would be interested in having")).

Only if contribution also were impracticable did the term sheet propose as a last resort that Altria would "cease to operate" its e-vapor business within nine months following the transaction. (PX1300 (Altria) at 005). As Valani testified, "the notional concept of 'cease to operate' was meant to be a sort of fail-safe if the other options had been exhausted." (Valani (JLI) Tr. 918-19). In any event, "this was all in the context of it being done under the sanction of the regulator," as part of the FTC review process following the transaction. (Valani (JLI) Tr. 918). As Pritzker testified, the "primary purpose" of the nine-month provision "was to give the regulators enough time to determine what they would allow or require as part of the [HSR] process." (Pritzker (JLI) Tr. 692). Nothing about the divestiture/contribution/"cease to operate" provision was "intended to describe an obligation or something Altria would do before they even had a transaction with JLI," or prior to FTC review of that transaction. (Pritzker (JLI) Tr. 815; PX1300 (Altria) at 004-05; *see also* Pritzker (JLI) Tr. 854).

In the same Antitrust Clearance Section, the July 30 term sheet also required that both parties would use "reasonable best efforts to seek Antitrust Clearance for a period of at least nine months after the Purchase" and would "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible

reduced-risk products business." (PX1300 (Altria) at 005). Pritzker explained that JLI wanted assurances that "if the FTC required anything of Altria," including divestiture, Altria "would agree to those things and that they would not be able to, for example, walk away from the deal because of concessionary requirements." (Pritzker (JLI) Tr. 818). "[W]e needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace . . . at the requirement of the FTC or anything else the FTC would require, for that matter." (Pritzker (JLI) Tr. 811).

Finally, Respondents note that the July 30 term sheet was an initial draft of a nonbinding term sheet and nothing proposed in it by JLI "requir[ed]" Altria to do anything. (PX1300 (Altria) at 002 n.1 (July 30 term sheet stating "[t]he transactional structure presented in this term sheet as the means for effecting [Altria's] investment is illustrative but not definitive"); Pritzker (JLI) Tr. 692-93 (calling the initial term sheet "a nonbinding letter of intent")). In fact, JLI's proposal for this term was quickly superseded by revised term sheets as the parties continued negotiations, (RFF ¶¶ 800-09, 824-33), and the divest/contribute/"cease to operate" provision that Complaint Counsel relies on is not contained in the final agreement nor in any subsequent term sheet after Altria struck it on August 9, (*see* RFF ¶¶ 804, 807).

895. Pritzker acknowledged that under any of the three options set forth in this term—divest, contribute, or cease to operate—Altria would no longer be competing in e-cigarettes by, at most, nine months post-transaction. (Pritzker (JLI) Tr. 691-92).

Response to Proposed Finding No. 895:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Pritzker also testified: "[T]his was all part of a regulatory process that I think the reason that it says nine months is that we believed that that would be the length of time it would take to have -- have action by the FTC on the proposed transaction. . . . [T]he primary purpose of this was to give the regulators enough time to determine what they would allow or require as part of the process." (Pritzker (JLI) Tr. 690-92).

Additionally, the provision did not provide three equal "options" that Altria could select from; it proposed a clearly ranked process beginning with divestiture, and the parties would only move on to the next step in the process if divestiture were "not reasonably practicable." (PX1300 (Altria) at 005). As Pritzker explained, "I was focused on the top of the list, that [Altria] will divest. I would have seen no reason that divestiture was not reasonably practicable, so to me, it wouldn't . . . get beyond that on the list." (Pritzker (JLI) Tr. 689).

896. Pritzker testified that this term addressed the issue of what would happen in the process of regulatory review given JLI's "insistence" that if Altria was going to have a significant ownership interest in JLI, "they could not have competitive products in the market that would benefit from the information from Juul and the technology that they could see that was proprietary." (PX7021 (Pritzker (JLI), Dep. at 93-94)).

Response to Proposed Finding No. 896:

The Proposed Finding is incomplete and misleading without additional context. As Pritzker's quote makes clear, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (*See* PX7021 Pritzker (JLI) Dep. at 93-94; *see also* RFF ¶¶ 1178-88). JLI's concern about Altria using JLI's proprietary information to develop new products did not apply to Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71).

The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). As Pritzker confirmed at trial, the carve-out to the noncompete reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with

the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874). Similarly, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction. (PX7035 Masoudi (JLI) Dep. at 73; *see also* RFF ¶¶ 1189-210).

897. Valani testified that this term was meant to "reflect the intent [] of them [Altria] not being directly competitive in the electronic cigarette space." (PX7011 (Valani (JLI), IHT at 81-82)).

Response to Proposed Finding No. 897:

The Proposed Finding is incomplete and misleading without additional context. As Valani explained at trial, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (*See* Valani (JLI) Tr. 908 ("[O]nce Altria . . . was inside our boardroom and then particularly providing services to us that were vitally strategic in nature, . . . there would be very large access to proprietary information, which . . . is highly sensitive for us given the fact that we're one of the few groups in the industry to design our own products . . . . [T]he idea that an investor would have access to those technologies and processes and be competing with their own products at the same time is of major concern to us."); *see also* PX7032 Valani (JLI) Dep. at 49; RFF ¶¶ 1178-88).

JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). To the contrary, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23;

see also RFF ¶ 1192), but that this was the outcome JLI expected. (*See, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874; PX7035 Masoudi (JLI) Dep. at 73 ("[A]s reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction."); *see also* RFF ¶¶ 1189-210).

Finally, Valani testified that as important as it was to protect JLI's proprietary information from potential misuse by Altria, it was "equally foundational" that Altria took the "appropriate[,] legally sanctioned route with the regulator to get there." (Valani (JLI) Tr. 912).

(1) It Did Not Matter to JLI How Altria Fulfilled Its Obligation to Get Rid of Its Existing Products

898. Referring to the divest/contribute/cease to operate clause in the July 30, 2018 term sheet, 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. However, I thought divestiture was clearly the most acceptable way in terms of regulatory approval, from other examples I'd seen." (PX7021 (Pritzker (JLI), Dep. at 96-97)).

Response to Proposed Finding No. 898:

The Proposed Finding is incomplete and misleading without additional context. Throughout negotiations, JLI believed Altria's existing e-vapor products "would be scrutinized by the FTC" as part of the antitrust clearance process for the transaction, and it intended for Altria "to keep those products on the market" as that process unfolded. (Pritzker (JLI) Tr. 822). To that end, the divest/contribute/"cease to operate" provision in the July 30 term sheet proposed a ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR review process. (PX1300 (Altria) at 005).

That this process would be followed as part of HSR review is necessary context for Pritzker's quote. As his testimony makes clear, JLI wanted assurances that "if the FTC required anything of Altria," including divestiture, Altria "would agree to those things and that they would

not be able to, for example, walk away from the deal because of concessionary requirements." (Pritzker (JLI) Tr. 818). "[W]e needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace . . . at the requirement of the FTC or anything else the FTC would require, for that matter." (Pritzker (JLI) Tr. 811). Thus, so long as the parties followed the regulatory process in dealing with Altria's e-vapor assets, it is unsurprising that Pritzker would not "care how that would come about." (*See* CCFF ¶ 898).

In addition, the divest/contribute/"cease to operate" term in the July 30 term sheet referenced above did not provide three equal options that Altria could select from; it proposed a clearly ranked process beginning with divestiture, and the parties would only move on to the next step in the process if divestiture were "not reasonably practicable." (PX1300 (Altria) at 005). As Pritzker repeatedly testified, JLI's "expectation" was "that the FTC would require a divestiture and that the product would then stay in the market with a different ownership," (Pritzker (JLI) Tr. 681), which Pritzker believed "was clearly the most acceptable way in terms of regulatory approval," (PX7021 Pritzker (JLI) Dep. at 97). Similarly, as Valani testified, "[T]he prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918).

Additionally, the statement that the "goal was for [Altria] not to be competing against Juul if they had a significant interest in" JLI lacks necessary context. (CCFF ¶ 898). As Pritzker testified at trial, JLI's "concern" about competition from Altria was not due to Altria's existing products or the "significant interest" itself; it was about the access to JLI's proprietary and confidential information that Altria would have through its seats on JLI's Board and the services it would provide to JLI. (Pritzker (JLI) Tr. 674-75; *see also* RFF ¶¶ 1178-88). JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value,"

(PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134). To the contrary, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874).

As Pritzker confirmed at trial, the carve-out to the noncompete reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874). Similarly, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction. (PX7035 Masoudi (JLI) Dep. at 73; *see also* RFF ¶¶ 1189-210). For that reason, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As he explained, Altria's "unilaterally taking products off the market, I thought, was complicating. I thought that that seemed inconsistent with our conversations that [Altria] would continue to operate those until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products. I thought it was -- at least in the context of the deal, I thought it was complicating." (PX7021 Pritzker (JLI) Dep. at 154-55).

899. Valani explained "there was a question as to how they would fulfill such obligation to us, and I guess this text is meant to give them some ability to handle that." (PX7011 (Valani (JLI), IHT at 81-82)).

Response to Proposed Finding No. 899:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, throughout negotiations, JLI believed Altria's existing e-vapor products "would be

scrutinized by the FTC" as part of the antitrust clearance process for the transaction, and it intended for Altria "to keep those products on the market" as that process unfolded. (Pritzker (JLI) Tr. 822). To that end, the divest/contribute/"cease to operate" provision proposed a ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR review process. (PX1300 (Altria) at 005). But the provision did not provide three equal "options" that Altria could select from; it proposed a clearly ranked process beginning with divestiture, and the parties would only move on to the next step in the process if divestiture were "not reasonably practicable." (PX1300 (Altria) at 005; Valani (JLI) Tr. 918 (noting that the provision is "constructed sequentially")). "[T]he prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918). And in any event, JLI's request that Altria not compete against it after the transaction was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12).

Second, Altria had no "obligation" to JLI prior to the execution of the deal. (CCFF ¶ 899). As Valani, Pritzker, and other JLI executives testified, there was no agreement for Altria to withdraw Nu Mark's products from the market prior to the transaction. (*See* Valani (JLI) Tr. 956-57; Pritzker (JLI) Tr. 884-85; RFF ¶¶ 1153-56).

900. When asked why there was a question as to how Altria could fulfill its obligation not to compete, Valani responded:

> I mean, this is really their problem, not ours, you know? I mean, I think that we're [] more concerned about an end state […] if JUUL can get the assets, then great, and if they have to divest, then great, so I think we were somewhat agnostic [. . .].
>
> (PX7011 (Valani (JLI), IHT at 82)).

Response to Proposed Finding No. 900:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As Valani explained at trial, JLI's concern was not about competition from Altria's existing products; rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (Valani (JLI) Tr. 908 ("[O]nce Altria . . . was inside our boardroom and then particularly providing services to us that were vitally strategic in nature, . . . there would be very large access to proprietary information, which . . . is highly sensitive for us given the fact that we're one of the few groups in the industry to design our own products . . . . [T]he idea that an investor would have access to those technologies and processes and be competing with their own products at the same time is of major concern to us."); *see also* PX7032 Valani (JLI) Dep. at 49; RFF ¶¶ 1178-88). JLI's concern about Altria using JLI's proprietary information to develop new products did not apply to Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71).

Throughout negotiations, JLI believed Altria's existing e-vapor products "would be scrutinized by the FTC" as part of the antitrust clearance process for the transaction, and it intended for Altria "to keep those products on the market" as that process unfolded. (Pritzker (JLI) Tr. 822). Accordingly, the "end state" Valani references in the quote above, (CCFF ¶ 900), is post-transaction and post-HSR review. This context is important, because as Valani testified, JLI's request that Altria not compete against it after the transaction was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria]

used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12). "[A]nything that [Altria] had to do as a concessionary requirement for this transaction, for [FTC's] approval, that they would have to do. So that was the understanding, and we believed that we gave them room to figure out -- figure it out with [the FTC]." (Valani (JLI) Tr. 934).

To that end, the divest/contribute/"cease to operate" provision proposed a ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR review process. (PX1300 (Altria) at 005). Following this review, in a post-HSR world, it is unsurprising that JLI would be "agnostic" on the FTC's ultimate decision regarding divestiture, so long as the transaction was approved. (*See* CCFF ¶ 900). But as Valani testified, "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918).

Finally, Altria had no "obligation" to JLI prior to the execution of the deal. (CCFF ¶ 899). As Valani, Pritzker, and other JLI executives testified, there was no agreement for Altria to withdraw Nu Mark's products from the market prior to the transaction. (*See* Valani (JLI) Tr. 956-57; Pritzker (JLI) Tr. 884-85; RFF ¶¶ 1153-56).

901. Valani confirmed that the "divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, then cease to operate)" language in the July 30, 2018 term sheet would have accomplished the end state that JLI wanted. (PX7011 (Valani (JLI), IHT at 82-83)).

Response to Proposed Finding No. 901:

The Proposed Finding is incomplete and misleading without additional context. As Valani explained at trial, JLI's concern was not about competition from Altria's existing products; rather, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its provision of services and seats on JLI's Board, it could develop new products using JLI's technology. (Valani (JLI) Tr. 908; *see also* RFF ¶¶ 1178-88). JLI's

concern about Altria using JLI's proprietary information to develop new products did not apply to Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71).

Throughout negotiations, JLI believed Altria's existing e-vapor products "would be scrutinized by the FTC" as part of the antitrust clearance process for the transaction, and it intended for Altria "to keep those products on the market" as that process unfolded. (Pritzker (JLI) Tr. 822). To that end, the divest/contribute/"cease to operate" provision proposed a ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR review process. (PX1300 (Altria) at 005). Accordingly, the "end state" following completion of this provision, (CCFF ¶ 901), would be post-transaction and post-HSR review. This context is important, because as Valani testified, JLI's request that Altria not compete against it after the transaction was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12).

Following this review, in a post-HSR world, it is unsurprising that JLI would be satisfied with the process so long as the outcome was sanctioned by the FTC, as contemplated by the "Antitrust Clearance Matters" section of the term sheet. (*See* CCFF ¶ 900; PX1300 (Altria) at 005). But as Valani testified, "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918).

902. [redacted] (PX7005 (Danaher (JLI), IHT at 167-68) (*in camera*)).

Response to Proposed Finding No. 902:

The Proposed Finding is incomplete and misleading without additional context, which shows that Danaher was referring to the treatment of Altria's existing products only *after* the transaction had been executed and reviewed as part of the FTC's HSR review process. (*See* PX7005 Danaher (JLI) IHT at 167-68; PX1269 (Altria) at 006-07). The October 15 term sheet Danaher was discussing did not contain the divest/contribute/"cease to operate" provision, which was removed by Altria in the August 9 term sheet. (*See* PX1269 (Altria) at 006-07; RFF ¶¶ 804, 807). Instead, Danaher was discussing the following term, which proposed a revised process for the treatment of Altria's existing e-vapor products in the event of a transaction, as part of the HSR review process:

> If Richard has not otherwise transferred its interests in its e-vapor assets to a third party, then Richard agrees that it will contribute, *upon receipt of Antitrust Clearance*, to Jack all Richard assets relating to the Field in the U.S. . . . . Richard will offer to divest all such Richard assets relating to the Field *if necessary to obtain Antitrust Clearance* to the extent Richard has the legal right to do so, no later than within 9 months after application for HSR clearance of the Purchase *if the parties have not received Antitrust Clearance at that point*.

(PX1269 (Altria) at 006 (emphases added). The term explicitly contemplates that it would be followed either following receipt of antitrust clearance, or in order to facilitate such clearance—in either case, after the transaction occurred. Relatedly, the noncompete and carve-out provision in the October 15 term sheet specifically permitted Altria to continue competing with its existing e-vapor products following the transaction until the FTC decided whether the products should be divested. (PX1269 (Altria) at 008).

[redacted]

[redacted] But as Valani testified, "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918).

903. Prior to July 30, 2018, Pritzker had discussed with Willard and Gifford what Altria would do with its e-cigarette business if Altria acquired a partial interest in JLI. (Pritzker (JLI) Tr. 683). These discussions were in the context of understanding that what Altria did with its e-cigarette business would require regulatory oversight. (Pritzker (JLI) Tr. 683). One option discussed was that Altria could sell its e-cigarette business. (Pritzker (JLI) Tr. 683). Altria never indicated that it would be unable to find a buyer. (Pritzker (JLI) Tr. 683-84).

Response to Proposed Finding No. 903:

Respondents have no specific response except to clarify that as Pritzker explained in response to the questioning cited by Complaint Counsel above and elsewhere in his testimony, all discussions involving the treatment of Altria's e-vapor portfolio were in the context of facilitating the HSR review process following a transaction. (Pritzker (JLI) Tr. 683 (Q. "Prior to this date, you had discussed with Mr. Willard and Mr. Gifford what Altria would do with its e-cigarette business if Altria acquired a partial interest in JUUL, correct? A. Yes, in the context of understanding that it would require regulatory oversight, and we had had that conversation."); PX7021 Pritzker (JLI) Dep. at 68 ("We were aware that anything we did was going to be subject to regulatory scrutiny, and we wanted to make sure that anything we did was -- would be acceptable."); Pritzker (JLI) Tr. 823 ("[A]nticipating regulatory review and defining terms such that the regulatory review would be anticipated and the chances for approval optimized legally, that's exactly what I would expect any transaction would -- would accomplish.")).

904. JLI's negotiators did not care if MarkTen and Elite were on the market so long as Altria wasn't the company marketing them. (PX7021 (Pritzker (JLI), Dep. at 86-87)). So JLI's negotiators did not care whether Altria divested the products, shut them down, or contributed them. (PX7021 (Pritzker (JLI), Dep. at 86-87)).

Response to Proposed Finding No. 904:

The Proposed Finding is incomplete and misleading without additional context. *First*, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). As Pritzker confirmed at trial, the carve-out to the noncompete reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874). Similarly, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] . . . through some period of time" following the transaction. (PX7035 Masoudi (JLI) Dep. at 73; *see also* RFF ¶¶ 1189-210).

Second, Complaint Counsel's assertion that "JLI's negotiators did not care whether Altria divested the products, shut them down, or contributed them," (CCFF ¶ 904), warps Pritzker's testimony. Pritzker was responding to Complaint Counsel's line of questioning specifically related to whether Altria might shut down its e-vapor business, and although Pritzker expected the FTC would require divestiture, he acknowledged that JLI would accept whatever the FTC required *as part of the HSR review process*:

> Q. Had anyone from Altria indicated to you that they might need to cease to operate their e-cigarette business?
>
> A. Well, I never thought that ceasing to operate was the right way to do this. So it might have come up as an idea of one thing that they might -- might be able to do. I never bought that that was going to be viable. I, as I say, having seen the Reynolds transaction, it was always my belief that the viable way to go was a sale of the -- of those products into the marketplace.

> Q. And when you say "viable," is that viable from -- from Juul's perspective?
>
> A. Well, it was viable from Juul's perspective because I didn't care if that -- if MarkTen, MarkTen Elite was in the market, as long as somebody else was -- was selling those products and not -- and not Altria. So whether they shut it down or contributed to Juul, . . . *I always believed that the right thing to do was for them to be willing to sell those products if that's what was required. If that's not what was required and they ended up shutting it down and that was consistent with regulatory approvals, that was okay, too.* We didn't care. . . . I didn't care which way it went, but I assumed that the right -- that the ultimate outcome was that they would divest themselves of products that would be -- that they would be required to divest.

(PX7021 Pritzker (JLI) Dep. at 86-87 (emphasis added)).

In fact, Pritzker viewed Altria's unilateral decision to withdraw its e-vapor products prior to the transaction as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874-75). As Pritzker explained at trial: "I was and JUUL was perfectly happy to have those products stay on the market until an FTC decision. We were expecting it. We thought it was appropriate for the FTC to -- to determine what should become of them and expected that it would be divestiture. We thought it was an FTC matter and not something for -- for a premature action. So it was not welcomed. I thought it would complicate things." (Pritzker (JLI) Tr. 874-75; *see also* PX7021 Pritzker (JLI) Dep. at 154-55).

905. Pritzker testified that if the FTC required Altria to divest its e-vapor products, that would be a way to achieve the goal of not having Altria compete against JLI. (PX7021 (Pritzker (JLI), Dep. at 70-71)).

Response to Proposed Finding No. 905:

The Proposed Finding is incomplete and misleading without additional context. As Pritzker has repeatedly testified, JLI's request for a noncompete was driven by its concern that once Altria had access to JLI's proprietary information through its seats on JLI's Board and provision of services, it could develop *new* products using JLI's technology. (*See* Pritzker (JLI) Tr. 674-75, 821-22; Valani (JLI) Tr. 908; *see also* PX7032 Valani (JLI) Dep. at 49, 54). Accordingly, the term of the noncompete provision is tied to the pendency of the Services

Agreement; once the Services Agreement expires, the noncompete does as well. (RFF ¶ 1129; *see also* RRFF ¶¶ 995, 999). Meanwhile, JLI was not concerned about competition from Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134).

To the contrary, every draft term sheet and deal document exchanged between the parties explicitly permitted Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval. (Pritzker (JLI) Tr. 821-23; RFF ¶ 1192). And the undisputed record demonstrates that this was the outcome JLI expected. (*See* Pritzker (JLI) Tr. 821-23, 853, 874). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

JLI also understood that any request that Altria not compete against it after the transaction was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934; *see also* PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator")). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12).

906. Pritzker testified that "in a transaction . . . where Altria would have access to data or proprietary information of JLI, [] it would be unacceptable for Altria to be in a position to use that information to compete against JLI, but [] the process would be overseen by the FTC, and [] I expected the FTC would likely require a divestiture of existing products." (Pritzker (JLI) Tr. 673-74).

Response to Proposed Finding No. 906:

Respondents have no specific response.

(2) The "Cease to Operate" Option Was a Fail-Safe So That Altria Would Not Have Any Outs in Its Commitment to Exit E-Cigarettes

907. Valani testified that the "cease to operate" language in the July 30, 2018 term sheet was a fail-safe in case the other options had been exhausted:

> And I think that the way that JLI might have thought about it at the time is that a divestiture was likely quite practicable and was the most likely outcome and that, if not, the contribution was the likely outcome. And then the notional concept of "cease to operate" was meant to be a sort of fail-safe if the other options had been exhausted.

(Valani (JLI) Tr. 918-19).

Response to Proposed Finding No. 907:

The Proposed Finding is incomplete and misleading without additional context. As Valani testified, the divest/contribute/"cease to operate" provision in the July 30 term sheet "was all in the context of it being done under the sanction of the regulator." (Valani (JLI) Tr. 918). To that end, the provision proposed a ranked process for the treatment of Altria's existing e-vapor assets following the transaction as part of the HSR review process. (PX1300 (Altria) at 005).

The provision was "constructed sequentially" in the order that JLI's antitrust counsel believed the FTC would be "most likely" to require. (Valani (JLI) Tr. 918). As Valani explained at trial, "it was really a question of . . . what [the FTC] would deem as an . . . appropriate solution to the issue." (Valani (JLI) Tr. 918). As Valani explained at trial on Complaint Counsel's questioning, "the notional concept of 'cease to operate' was meant to be a sort of fail-safe if the other options had been exhausted, but I do need to reiterate to you that this was all in the context of what the regulator deemed as an appropriate -- as an appropriate solution." (Valani (JLI) Tr. 918-19).

The proposed clause's tiered structure is why Valani described "cease to operate" as a "fail-safe," (CCFF ¶ 907): As the "Antitrust Clearance Matters" section of the term sheet makes clear,

"cease to operate" could only arise in a situation where (1) the FTC approved the transaction; (2) the FTC did not require divestiture, contribution, or any other concessionary requirements (despite its knowledge of the "cease to operate" clause); and (3) *both* divestiture and contribution were "not reasonably practicable." (PX1300 (Altria) at 004-05). But as Valani testified, "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process, (Valani (JLI) Tr. 918), and he had no reason to think divestiture would not be reasonably practicable, (PX7032 Valani (JLI) Dep. at 52).

Finally, Respondents note that the July 30 term sheet was an initial draft of a nonbinding term sheet. (PX1300 (Altria) at 002 n.1 (July 30 term sheet stating "[t]he transactional structure presented in this term sheet as the means for effecting [Altria's] investment is illustrative but not definitive"); Pritzker (JLI) Tr. 692-93 (calling the initial term sheet "a nonbinding letter of intent")). In fact, JLI's proposal for this term was quickly superseded by revised term sheets as the parties continued negotiations, (RFF ¶¶ 800-09, 824-33), and the divest/contribute/"cease to operate" provision that Complaint Counsel relies on is not contained in the final agreement nor in any subsequent term sheet after Altria struck it on August 9, (*see* RFF ¶¶ 804, 807).

908. Valani testified that construction of the "divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, then cease to operate)" language in the July 30, 2018 term sheet reflected that "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route, and if not, a contribution, and if not, that they would find the ability to cease to operate." (Valani (JLI) Tr. 917-18).

Response to Proposed Finding No. 908:

The Proposed Finding is inconsistent and misleading without additional context. As Valani testified, the divest/contribute/"cease to operate" provision in the July 30 term sheet "was all in the context of it being done under the sanction of the regulator." (Valani (JLI) Tr. 918). To that

end, the provision proposed a ranked process for the treatment of Altria's existing e-vapor assets following the transaction as part of the HSR review process. (PX1300 (Altria) at 005). The provision was "constructed sequentially" in the order that JLI's antitrust counsel believed the FTC would be "most likely" to require. (Valani (JLI) Tr. 918).

As the "Antitrust Clearance Matters" section of the term sheet makes clear, "cease to operate" could only arise in a situation where (1) the FTC approved the transaction; (2) the FTC did not require divestiture, contribution, or any other concessionary requirements (despite its knowledge of the "cease to operate" clause); and (3) *both* divestiture and contribution were "not reasonably practicable." (PX1300 (Altria) at 004-05). This is what Valani meant by "find the ability to cease to operate" in the quote above, (CCFF ¶ 908); as he explained at trial, "it was really a question of . . . what [the FTC] would deem as an . . . appropriate solution to the issue," (Valani (JLI) Tr. 918). But as Valani testified, "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require, (Valani (JLI) Tr. 918), and he had no reason to think divestiture would not be reasonably practicable, (PX7032 Valani (JLI) Dep. at 52).

909. Valani testified that the "cease to operate" language was "probably a reflection of JLI's desire to not have any outs in the commitment to not be [] competing in market when they're [Altria is] privy to JLI information." (PX7032 (Valani (JLI), Dep. at 53-54)).

Response to Proposed Finding No. 909:

The Proposed Finding is incomplete and misleading without additional context. As the rest of Valani's testimony on this point made clear, JLI's concern was not about Altria's existing products, but about the risk that Altria could use JLI's proprietary information to develop *new* products: "[I]f they were developing products, if they had access to all of the JLI, you know, kind of product roadmap, technology roadmap, and they were developing markets and they were a major shareholder of JLI and supporting JLI with, you know, services, then it's kind of a risky

position for JLI to be in . . . ." (PX7032 Valani (JLI) Dep. at 54). This concern did not apply to Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71). This is why the parties' agreement explicitly excluded Altria's existing products from the noncompete; as Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

As Valani testified, the divest/contribute/"cease to operate" provision in the July 30 term sheet "was all in the context of it being done under the sanction of the regulator" as part of the HSR review process. (Valani (JLI) Tr. 918). To that end, the provision proposed a ranked process for the treatment of Altria's existing e-vapor assets following the transaction as part of the HSR review process. (PX1300 (Altria) at 005). The provision was "constructed sequentially" in the order that JLI's antitrust counsel believed the FTC would be "most likely" to require. (Valani (JLI) Tr. 918).

By the draft provision's terms, "cease to operate" could only arise in a situation where (1) the FTC approved the transaction; (2) the FTC did not require divestiture, contribution, or any other concessionary requirements (despite its knowledge of the "cease to operate" clause); and (3) *both* divestiture and contribution were "not reasonably practicable." (PX1300 (Altria) at 004-05). As Valani explained at trial, "it was really a question of . . . what [the FTC] would deem as an . . . appropriate solution to the issue." (Valani (JLI) Tr. 918). But as Valani testified, "the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely

route" that the FTC would require, (Valani (JLI) Tr. 918), and he had no reason to think divestiture would not be reasonably practicable, (PX7032 Valani (JLI) Dep. at 52).

Finally, Respondents note that the July 30 term sheet was an initial draft of a nonbinding term sheet. (PX1300 (Altria) at 002 n.1 (July 30 term sheet stating "[t]he transactional structure presented in this term sheet as the means for effecting [Altria's] investment is illustrative but not definitive"); Pritzker (JLI) Tr. 692-93 (calling the initial term sheet "a nonbinding letter of intent")). In fact, JLI's proposal for this term was quickly superseded by revised term sheets as the parties continued negotiations, (RFF ¶¶ 800-09, 824-33), and the divest/contribute/"cease to operate" provision that Complaint Counsel relies on is not contained in the final agreement nor in any subsequent term sheet after Altria struck it on August 9, (*see* RFF ¶¶ 804, 807).

(3) JLI's July 30, 2018 Term Sheet Also Included a Non-Compete

910. Valani testified that testified that although the divest/contribute/cease to operate clause in the July 30, 2018 term sheet dealt with what Altria would do with the products it already had in the market, of "equally, if not greater importance to us, was the notion that [Altria] just wouldn't be competing in-market [] with any future products." (Valani (JLI) Tr. 914-15).

Response to Proposed Finding No. 910:

The Proposed Finding is incomplete and misleading without additional context. As Valani explained at trial, JLI's concern prompting the noncompete provision related to the risk that Altria could use JLI's technology, which it would have access to through its seats on JLI's Board and its provision of services to JLI, to develop new products. (Valani (JLI) Tr. 908; *see also* Pritzker (JLI) Tr. 668-69, 674-75, 821-22).

This concern did not apply to Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71). This is why the

parties' agreement specifically carved out Altria's existing products from the noncompete; as Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874).

911. JLI's July 30, 2018 term sheet included a non-competition clause:

> 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 or contribution as described above)." (PX1300 (Altria) at 006); PX2173 (JLI) at 006).

Response to Proposed Finding No. 911:

Respondents have no specific response except to note that the noncompete and carve-out provision was included in the "Richard Support Obligations" section of the term sheet, which detailed various support services that JLI proposed Altria would provide to JLI, such as regulatory assistance with JLI's PMTA applications. (PX1300 (Altria) at 005-06). Because those services necessarily would give Altria access to JLI's "technology, trade secrets, data," and other confidential information that would "work to the detriment of JUUL if Altria . . . appl[ied] that information to their own product portfolio," (Pritzker (JLI) Tr. 821), JLI's proposed term sheet called for Altria to "refrain from competing . . . in the e-vapor business, (other than with respect to MarkTen and MarkTen Elite prior to their divestiture or contribution as described above)." (PX1300 (Altria) at 006).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop new e-vapor products. But the provision explicitly *permitted* Altria to continue competing against JLI with Nu Mark's existing products

until the FTC could review the transaction and determine what should be done with Altria's e-vapor portfolio. (Pritzker (JLI) Tr. 821-23; PX1300 (Altria) at 006).

912. Valani testified that this non-competition clause in the July 30, 2018 term sheet was consistent with JLI not wanting Altria to have competitive products. (PX7011 (Valani (JLI), IHT at 83-84)).

Response to Proposed Finding No. 912:

The Proposed Finding is incomplete and misleading without additional context. JLI was not concerned about competition from Altria's existing products, but it feared that Altria would "use information [it was] getting from [JLI] to be able to enhance [its] product or develop *new* products that would be injurious to [JLI's] business." (PX7021 Pritzker (JLI) Dep. at 82-83 (emphasis added)). Consistent with this concern, Valani, Pritzker, Burns, and other JLI witnesses testified that *if* Altria was going to have access to JLI's proprietary and confidential information through its seats on JLI's Board and its provision of services to JLI, *then* a noncompete agreement was necessary to protect JLI's information from potential misuse by Altria to develop new products. (*See, e.g.*, Pritzker (JLI) Tr. 668-69, 674-75, 821-22; Valani (JLI) Tr. 908; PX7021 Pritzker (JLI) Dep. at 70; PX7009 Burns (JLI) IHT at 138; PX7035 Masoudi (JLI) Dep. at 129-30; *see also* PX7031 Willard (Altria) Dep. at 229 ("[JLI's] real interest in -- in this provision not to compete was really more related to the future. They didn't want us to invest in JUUL, learn a whole lot about their product and what made it successful, and then, separate from our investment in JUUL, go out and create an e-vapor business based on their information, and that was a fairly reasonable expectation on their part."); RFF ¶¶ 1178-88).

As Burns explained, the noncompete was necessary because of the deal structure and access that Altria sought: "If, in fact, they were a minority, passive investor, had no governance rights over the company, and no access to our confidential information, I remember the discussions

being that we would be far less concerned about them continuing to compete head to head against us in the marketplace." (PX7025 Burns (JLI) Dep. at 122-23).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop new e-vapor products. But the provision explicitly *permitted* Altria to continue competing against JLI with Nu Mark's existing products until the FTC could review the transaction and determine what should be done with Altria's e-vapor portfolio. (Pritzker (JLI) Tr. 821-23; PX1300 (Altria) at 006). The "goal" of the carve-out from the noncompete "was for those [products] to stay in the marketplace until the FTC ruled on what would happen to them." (Pritzker (JLI) Tr. 692). JLI believed the products "would be scrutinized by the FTC," and JLI intended for the carve-out to "allow Altria to keep those products on the market." (Pritzker (JLI) Tr. 822).

913. On August 4, 2018, Pritzker sent Willard a revised term sheet. (PX2570 (JLI) at 001). One of the revisions was that the word "shutdown" was added to the non-compete term:

> 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 described above). (PX2570 (JLI) at 001, 007; Pritzker (JLI) Tr. 704-06).

Response to Proposed Finding No. 913:

The Proposed Finding is incomplete and misleading without additional context. Pritzker testified at trial that this provision was not a subject of discussion with Altria, and he did not remember why the word "shutdown" was added to the August 4 term sheet. (Pritzker (JLI) Tr. 829-30). Based on the process of the revisions, however, Pritzker believed a lawyer added the word "to make this draft compatible" with the three ranked scenarios in the divest/contribute/"cease to operate" Antitrust Clearance provision, which remained unchanged from the July 30 term sheet. (Pritzker (JLI) Tr. 829-30; *compare* PX1300 (Altria) at 005, *with*

PX2570 (JLI) at 005). This revision did not propose any obligations to Altria; it merely cross-referenced an earlier section of the term sheet "described above." (PX2570 (JLI) at 007; Pritzker (JLI) Tr. 829-30).

This was the last proposed term sheet to make any reference to "cease to operate" or "shutdown"; those terms did not appear in any subsequent draft term sheet, draft deal document, or the final agreement. (*See* RFF ¶¶ 804, 807).

c) JLI's Response to Altria's August 9, 2018 Term Sheet Made Crystal Clear That Altria Could Not Retain Any Ability to Compete in E-Cigarettes

914. When Altria's August 9, 2018 term sheet removed the commitment to get rid of its existing e-cigarette business, JLI's response made crystal clear that it was "unacceptable" for Altria to retain any right to compete in e-cigarettes, either with existing or future products. (*See* CCFF ¶¶ 915-24, below).

Response to Proposed Finding No. 914:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. JLI's "response" to Altria's August 9 term sheet—by which Complaint Counsel is presumably referring to JLI's August 15 issues list—did not make "crystal clear" that Altria could not "retain any right to compete" with existing e-vapor products. (CCFF ¶ 914). To the contrary, the bullet point in JLI's August 15 list addressing the noncompete provision made "crystal clear" that JLI's concern was related to *future* products, not Altria's existing products: "You have retained the right under certain circumstances to compete not only with existing Mark Ten products"—a right retained pending HSR review in every iteration of the term sheets drafted by either party, (*see* RFF ¶ 1192)—"but also with *products under development and future products*," (PX4171 (Altria) at 002 (emphasis added)). In other words, JLI took issue with Altria expanding the carve-out to apply not just to existing products (as JLI had proposed), but to future products as well. (PX4171 (Altria) at 002). As both JLI and Altria witnesses repeatedly testified, JLI was

concerned about Altria developing *new* products after becoming privy to JLI's proprietary information as a result of the transaction, (*see* RFF ¶¶ 1178-88)—but not Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87; *see also* RFF ¶¶ 1189-211), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71).

JLI did not demand that Altria pull Nu Mark's existing products as a condition to the transaction. Instead, as PX4171 demonstrates, what JLI sought was a commitment from Altria that it would *divest* its existing e-vapor products if required by the FTC as part of the HSR clearance process following a transaction: "The commitment to divest Mark Ten has been stricken. This is not acceptable to us." (PX4171 (Altria) at 002). Notably, PX4171 made no mention of Altria striking "cease to operate" from the term sheet. (PX4171 (Altria) at 002).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 915-24, Respondents incorporate their responses to those Proposed Findings herein.

915. In the August 9, 2018 term sheet that Altria's Gifford sent to JLI's Valani, Pritzker, and Burns, Altria struck out the entire provision requiring Altria to "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." (PX1303 (Altria) at 015; PX2313 (JLI) at 015; Pritzker (JLI) Tr. 707-08; Valani (JLI) Tr. 920-21; *see also* CCFF ¶¶ 703-08, above).

Response to Proposed Finding No. 915:

Respondents have no specific response except to note that Altria's edits show that no agreement had been reached at that time. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 703-08, Respondents incorporate their responses to those Proposed Findings herein.

916. On August 14, 2018, Pritzker wrote to Willard and Gifford that JLI "will be sending you our position on a number of specific points to make sure that you understand where we will

need to draw the line before finalizing a commitment to [meet on August 18.]" (PX2025 (JLI) at 001; *see also* CCFF ¶¶ 709-28, above).

Response to Proposed Finding No. 916:

Respondents have no specific response except to note that Complaint Counsel offers no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 709-28, Respondents incorporate their responses to those Proposed Findings herein.

917. On August 15, 2018, JLI's Valani emailed Altria's Devitre the list of "specific points" that Pritzker said JLI would send. (PX4171 (Altria); PX2025 (JLI) at 001; Valani (JLI) Tr. 929; Pritzker (JLI) Tr. 711; PX1308 (Altria) at 001-03 (Devitre Email, dated August 15, 2018, sending same list to Altria's Willard); PX7001 (Devitre (Altria), IHT at 93-95); *see also* CCFF ¶¶ 709-28, above).

Response to Proposed Finding No. 917:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 709-28, Respondents incorporate their responses to those Proposed Findings herein.

918. In JLI's August 15, 2018 list of specific points, the second bullet point (of nine) stated:

> 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. (PX4171 (Altria) at 002 (reflecting redline edits); *see also* CCFF ¶ 722, above).

Response to Proposed Finding No. 918:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 722, Respondents incorporate their response to that Proposed Finding herein. (*See also* RRFF ¶ 914).

919. Valani testified that [redacted] (PX7032 (Valani (JLI), Dep. at 74-75) ([redacted]) (*in camera*)).

Response to Proposed Finding No. 919:

The Proposed Finding is incomplete and misleading without additional context. *First*, Valani's testimony explained that what was "important to JLI" was that Altria not compete against JLI by "developing" new e-vapor products once it was "privy to all of JLI's product plan and technology plan," as it would be through its provision of services to JLI and its seats on JLI's Board, due to the risk that "JLI's proprietary information might . . . find its way into products that Altria developed." (PX7032 Valani (JLI) Dep. at 77-78). This concern did not apply to Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71). The treatment of Altria's existing products following the transaction was "subject to complete and total regulatory sanction" as part of the HSR clearance process. (Valani (JLI) Tr. 934).

Second, there is no evidence whatsoever that any discussions between Altria and JLI involved JLI demanding or Altria agreeing to pull any products prior to FTC review of a transaction. To the contrary, all discussions involving the treatment of Altria's e-vapor portfolio in the event of a transaction were in anticipation of FTC review of the transaction. (Valani (JLI) Tr. 934 (noting that discussions with Altria regarding the importance of the noncompete post-transaction were "subject to complete and total regulatory sanction . . . . [A]nything that they had to do as a concessionary requirement for this transaction, for [the FTC's] approval, . . . they would have to do. So that was the understanding, and we believed that we gave them room to . . . figure it out with [the FTC]"); Pritzker (JLI) Tr. 823 ("[A]nticipating regulatory review and defining

terms such that the regulatory review would be anticipated and the chances for approval optimized legally, that's exactly what I would expect any transaction would -- would accomplish."); PX7032 Valani (JLI) Dep. at 49, 51). At every step of the negotiations, the parties intended—and the term sheets proposed—that any actions taken with respect to Altria's existing products as a result of the transaction would be "subject to scrutiny by the FTC in the course of its regulatory review." (Pritzker (JLI) Tr. 821-22).

920. Valani testified that "it was important to [JLI] that [Altria was] aligned against this set of principles" reflected in the August 15, 2018 list of specific points. (Valani (JLI) Tr. 932-33).

Response to Proposed Finding No. 920:

Respondents have no specific response except to note that Valani's testimony explained that it was important to JLI that Altria not compete against JLI once it "had access to all of [JLI's] proprietary information," "particularly in situations where [Altria] could use [JLI's] . . . information for [its] own benefit," by developing new products incorporating JLI's proprietary technology. (Valani (JLI) Tr. 933-34). This concern did not apply to Altria's existing products, which Valani believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71). The treatment of Altria's existing products following the transaction was "subject to complete and total regulatory sanction" as part of the HSR clearance process. (Valani (JLI) Tr. 934).

921. Upon reviewing the August 15, 2018 list of issues that Valani gave to Devitre, Altria's Gifford understood the second bullet to be a response from JLI to Altria's strike-through of the divest/contribute/cease to operate commitment in the August 9, 2018 term sheet, and that it was specifically referring to Altria's existing MarkTen brand products. (Gifford (Altria) Tr. 2,873-74; PX1303 (Altria) at 015; PX1012 (Altria) at 002).

Response to Proposed Finding No. 921:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Gifford did not testify that he "understood *the second bullet* to be a response from JLI to

Altria's strike-through" of the divest/contribute/"cease to operate" provision. (CCFF ¶ 921 (emphasis added)). Complaint Counsel specifically asked if the *phrase* "[t]he commitment to divest MarkTen has been stricken" was "consistent with" the strike-through in the August 9 term sheet, and Gifford agreed that it was. (Gifford (Altria) Tr. 2874). But the second bullet also referenced Altria's revision concerning post-transaction competition with "products under development and future products," (PX4171 (Altria) at 002), which did not concern Altria's revisions to the Antitrust Clearance Matters section of the term sheet involving existing products.

922. Willard understood that the language "this is unacceptable to us" referred to Altria's retention of rights to compete with existing and future e-vapor products. (Willard (Altria) Tr. 1,206-07; PX1012 (Altria) at 002).

Response to Proposed Finding No. 922:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Complaint Counsel misconstrues Willard's testimony—he did not testify that he "understood" the quoted language to refer to "Altria's retention of rights to compete with existing and future e-vapor products." (CCFF ¶ 922). The extent of Willard's testimony is that the language "this is not acceptable to us" "seem[s] like [it] is referring to the prior sentences in that bullet." (Willard (Altria) Tr. 1206-07). Complaint Counsel then read one of the sentences from the bullet and asked if it was, in fact, one of the sentences in the bullet: "Q. And one of the prior sentences in that bullet states, 'You have retained the right under certain circumstances to compete not only with existing MarkTen products, but also with products under development and future products. The commitment to divest MarkTen has been stricken.' Is that correct, sir?" Willard agreed that the sentence was in the bullet. (Willard (Altria) Tr. 1207).

But this does not mean that Willard understood JLI's position to be that Altria could not compete with "*existing MarkTen products*" after the transaction—as opposed to "under development and future products." (PX4171 (Altria) at 002 (emphasis added)). To the contrary,

JLI took issue with Altria *expanding* the carve-out to apply not just to existing products (as JLI had proposed), but to future products as well. (PX4171 (Altria) at 002). Indeed, every iteration of the term sheets drafted by either party retained the right for Altria to continue to compete with Nu Mark's existing products following the transaction, pending HSR review. (*See* RFF ¶ 1192). As both JLI and Altria witnesses repeatedly testified, JLI was concerned about Altria developing *new* products after becoming privy to JLI's proprietary information as a result of the transaction, (*see* RFF ¶¶ 1178-88)—but not Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87; *see also* RFF ¶¶ 1189-211), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71).

923. Willard understood that the JLI team must have thought that the issues in the list provided by Valani to Devitre were important enough to be worth sharing with Altria. (Willard (Altria) Tr. 1209).

Response to Proposed Finding No. 923:

Respondents have no specific response except to note that Willard's testimony was: "I'm sure that there were issues that were more important and less important, given how long the list was, but somebody on their team must have thought they were worth sharing with us." (Willard (Altria) Tr. 1209).

924. The final bullet in the list of specific points that Valani provided to Devitre read: "There are other matters on which we have fundamental disagreement, but we believe we need clarity on the above matters if there is to be any hope of a productive discussion this weekend." (PX4171 (Altria) at 003).

Response to Proposed Finding No. 924:

Respondents have no specific response except to note that Complaint Counsel offers no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting.

3. Altria's Ability to Divest or Contribute Its E-cigarette Products Was Limited by Its Contractual Commitments to PMI

925. Altria was unsure if it was permitted to divest or contribute its e-cigarette products to a third party prior to the expiration of its agreement with PMI in July 2020. (*See* CCFF ¶¶ 926-43, below). During negotiations, Altria explained this concern to JLI. Altria and JLI reached a resolution by agreeing that Altria would have until July 2020 to file for HSR clearance, and would be required to contribute its e-cigarette assets to JLI upon antitrust clearance, or if necessary to obtain that clearance, divest the assets. (*See* CCFF ¶¶ 926-43, below). Altria never took any steps to explore a potential divestiture of its e-cigarette assets. (*See* CCFF ¶¶ 939-40, below). Altria discontinued its e-cigarette products completely on December 7, 2018. (*See* CCFF ¶ 942, below).

Response to Proposed Finding No. 925:

The Proposed Finding is incomplete and misleading without additional context. *First*, there is no evidence to suggest that the question of whether Altria could divest its products prior to the expiration of its agreement with PMI had any relation to Altria's decision to discontinue any products. To the contrary, and as discussed below, the record reflects that the parties resolved to delay filing for HSR specifically to "avoid" any potential issue with the PMI agreement, to allow Altria to divest or contribute its existing products as part of the HSR clearance process. (Garnick (Altria) Tr. 1671).

Second, the Proposed Finding is vague as to the timing of when Altria raised the topic with JLI. (*See* CCFF ¶ 925). As Garnick testified, the question of whether Altria could divest or contribute Nu Mark's existing products while the JRDTA was in effect arose "later in the negotiations," by which time the parties had already resolved that Altria would continue competing with its existing e-vapor products after the transaction pending HSR approval. (Garnick (Altria) Tr. 1588, 1591-92; PX7036 Garnick (Altria) Dep. at 198; *see also* RFF ¶¶ 1050-53). By the end of October 2018, the parties had developed a work-around by resolving to delay filing for HSR until July 2020. (PX7036 Garnick (Altria) Dep. at 197; *see also* RFF ¶¶ 1054-61). The contemporaneous documents support this testimony. By August 22, the parties concluded there

was no "material substantive difference" between the parties' positions in the Antitrust Clearance Matters section of the August 19 term sheet, (RX1784 (PWP) at 002 (Aug. 22 issues list)), and the October 15 term sheet was the first to propose a solution to the potential problem: extending the date for Altria to file for HSR clearance past the date that the JRDTA was set to expire, (PX1269 (Altria) at 006; Garnick (Altria) Tr. 1591-92; PX7036 Garnick (Altria) Dep. at 197).

In the October 15, 2018 term sheet, Altria proposed: "[Altria] shall elect the time (not to exceed two years from closing of the Purchase) when the parties initiate the HSR clearance process." (PX1269 (Altria) at 006; *see also* Garnick (Altria) Tr. 1591-92). By the time of this term sheet, July 2020 was less than two years away. (PX1269 (Altria) at 001). As Garnick explained, this language "was to give us some room to file HSR so that when we did it, and we got HSR approval, we could go ahead and contribute our product or divest it, if necessary, if possible, to a third party." (PX7036 Garnick (Altria) Dep. at 157).

In the next term sheet exchanged on October 28, JLI largely accepted Altria's proposal to delay filing for HSR, but changed the filing deadline to be July 2020 rather than an undefined date within two years of closing: "[Altria] shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process." (PX2503 (JLI) at 007). [redacted]

The October 30 final nonbinding term sheet left unchanged JLI's proposal that Altria could delay HSR filing until July 2020. (RX0285 (Altria) at 022 ("[Altria] shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process."); *see also* RX0838 (Altria) at 325 (Nov. 15 draft deal document with deadline to file for HSR clearance "[o]n or prior to July 15, 2020")).

This solution was acceptable to both parties. (Garnick (Altria) Tr. 1671, 1677-78). For Altria, the resolution "avoid[ed]" any potential issue with the PMI agreement and allowed Altria to divest or contribute its existing products. (Garnick (Altria) Tr. 1671). Meanwhile, the delay was acceptable to JLI because JLI's "concern" was not "the time period before filing HSR. What [JLI was] concerned about [was] that once [Altria was] on their board, which would happen upon HSR approval, that [the parties] would not be competitors at that point." (Garnick (Altria) Tr. 1677). Accordingly, JLI was fine with putting off HSR approval until July 2020, "because it meant pushing back the date when [Altria] would be on [its] board." (Garnick (Altria) Tr. 1678).

Third, Complaint Counsel's statement that Altria "never took any steps to explore a potential divestiture" of its products is irrelevant. (CCFF ¶ 925). As Garnick explained, Altria's understanding of divestiture was "that, as a condition of getting HSR approval, we might need to try to divest our products." (PX7036 Garnick (Altria) Dep. at 12). Altria had no reason to "t[ake] steps to explore" a divestiture before the FTC asked or required Altria to do so as part of the HSR review process. (CCFF ¶ 925).

Finally, on December 7, Altria announced the discontinuation of not just Nu Mark's remaining e-vapor products, but also Nu Mark's oral nicotine-containing product, Verve. (PX9080 (Altria) at 001; *see also* PX7036 Garnick (Altria) Dep. at 221). Because Verve was not an e-vapor product, it would not have been included in the noncompete under discussion between the parties. (*See* PX7036 Garnick (Altria) Dep. at 221; RFF ¶ 1094).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 926-43, Respondents incorporate their responses to those Proposed Findings herein.

926. The final deal documents, dated December 20, 2018, no longer gave Altria through July 15, 2020 to make its HSR filing, but instead required both Altria and JLI to make their HSR filings within 90 days. (*See* CCFF ¶ 943, below).

Response to Proposed Finding No. 926:

The Proposed Finding is incomplete and misleading without additional context. The revision to the timing for making HSR filings is not evidence that there was any agreement for Altria to withdraw Nu Mark's products before the deal was executed. Complaint Counsel has similarly offered no evidence that the timeline for filing for HSR approval played any role whatsoever in Altria's decision to discontinue Nu Mark's remaining products.

Garnick testified about this change at trial. As he explained, after Altria unilaterally withdrew Nu Mark's remaining cig-a-like products from the market for budgetary reasons, Altria and JLI were no longer competing in the e-vapor market. (Garnick (Altria) Tr. 1678). This complicated some of the terms the parties had otherwise resolved, including when Altria should file for HSR clearance, which the parties had previously decided to delay until July 15, 2020. (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria) Dep. at 222-23; *see also* RFF ¶¶ 1050-73). "When we, for other reasons, really budgetary reasons, decided to discontinue MarkTen cigalike and we were no longer in the e-vapor market, then there was no reason to wait until July 2020, and so we were trying to deal with the realities . . . ." (Garnick (Altria) Tr. 1678).

As Garnick explained, however, this change to the final Purchase Agreement was not made because JLI pushed for a shorter deadline for the HSR filing or to begin enhanced services sooner—to the contrary, Garnick did not "recall any desire or concern from JLI about reducing the time period before filing HSR." (Garnick (Altria) Tr. 1677; *see also* Pritzker (JLI) Tr. 871-72 (timing of enhanced services was not "consequential"); Willard (Altria) Tr. 1213 (recalling both Altria and JLI were "flexible" on timing for enhanced services)). Instead, the parties were trying to "address the reality" after Altria's unilateral withdrawal:

> [W]e had made the announcement already by this time that we were pulling our MarkTen cigalike from the market. And so the term sheet assumed that we would still be in the market, but we had pulled, unilaterally, the MarkTen from the market.
>
> And so the idea would be, let's take into account the reality of the current situation and make sure that the deal documents address the reality.

(PX7036 Garnick (Altria) Dep. at 223).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 943, Respondents incorporate their response to that Proposed Finding herein.

927. Altria's Joint Research, Development, and Technology Sharing Agreement with PMI was set to (and did) expire in July 2020. (*See* CCFF ¶¶ 932, 1588-89, below; PX7036 (Garnick (Altria), Dep. at 156-59)). Altria was not sure if it was permitted to sell or contribute its e-cigarette products to a third party prior to the expiration of its agreement with PMI in July 2020. (Garnick (Altria) Tr. 1,586-87; PX7036 (Garnick (Altria), Dep. at 156-59)).

Response to Proposed Finding No. 927:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 932 and 1588-89, Respondents incorporate their responses to those Proposed Findings herein.

928. In June 2018, Altria put together talking points about Altria's relationship with PMI for Willard and Gifford to discuss with JLI. (PX1611 (Altria)).

Response to Proposed Finding No. 928:

The Proposed Finding is incomplete and misleading without additional context. *First*, to the extent Complaint Counsel insinuates that these talking points involved discussion of the potential limitations on Altria's ability to divest its products before July 2020, there is no evidence to support this claim. The talking points are privileged and thus were not produced. The relationship between Altria and PMI raised issues unrelated to whether Altria could divest Nu Mark's existing products. [redacted] And there is no evidence in the record about what part of the relationship between Altria and PMI the talking points covered. (PX1611 (Altria) at 001).

Second, the question of whether Altria could divest or contribute Nu Mark's existing products while the JRDTA was in effect arose "later in the negotiations," after the parties had already resolved that Altria would continue competing with its existing e-vapor products after the transaction pending HSR approval. (Garnick (Altria) Tr. 1588, 1591-92; PX7036 Garnick (Altria) Dep. at 198; *see also* RFF ¶¶ 1050-53). The contemporaneous documents demonstrate this: By August 22, the parties concluded there was no "material substantive difference" between the parties' positions in the Antitrust Clearance Matters section of the August 19 term sheet, (RX1784 (PWP) at 002 (Aug. 22 issues list)), and the October 15 term sheet was the first to propose extending the time for Altria to file for HSR clearance until a date after July 2020. (PX1269 (Altria) at 006).

Finally, Complaint Counsel cites no evidence suggesting that Altria ever used these talking points in discussion with JLI. Indeed, the July 13 meeting referenced in PX1611, for which the talking points were prepared, was later cancelled. (PX4390 (Altria) at 001).

929. On June 27, 2018, Altria's in-house attorney Reale emailed those talking points to Willard, Gifford, Crosthwaite, and others, writing "Howard and Billy – Attached are talking points for the 7/13 Tree meeting that cover the Vulcan [PMI] relationship." (PX1611 (Altria)). The document attached to Reale's email was entitled "Tree Talking Points re Vulcan with [Wachtell] and Altria comments." (PX1611 (Altria)). The attached document itself was withheld from production. (PX1611 (Altria)).

Response to Proposed Finding No. 929:

The Proposed Finding is incomplete and misleading without additional context. *First*, to the extent Complaint Counsel insinuates that these talking points involved discussion of the potential limitations on Altria's ability to divest its products before July 2020, there is no evidence to support this claim. The talking points are privileged and thus were not produced. The relationship between Altria and PMI raised issues unrelated to whether Altria could divest Nu Mark's existing products. [redacted]

And there is no evidence in the record about what part of the relationship between Altria and PMI the talking points covered. (PX1611 (Altria) at 001).

Second, the undisputed record shows that the question of whether Altria could divest or contribute Nu Mark's existing products while the JRDTA was in effect arose "later in the negotiations," after the parties had already resolved that Altria would continue competing with its existing e-vapor products after the transaction pending HSR approval. (Garnick (Altria) Tr. 1588, 1591-92; PX7036 Garnick (Altria) Dep. at 198; *see also* RFF ¶¶ 1050-53). The contemporaneous documents demonstrate this: By August 22, the parties concluded there was no "material substantive difference" between the parties' positions in the Antitrust Clearance Matters section of the August 19 term sheet, (RX1784 (PWP) at 002 (Aug. 22 issues list)), and the October 15 term sheet was the first to propose extending the time for Altria to file for HSR clearance until a date after July 2020. (PX1269 (Altria) at 006).

Finally, Complaint Counsel cites no evidence suggesting that Altria ever used these talking points in discussion with JLI. Indeed, the July 13 meeting referenced in PX1611, for which the talking points were prepared, was later cancelled. (PX4390 (Altria) at 001).

930. On July 9, 2018, Pritzker emailed Willard and Gifford to tell them that JLI had to cancel the planned July 13, 2018 meeting. (PX4390 (Altria)). Pritzker and Willard arranged to speak by phone the next day, with Valani joining as well. (PX4390 (Altria)).

Response to Proposed Finding No. 930:

The Proposed Finding is incomplete and misleading without additional context. To the extent Complaint Counsel insinuates that the phone call involved a discussion of Altria's relationship with PMI using the talking points attached to PX1611, there is no evidence to support this theory. In his email canceling the meeting, Pritzker wrote that he and Valani "would like to get on a call . . . to explain" why the meeting was canceled. (PX4390 (Altria) at 001). Complaint

Counsel adduced no evidence that this call took place, nor any testimony regarding what was discussed on any such call.

931. Willard believes that during negotiations in 2018, he and JLI's negotiators did discuss Altria's relationship with PMI in terms of how it might impact the structure of a potential deal between Altria and JLI. (PX7031 (Willard (Altria), Dep. at 156-57)). Altria would have had to consider how to do a divestiture or contribution of its e-vapor business in a way that was consistent with its PMI relationship. (PX7031 (Willard (Altria), Dep. at 242-44)). Given that, Altria may have explained its PMI relationship to JLI. (PX7031 (Willard (Altria), Dep. at 242-44)).

Response to Proposed Finding No. 931:

The Proposed Finding is incomplete and misleading without additional context. The Proposed Finding does not specify when in 2018 these discussions regarding "Altria's relationship with PMI" would have occurred. (CCFF ¶ 931). Willard could not recall when such a discussion may have happened or who would have given such an explanation to JLI. (PX7031 Willard (Altria) Dep. at 243-45). Garnick, meanwhile, recalled that the question of whether Altria could divest or contribute Nu Mark's existing products while the JRDTA was in effect arose "later in the negotiations," after the parties had already resolved that Altria would continue competing with its existing e-vapor products after the transaction pending HSR approval. (Garnick (Altria) Tr. 1588, 1591-92; PX7036 Garnick (Altria) Dep. at 198; *see also* RFF ¶¶ 1050-53). The contemporaneous documents support this: By August 22, the parties concluded there was no "material substantive difference" between the parties' positions in the Antitrust Clearance Matters section of the August 19 term sheet, (RX1784 (PWP) at 002 (Aug. 22 issues list)), and the October 15 term sheet was the first to propose extending the time for Altria to file HSR for a date after July 2020. (PX1269 (Altria) at 006).

932. Altria's General Counsel Garnick testified that during negotiations, Altria raised with JLI that there was an issue about whether Altria could divest or contribute its e-cigarette products prior to the July 2020 expiration of its agreement with PMI. (Garnick (Altria) Tr. 1,587-88; PX7036 (Garnick (Altria), Dep. at 156-57)). The parties "took that into account in various term sheets to accommodate that concern." (Garnick (Altria) Tr. 1,587-88).

Response to Proposed Finding No. 932:

Respondents have no specific response.

933. Because of the concerns about Altria's ability to divest or contribute its e-cigarette products before July 2020, the parties "agreed—by that I mean resolved in the context of the negotiation—that [Altria] could put off filing for HSR approval until July 2020, and in the meantime, compete up to that time." (Garnick (Altria) Tr. 1,591-92). Then, if HSR approval was granted, Altria would contribute its e-cigarette products to JLI, or if necessary to get HSR approval, divest them to a third party. (Garnick (Altria) Tr. 1,591-92).

Response to Proposed Finding No. 933:

Respondents have no specific response.

934. The October 15, 2018 term sheet specified that Altria "shall elect the time (not to exceed two years from closing of the Purchase) when the parties initiate the HSR clearance process." (PX2147 (JLI) at 023); *see also* CCFF ¶ 799, above).

Response to Proposed Finding No. 934:

Respondents have no specific response except to note that Altria's revision to the term sheet on this point can be better seen in the redlined version at PX1269 (Altria) at 006. To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 799, Respondents incorporate their response to that Proposed Finding herein.

935. The October 30, 2018 final term sheet also stated that Altria "shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process." (PX1271 (Altria) at 022; *see also* CCFF ¶ 827, above).

Response to Proposed Finding No. 935:

Respondents have no specific response except to note that the purpose of this term was to make sure that Altria could divest or contribute its e-vapor portfolio, if requested by the FTC to obtain antitrust clearance, without potentially impacting a preexisting agreement with PMI. (*See* RFF ¶¶ 1050-61). JLI circulated the October 28 and October 30 term sheets containing this provision, demonstrating that it was not concerned with Nu Mark's products remaining on the market following the transaction. (*See* RFF ¶¶ 1057-59).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 827, Respondents incorporate their response to that Proposed Finding herein.

936. Altria's understanding was that it could not take its board seats until it got HSR approval. (Garnick (Altria) Tr. 1,592).

Response to Proposed Finding No. 936:

Respondents have no specific response.

937. Altria and JLI negotiated that Altria would not take its board seats until such time as it had divested or contributed its e-cigarette products and was no longer competing with JLI. (Garnick (Altria) Tr. 1,594-95). Garnick testified that "the reason we were willing to take our products off the market in the negotiations, is to get on the board and after we get HSR approval." (Garnick (Altria) Tr. 1,594-95; *see also* PX7000 (Garnick (Altria), IHT at 096-97) ("It was felt that if we were going to pay for a third of the company, we wanted to at least have a seat at the table. And even with a minority position, we wanted to be able to interact and understand the business and express our views.")).

Response to Proposed Finding No. 937:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Altria and JLI did not "negotiate[] that Altria would not take its board seats until" it had divested or contributed its products. (CCFF ¶ 937). To the contrary, under antitrust law, Altria *could not* take seats on JLI's Board until the transaction received HSR approval. (Garnick (Altria) Tr. 1594 ("[O]ur desire to be on the board at JLI required us to get HSR approval . . . .")).

The Proposed Finding takes Garnick's testimony out of context; he was making exactly the opposite point. (*See* Garnick (Altria) Tr. 1593-95). Altria's ability to take its seats on JLI's Board was triggered by HSR approval, *not* by Altria divesting or contributing its products. (Garnick (Altria) Tr. 1593-95). And JLI had no interest in Altria divesting or contributing its products prior to HSR review and approval, either: As Garnick explained, JLI's concern about competition from Altria was based on the sensitive and confidential information that Altria would have access to as a result of its position on the Board and its provision of services to JLI. (Garnick (Altria) Tr. 1594-95; *see also, e.g.*, Pritzker (JLI) Tr. 668-69, 674-75, 821-22; Valani (JLI) Tr.

908; PX7021 Pritzker (JLI) Dep. at 70; PX7009 Burns (JLI) IHT at 138; PX7035 Masoudi (JLI) Dep. at 129-30; PX7031 Willard (Altria) Dep. at 229; RFF ¶¶ 1178-88). Accordingly, the term of the noncompete provision is tied to the pendency of the Services Agreement; once the Services Agreement expires, the noncompete does as well. (RFF ¶ 1129; *see also* RRFF ¶¶ 995, 999).

By contrast, JLI was simply not concerned about competition from Altria's existing products prior to HSR approval, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87), and believed were "terrible," (PX7011 Valani (JLI) IHT at 134; *see also* Pritzker (JLI) Tr. 821-23, 853, 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 55-56; PX7025 Burns (JLI) Dep. at 126-27; PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

Accordingly, under the terms of the transaction contemplated by the parties, Altria "would not have contributed or gotten out of the market before getting HSR approval because there would be no reason" to do so—it was HSR approval that would permit Altria to take its Board seats, not withdrawing from the market. (Garnick (Altria) Tr. 1595). "The only time that we would want to get out of the market would be after we got FTC approval with HSR because it is only at that point that we would be on the board." (Garnick (Altria) Tr. 1595).

938. Pritzker testified that Altria's edits to the divestiture and contribution language in the October 15, 2018 draft term sheet suggest that Altria might not have the legal right to divest or contribute its e-cigarette assets. (Pritzker (JLI) Tr. 867-69; (PX2147 (JLI) at 022-23); *see also* CCFF ¶¶ 799-803, above).

Response to Proposed Finding No. 938:

Respondents have no specific response except to note that Pritzker also testified that he does not recall focusing on the "legal right" edit at the time, but he "certainly" understood the divestiture clause in the October 15 term sheet to mean that in the event of a deal, Altria would commit to divesting its existing products if required to do by the FTC. (Pritzker (JLI) Tr. 868-69).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 799-803, Respondents incorporate their responses to those Proposed Findings herein.

939. Garnick testified that Altria senior management discussed the potential divestiture of Altria's e-cigarette business, but that they never seriously pursued that or reached out to anyone about acquiring those products. (Garnick (Altria) Tr. 1,586; PX7036 (Garnick (Altria), Dep. at 12-14)). Part of the discussion among Altria management was whether Altria was allowed to sell its e-cigarette products to a third party under its agreement with PMI. (PX7036 (Garnick (Altria), Dep. at 12-14)).

Response to Proposed Finding No. 939:

The Proposed Finding is incomplete and misleading without additional context. As Garnick explained, the discussion regarding divestiture was "that, as a condition of getting HSR approval, we might need to try to divest our products." (PX7036 Garnick (Altria) Dep. at 12). Altria had no reason to "seriously pursue[]" or "reach[] out to anyone" about divestiture before the FTC asked or required Altria to do so as part of the HSR review process. (*See* CCFF ¶ 939).

940. Altria's Gifford also testified that he is not aware of Altria taking any steps to divest its e-cigarette business. (Gifford (Altria) Tr. 2,877; PX7040 (Gifford (Altria), Dep. at 134-36)). Altria did not analyze or reach out to any potential divestiture buyers, nor did it prepare a confidential information memorandum for a potential divestiture. (PX7040 (Gifford (Altria), Dep. at 134-36)).

Response to Proposed Finding No. 940:

Respondents have no specific response except to note that, as Gifford explained, divestiture was included in draft term sheets as a potential requirement for FTC approval. (PX7040 Gifford (Altria) Dep. at 129-30). Altria had no reason to "tak[e] any steps to divest" or "reach out to any potential divestiture buyers" before the FTC asked or required Altria to do so as part of the HSR review process. (*See* CCFF ¶ 940).

941. The December 5, 2018 draft purchase agreement stated that Altria must file for HSR clearance on or before July 15, 2020. (PX1500 (Altria) at 164-65 (Section 4.1(a) of draft Purchase Agreement); *see also* CCFF ¶ 843, above).

Response to Proposed Finding No. 941:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 843, Respondents incorporate their response to that Proposed Finding herein.

942. On December 7, 2018, Altria announced the discontinuation of all of its remaining e-cigarette products. (PX9080 at 001 (Altria press release); *see also* CCFF ¶ 848, above).

Response to Proposed Finding No. 942:

The Proposed Finding is incomplete and misleading without additional context to the extent it is intended to imply that the December 7 discontinuation of Nu Mark's remaining cig-a-like products was part of an agreement to speed up HSR review of the transaction. *First*, Complaint Counsel has cited no evidence that the timeline for filing for HSR clearance played any role whatsoever in Altria's decision to discontinue Nu Mark's remaining products.

Second, on December 7, Altria announced the discontinuation of not just Nu Mark's remaining e-vapor products, but also Nu Mark's oral nicotine-containing product, Verve. (PX9080 (Altria) at 001; *see also* PX7036 Garnick (Altria) Dep. at 221). Because Verve was not an e-vapor product, it would not have been impacted by any potential transaction between Altria and JLI. (*See* PX7036 Garnick (Altria) Dep. at 221; RFF ¶ 1094).

As the press release explained, Altria's decision was "based upon the current and expected financial performance of these products, coupled with regulatory restrictions that burden Altria's ability to quickly improve these products. The company will refocus its resources on more compelling reduced-risk tobacco product opportunities." (PX9080 (Altria) at 001). Altria decided to stop making these products based on a determination that those products had no pathway to profitability and thus did not merit further investment; those remaining products were in a dying product segment, were not converting adult smokers, had technical problems, and would not

receive FDA approval; and a need for cost savings to fund either the Growth Teams or, if the parties came to an agreement, the JLI investment. (*See* RFF ¶¶ 1074-98).

But Altria did not make this decision in response to any demand from or agreement with JLI, (*see* Gifford (Altria) Tr. 2774, 2843-44)—to the contrary, it was done for "[s]eparate, independent business reasons," (Gifford (Altria) Tr. 2850). As Willard explained, "[Altria was] making hard decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products" because "[it was] not in the business of losing money; [it was] in the business of making money." (Willard (Altria) Tr. 1460; *see also* Gifford (Altria) Tr. 2841 ("[L]et's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space."); PX7024 Crosthwaite (Altria/JLI) Dep. at 283 (recalling Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform"); PX7031 Willard (Altria) Dep. at 281; *see also* [redacted]).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 848, Respondents incorporate their response to that Proposed Finding herein.

943. The final deal documents, executed on December 20, 2018, no longer gave Altria through July 15, 2020 to make its HSR filing, but instead required both Altria and JLI to make their HSR filings within 90 days. (PX2141 (JLI) at 034 (Altria/JLI Purchase Agreement, Section 4.1(a)); *see also* CCFF ¶ 865, above).

Response to Proposed Finding No. 943:

The Proposed Finding is incomplete and misleading without additional context to the extent it is intended to imply that the December 7 discontinuation of Nu Mark's remaining cig-a-like products was part of an agreement to speed up HSR review of the transaction. This revision

is not evidence that there was any agreement for Altria to withdraw Nu Mark's products before the deal was executed. Complaint Counsel has similarly offered no evidence that the timeline for filing for HSR clearance played any role whatsoever in Altria's decision to discontinue Nu Mark's remaining products.

Garnick testified about this change at trial. As he explained, after Altria unilaterally withdrew Nu Mark's remaining cig-a-like products from the market for budgetary reasons, Altria and JLI were no longer competing in the e-vapor market. (Garnick (Altria) Tr. 1678). This complicated some of the terms the parties had otherwise resolved, including when Altria should file for HSR clearance, which the parties had previously decided to delay until July 15, 2020. (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria) Dep. at 222-23; *see also* RFF ¶¶ 1050-73). "When we, for other reasons, really budgetary reasons, decided to discontinue MarkTen cigalike and we were no longer in the e-vapor market, then there was no reason to wait until July 2020, and so we were trying to deal with the realities . . . ." (Garnick (Altria) Tr. 1678).

As Garnick explained, however, this change to the final Purchase Agreement was not made because JLI pushed for a shorter deadline for the HSR filing or to begin enhanced services sooner—to the contrary, Garnick did not "recall any desire or concern from JLI about reducing the time period before filing HSR." (Garnick (Altria) Tr. 1677; *see also* Pritzker (JLI) Tr. 871-72 (timing of enhanced services was not "consequential"); Willard (Altria) Tr. 1213 (recalling both Altria and JLI were "flexible" on timing for enhanced services)). Instead, the parties were trying to "address the reality" after Altria's unilateral withdrawal:

> [W]e had made the announcement already by this time that we were pulling our MarkTen cigalike from the market. And so the term sheet assumed that we would still be in the market, but we had pulled, unilaterally, the MarkTen from the market.
>
> And so the idea would be, let's take into account the reality of the current situation and make sure that the deal documents address the reality.

(PX7036 Garnick (Altria) Dep. at 223).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 865, Respondents incorporate their response to that Proposed Finding herein.

M. ALTRIA AGREED TO JLI'S DEMAND TO EXIT THE E-CIGARETTE BUSINESS

944. Altria repeatedly indicated that it would meet JLI's demand that it not compete in e-cigarettes, including getting rid of its existing e-cigarette products. (*See* CCFF ¶¶ 945-67, below). During negotiations, several options were discussed regarding how Altria could comply with JLI's demand that it not compete in e-cigarettes. (*See* CCFF ¶¶ 968-86, below). One of the options discussed was that Altria could cease to operate its e-cigarette business. (*See* CCFF ¶¶ 969-86, below). On several occasions, Altria indicated to JLI that it might meet JLI's noncompetition demand by ceasing to operate its e-cigarette business. (*See* CCFF ¶¶ 969-86, below). And that is what Altria did—in late October, 2018, Altria removed its pod-based e-cigarettes, as well as certain flavored cigalikes, from the market. (*See* CCFF ¶¶ 987-88, below). On December 7, 2018, Altria discontinued the production and distribution of all of its e-cigarettes. (*See* CCFF ¶¶ 989-94, below).

Response to Proposed Finding No. 944:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, JLI did not "demand that [Altria] not compete in e-cigarettes, including getting rid of its existing e-cigarettes products." (CCFF ¶ 944). To the contrary, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). As Pritzker confirmed at trial, the carve-out to the noncompete provision reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874; *see also* RFF ¶¶ 1189-210).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop *new* e-vapor products. (Pritzker (JLI) Tr. 674-

75, 821-22; *see also* PX7021 Pritzker (JLI) Dep. at 70, 151-52; PX7025 Burns (JLI) Dep. at 122-23). Accordingly, the term noncompete is tied to the pendency of the Services Agreement; once the Services Agreement expires, the noncompete does as well. (RFF ¶ 1129; *see also* RRFF ¶¶ 995, 999). Meanwhile, JLI was not concerned about competition from Altria's existing products, which JLI believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and to which it "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87). JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market prior to HSR approval, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 821-23; 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

Additionally, it was JLI's view that the noncompete provision would be "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

Second, Altria and JLI did not "discuss[]" "several options . . . regarding how Altria could comply with JLI's demand that it not compete in e-cigarettes." (CCFF ¶ 944). As explained above, there was no such demand, and every draft of the term sheets and deal documents exchanged between the parties explicitly exempted Altria's existing products from the noncompete provision pending HSR review of the transaction. (RFF ¶ 1192).

The parties addressed the treatment of Altria's existing e-vapor products in the event of a transaction through the "Antitrust Clearance Matters" section of each draft term sheet, and these communications were in the context of "what might be allowed or required by the FTC" *as part of the HSR review process*. (Pritzker (JLI) Tr. 686; *see also* PX7021 Pritzker (JLI) Dep. at 85-86; RFF ¶¶ 772, 802, 807-08, 826, 994, 1043, 1049 (each draft term sheet contained an "Antitrust Clearance Matters" section addressing the treatment of Altria's existing e-vapor products)). There is no evidence whatsoever that Altria and JLI ever discussed Altria taking any action with respect to its existing e-vapor products *prior to the transaction*, or prior to HSR approval of any transaction. (*See* RFF ¶¶ 1189-211).

Finally, Altria never "indicated to JLI that it might meet JLI's noncompetition demand by ceasing to operate its e-cigarette business," and Altria did not discontinue any of its e-vapor products as a condition to its investment in JLI. (CCFF ¶ 945). To the contrary, Altria struck the "cease to operate" provision in the August 9, 2018 draft term sheet, and it never returned to any subsequent draft term sheet, draft deal document, or the final agreement. (*See* RFF ¶¶ 804, 807). Indeed, Burns does not recall the parties ever discussing "ceasing to operate" after it was removed from the term sheet. (PX7025 Burns (JLI) Dep. at 205-08). And every single witness involved in the negotiations testified that there was no agreement for Altria to pull its e-vapor products in exchange for an investment in JLI. (RFF ¶¶ 1152-61).

Further, the record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that Altria withdrew Nu Mark's products for independent business reasons. Altria pulled Elite and nontraditionally flavored MarkTen cig-a-like products in response to regulatory concerns about youth usage of those types of products and against the backdrop that those products were not converting adult smokers, had technical problems, and would not receive

FDA approval. (RFF ¶¶ 938-51). Altria subsequently pulled Nu Mark's remaining MarkTen cig-a-like products based on a determination that those products had no pathway to profitability and thus did not merit further investment; those remaining products were in a dying product segment, were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 1074-91). And Altria provided no notice to JLI that it intended to withdraw those products for independent business reasons. (RFF ¶¶ 1152-61).

Moreover, on December 7, Altria announced the discontinuation of not just Nu Mark's remaining e-vapor products, but also Nu Mark's oral nicotine-containing product, Verve. (PX9080 (Altria) at 001; *see also* PX7036 Garnick (Altria) Dep. at 221). Because Verve was not an e-vapor product, it would not have been included in the noncompete under discussion between the parties. (*See* PX7036 Garnick (Altria) Dep. at 221; RFF ¶ 1094).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 945-94, Respondents incorporate their responses to those Proposed Findings herein.

1. Altria Indicated That It Would Meet JLI's Demand to Exit E-Cigarettes

945. During negotiations, JLI made clear to Altria that a requirement of the transaction was that Altria could not compete in e-cigarettes with current or future products. (*See* CCFF ¶¶ 867-924, above). Altria repeatedly communicated to JLI that it would comply with JLI's demand that it stop competing in e-cigarettes, including getting rid of its existing e-cigarette products. (*See* CCFF ¶¶ 946-86, below). Other than the August 9, 2018 term sheet, every term sheet exchanged between Altria and JLI required Altria to exit e-cigarettes. (*See* CCFF ¶¶ 957, 965, 967, below; *see also* CCFF ¶¶ 893-97, above). Other than the August 9, 2018 term sheet, no term sheet permitted Altria to keep its e-cigarette products on the market indefinitely. (*See* CCFF ¶¶ 957, 965, 967, below).

Response to Proposed Finding No. 945:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, JLI did not make "clear to Altria that a requirement of the transaction was that Altria could not compete in e-cigarettes with current or future products." (CCFF ¶ 945). To the

contrary, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). As Pritzker confirmed at trial, the carve-out to the noncompete provision reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874; *see also* RFF ¶¶ 1189-210).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop *new* e-vapor products. (Pritzker (JLI) Tr. 674-75, 821-22; *see also* PX7021 Pritzker (JLI) Dep. at 70, 151-52; PX7025 Burns (JLI) Dep. at 122-23). But this concern did not apply to Altria's existing products, which JLI believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and to which it "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87). JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market prior to HSR approval, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 821-23; 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

Additionally, JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust

Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

Second, Altria did not "communicate[] to JLI that it would comply with JLI's demand that it stop competing in e-cigarettes, including getting rid of its existing e-cigarette products." (CCFF ¶ 945). As explained above, there was no such demand, and every draft of the term sheets and deal documents exchanged between the parties explicitly exempted Altria's existing products from the noncompete provision pending HSR review of the transaction. (RFF ¶ 1192).

The parties addressed the treatment of Altria's existing e-vapor products in the event of a transaction through the "Antitrust Clearance Matters" section of each draft term sheet, and these communications were in the context of "what might be allowed or required by the FTC" *as part of the HSR review process*. (Pritzker (JLI) Tr. 686; *see also* PX7021 Pritzker (JLI) Dep. at 85-86; RFF ¶¶ 772, 802, 807-08, 826, 994, 1043, 1049 (each draft term sheet contained an "Antitrust Clearance Matters" section addressing the treatment of Altria's existing e-vapor products)). There is no evidence whatsoever that Altria and JLI ever discussed Altria taking any action with respect to its existing e-vapor products *prior to the transaction*, or prior to HSR approval of any transaction. (*See* RFF ¶¶ 1189-211). Every single witness involved in the negotiations testified that there was no agreement for Altria to pull Nu Mark's e-vapor products in exchange for an investment in JLI, and Altria provided no notice to JLI that Altria intended to withdraw those products for independent business reasons. (RFF ¶¶ 1152-61).

Further, the record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that Altria withdrew Nu Mark's products for independent business reasons. Altria pulled Elite and nontraditionally flavored MarkTen cig-a-like products in response to regulatory concerns about youth usage of those types of products and against the backdrop that

those products were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 938-51). Altria subsequently pulled Nu Mark's remaining MarkTen cig-a-like products based on a determination that those products had no pathway to profitability and thus did not merit further investment; those remaining products were in a dying product segment, were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 1074-91).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 867-924 and 946-86, Respondents incorporate their responses to those Proposed Findings herein.

946. Valani testified that he was not sure when Altria committed to not having any competitive e-cigarette products of their own, but that in "subsequent [to Burns' April 20, 2018 letter] paper that was exchanged between the companies it does show up." (PX7011 (Valani), IHT at 64)).

Response to Proposed Finding No. 946:

The Proposed Finding is inaccurate. Altria did not "commit[] to not having any competitive e-cigarette products of their own" in any "subsequent . . . paper" exchanged between the parties during the negotiations. (CCFF ¶ 947). Complaint Counsel takes Valani's testimony out of context; he was referring to the sentence in Burns' April 20, 2018 letter that stated: "JUUL's and Altria's respective antitrust counsel would discuss and develop a plan with respect to seeking and obtaining regulatory approval for the majority investment, including the treatment of any competitive products owned by Altria." (PX7011 Valani (JLI) IHT at 62-64 (discussing PX2026 (JLI) at 003)).

Subsequent to this letter, JLI and Altria, along with their antitrust counsel, did develop a plan for seeking and obtaining regulatory approval for the investment. (*See* RFF ¶¶ 822-30, 834-38). By the exchange of the August 19 term sheet (and as reflected as in the August 22 issues list), Altria and JLI had resolved that in the event of a transaction, *as part of the HSR review process*,

Altria would commit to divesting its e-vapor assets if required by the FTC. If divestiture was not required, Altria would contribute its e-vapor assets to JLI after receiving antitrust clearance. (*See* RFF ¶¶ 822-27, 830; RX1783 (PWP) 001 (cover email); RX1784 (PWP) at 002 (August 22 issues list noting "[i]n general, we do not see any material substantive difference on these antitrust points")). In either case, it was "well settled" that MarkTen cig-a-like and MarkTen Elite could stay on the market until the deal received HSR approval. (Garnick (Altria) Tr. 1752).

947. Garnick testified that in response JLI's July 30, 2018 term sheet, Altria proposed "a non-compete that carved out, on a permanent basis, our e-vapor products and all products currently in development." (PX7036 (Garnick (Altria), Dep. at 51-52); PX1303 (Altria) at 015, 017 (Altria's August 9, 2018 term sheet); *see also* CCFF ¶ 686, above).

Response to Proposed Finding No. 947:

The Proposed Finding is incomplete and misleading without additional context. Although Altria expanded the carve-out in the August 9 term sheet, the terms still contemplated that Altria would agree to divest its e-vapor business if necessary for HSR clearance. (PX2313 (JLI) at 015 (same document as PX1303)). Specifically, Altria's August 9 term sheet continued to propose that both parties would use "reasonable best efforts to seek Antitrust Clearance," adding that the "details relating to such efforts" were "to be discussed by the parties." (PX2313 (JLI) at 015). The term sheet also still required Altria to "cooperate with the FTC and to agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2313 (JLI) at 015). In other words, if the FTC required Altria to divest or take any other action with respect to its existing products, the August 9 term sheet required Altria to comply.

Garnick further testified that following Altria's revisions to the August 9 term sheet, Altria came to realize that JLI's concern underlying the proposed noncompete provision was that after receiving HSR approval, Altria "would be on their board and be involved in their operations," which would give it access to JLI's most confidential information. (PX7036 Garnick (Altria) Dep.

at 53; *see also* RFF ¶¶ 1178-88). As Garnick recalled: "[O]nce [Altria] fully understood what [JLI's] position was and the reason for it, we could understand it and we had some agreement, some sympathy for it, and that's why we thought we could live with a carve-out provision that allowed us to stay in the market until we got HSR approval and, at that point, we would get board seats, we would have more operational involvement into [JLI], and that would be an appropriate time for us to contribute our e-vapor products to [JLI]." (PX7036 Garnick (Altria) Dep. at 54).

By the exchange of the August 19 term sheet, Altria and JLI had come to an understanding on the antitrust clearance and the noncompete provisions: In the event of a transaction, Altria's existing products would remain in the market until the deal received HSR clearance, and then Altria would contribute the products to JLI. (PX7036 Garnick (Altria) Dep. at 53; PX1432 (Altria) at 021-22, 024). If necessary, to receive HSR clearance, Altria would divest its products. (PX1432 (Altria) at 022).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 686, Respondents incorporate their response to that Proposed Finding herein.

948. Consistent with Garnick's testimony, in the August 9, 2018 term sheet, Altria struck out the entire provision requiring it to "divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, then cease to operate), all Richard [Altria] assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed or has under development." (PX1303 (Altria) at 015; PX2313 (JLI) at 015 (JLI's copy of Aug. 9, 2018 term sheet); *see also* CCFF ¶¶ 704-07, above).

Response to Proposed Finding No. 948:

The Proposed Finding is incomplete and misleading without additional context. Although Altria struck the divest/contribute/"cease to operate" provision in the August 9 term sheet, the terms still contemplated that Altria would agree to divest its e-vapor business if necessary for HSR clearance. (PX2313 (JLI) at 015 (same document as PX1303)). Specifically, Altria's August 9 term sheet continued to propose that both parties would use "reasonable best efforts to seek

Antitrust Clearance," adding that the "details relating to such efforts" were "to be discussed by the parties." (PX2313 (JLI) at 015). The term sheet also still required Altria to "cooperate with the FTC and to agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2313 (JLI) at 015). In other words, if the FTC required Altria to divest or take any other action with respect to its existing products, the August 9 term sheet required Altria to comply.

Respondents further note that following Altria's revisions to the August 9 term sheet, Altria came to realize that JLI's concern underlying the proposed noncompete provision was that after receiving HSR approval, Altria "would be on their board and be involved in their operations," which would give it access to JLI's most confidential information. (PX7036 Garnick (Altria) Dep. at 53; *see also* RFF ¶¶ 1178-88). As Garnick recalled: "[O]nce [Altria] fully understood what [JLI's] position was and the reason for it, we could understand it and we had some agreement, some sympathy for it, and that's why we thought we could live with a carve-out provision that allowed us to stay in the market until we got HSR approval and, at that point, we would get board seats, we would have more operational involvement into [JLI], and that would be an appropriate time for us to contribute our e-vapor products to [JLI]." (PX7036 Garnick (Altria) Dep. at 54).

By the exchange of the August 19 term sheet, Altria and JLI had come to an understanding on the antitrust clearance and the noncompete provisions: Altria's existing products would remain in the market until the deal received HSR clearance, and then Altria would contribute the products to JLI. (PX7036 Garnick (Altria) Dep. at 53; PX1432 (Altria) at 021-22, 024). If necessary, to receive HSR clearance, Altria would divest its products. (PX1432 (Altria) at 021-22). After Altria struck the divest/contribute/"cease to operate" provision from the July 30 term sheet on August 9,

it did not appear in any subsequent draft term sheet, draft deal document, or in the final agreement. (RFF ¶ 804).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 704-07, Respondents incorporate their responses to those Proposed Findings herein.

949. On August 15, 2018, in response to Altria's August 9, 2018 term sheet, JLI's Valani provided Altria's Devitre with JLI's "position on a number of specific points to make sure that [Altria] [] understand[s] where [JLI] will need to draw the line before finalizing a commitment to [meet on August 18.]" (PX2025 (JLI) at 001 (Aug. 14 2018 Pritzker Email telling Altria to expect specific points); PX4171 (Altria) at 002-03 (Valani Email to Devitre attaching specific points); *see also* CCFF ¶¶ 710-27, above).

Response to Proposed Finding No. 949:

Respondents have no specific response except to note that Complaint Counsel offers no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting.

Moreover, Devitre received JLI's list in his role as "facilitator," not as a substantive negotiator for Altria. (PX7001 Devitre (Altria) IHT at 95; *see also* RRFF ¶¶ 589, 591). Devitre testified that he could not "recall whether Altria got back to [JLI] on any of these points." (PX7001 Devitre (Altria) IHT at 103-04).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 710-27, Respondents incorporate their responses to those Proposed Findings herein.

950. In JLI's August 15, 2018 list of specific points, the second bullet point (of nine) stated:

> 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. (PX4171 (Altria) at 002; *see also* CCFF ¶ 722, above).

Response to Proposed Finding No. 950:

The Proposed Finding is incomplete and misleading to the extent Complaint Counsel insinuates that with this bullet point, "JLI made clear to Altria that a requirement of the transaction was that Altria could not compete in e-cigarettes with current or future products." (CCFF ¶ 945). To the contrary, the above bullet point makes clear that JLI's concern with regard to the noncompete was related to *future* products, not Altria's existing products: "You have retained the right under certain circumstances to compete not only with existing Mark Ten products"—a right retained in every iteration of the term sheets drafted by either party pending HSR review, (*see* RFF ¶ 1192)—"but *also with products under development and future products*," (PX4171 (Altria) at 002 (emphasis added)). In other words, JLI took issue with Altria expanding the carve-out to apply not just to existing products (as JLI had proposed), but to future products as well. (PX4171 (Altria) at 002). As both JLI and Altria witnesses repeatedly testified, JLI was concerned about Altria developing *new* products after becoming privy to JLI's proprietary information as a result of the transaction. (*See* RFF ¶¶ 1178-88). JLI was not concerned about Altria's existing products, to which JLI "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87; *see also* RFF ¶¶ 1189-211), and which could not be improved using JLI's technology in the near term due to strict FDA regulations, (*see* RFF ¶¶ 65-71).

JLI did not demand that Altria pull Nu Mark's existing products as a condition to the transaction. Instead, as PX4171 demonstrates, what JLI sought was a commitment from Altria that it would *divest* its existing e-vapor products if required by the FTC as part of the HSR clearance process following a transaction: "The commitment to divest Mark Ten has been stricken. This is not acceptable to us." (PX4171 (Altria) at 002). Notably, PX4171 made no mention of Altria striking "cease to operate" from the term sheet. (PX4171 (Altria) at 002).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 722, Respondents incorporate their response to that Proposed Finding herein.

951. The August 15, 2018 list of bullets Valani gave to Devitre was meant to "communicate clearly that these were foundational concepts" such that JLI would only go ahead with the planned August 18, 2018 San Francisco meeting "if the Altria team agreed that they were clear on these points." (Valani (JLI) Tr. 930-31). Valani testified that there was "no point in meeting unless there's alignment" on the foundational concepts set forth in JLI's August 15, 2018 list. (Valani (JLI) Tr. 931-32).

Response to Proposed Finding No. 951:

Respondents have no specific response except to note that there is no evidence that the parties agreed to any terms prior to the August 18 meeting, nor that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting.

Moreover, Devitre received JLI's list in his role as "facilitator," not as a substantive negotiator for Altria. (PX7001 Devitre (Altria) IHT at 95; *see also* RRFF ¶¶ 589, 591). Devitre testified that he could not "recall whether Altria got back to [JLI] on any of these points." (PX7001 Devitre (Altria) IHT at 103-04).

952. Valani believes that he and Devitre discussed the list of JLI's specific points to "signal that [] we would want some verification from the Altria team that [] they were aligned with this prior to us sitting down" for the planned August 18, 2018 meeting. (Valani (JLI) Tr. 932); *see also* CCFF ¶ 724, above).

Response to Proposed Finding No. 952:

The Proposed Finding is incomplete and misleading without additional context. Valani testified that he "presume[d]" that he and Devitre discussed the list, (Valani (JLI) Tr. 932), but he did not recall doing so, (PX7032 Valani (JLI) Dep. at 69). Devitre similarly testified that he does not recall "which points we discussed in any detail and which points we didn't discuss." (PX7001 Devitre (Altria) IHT at 98). Accordingly, there is no evidence regarding the substance of any conversation about JLI's list between Valani and Devitre, and there is no evidence that the second bullet point was discussed.

Further, Complaint Counsel offers no evidence that the occurrence of the August 18 meeting was preconditioned on any agreements on proposed terms in advance of the meeting. Devitre participated in any such conversation in his role as "facilitator," not as a substantive negotiator for Altria. (PX7001 Devitre (Altria) IHT at 95; *see also* RRFF ¶¶ 589, 591). Devitre testified that he could not "recall whether Altria got back to [JLI] on any of these points." (PX7001 Devitre (Altria) IHT at 103-04).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶¶ 724, Respondents incorporate their response to that Proposed Finding herein.

953. After JLI provided Altria with its list of "specific points," JLI went forward with meeting with Altria on August 18, 2018 in San Francisco. (Pritzker (JLI) Tr. 708-11; Valani (JLI) Tr. 924, 936; PX7032 (Valani (JLI), Dep. at 63-64); *see also* CCFF ¶ 728, above).

Response to Proposed Finding No. 953:

The Proposed Finding is inaccurate, incomplete, and misleading to the extent it implies that because the August 18 meeting took place, Altria and JLI must have agreed on all of the points discussed in JLI's August 15 issues list. Contrary to Complaint Counsel's insinuation, there is no evidence that as a precondition to the August 18 meeting, Altria agreed to pull Nu Mark's existing products from the market.

Indeed, the August 18 meeting went forward notwithstanding the fact that Altria and JLI clearly did not reach agreement on other "specific points" raised by JLI. (*See* CCFF ¶ 953). For example, JLI's list stated that the voting power term contained in Altria's August 9 term sheet was "not acceptable" compared to JLI's proposed "~15% of voting power initially to be voted in [Altria's] discretion, with any future voting power about 15% voted pro rata." (PX4171 (Altria) at 002). If Complaint Counsel's theory were true, Altria would have had to agree to this (and every other point in JLI's list) as a precondition to the August 18 meeting, but it did not. (*See* PX1432 (Altria) at 017-18 (August 19 term sheet in which *JLI* proposes Altria receive 20 percent voting

power); PX2141 (JLI) at 007, PX2216 (JLI) at 001 (final purchase and voting agreements, together indicating that upon antitrust conversion, Altria would receive 35 percent voting power)).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 728, Respondents incorporate their response to that Proposed Finding herein.

954. Valani thinks it is "likely" that the non-compete term was discussed at the August 18, 2018 meeting. (PX7011 (Valani (JLI), IHT at 102)).

Response to Proposed Finding No. 954:

The Proposed Finding is incomplete and misleading without additional context. Valani further testified that he did not specifically recall discussing the noncompete provision at the August 18 meeting, (PX7011 Valani (JLI) IHT at 102), and Complaint Counsel cites no affirmative evidence that it was. As Willard explained, the treatment of Altria's e-vapor products was not a topic he recalled reaching during the discussions between the senior group of negotiators; rather, it was an issue "that the respective counsels at the companies were . . . focused on." (Willard (Altria) Tr. 1219; *see also* Willard (Altria) Tr. 1223-24).

955. Valani recalls Altria "acquiescing to a number of positions" during the August 18, 2018 meeting. (PX7011 (Valani (JLI), IHT at 99-100)).

Response to Proposed Finding No. 955:

The Proposed Finding is incomplete and misleading without additional context. *First*, to the extent Complaint Counsel insinuates that at the August 18 meeting, Altria "acquiesce[ed]," (CCFF ¶ 955), to a "demand" from JLI "that it stop competing in e-cigarettes, including getting rid of its existing e-cigarette products," (CCFF ¶ 945), there is no evidence whatsoever to support this claim. To the contrary, JLI made no such "demand," nor did Altria ever agree to stop competing with its existing products prior to receiving HSR approval. The undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval,

(Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874). As Pritzker confirmed at trial, the carve-out to the noncompete provision reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was "perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874; *see also* RFF ¶¶ 1189-210).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop *new* e-vapor products. (Pritzker (JLI) Tr. 674-75, 821-22; *see also* PX7021 Pritzker (JLI) Dep. at 70, 151-52; PX7025 Burns (JLI) Dep. at 122-23). But this concern did not apply to Altria's existing products, which JLI believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and to which it "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87). JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market prior to HSR approval, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 821-23; 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

Additionally, JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

Second, the proposed terms the parties eventually coalesced around (in the August 19 term sheet) did not involve Altria agreeing to stop competing with its existing products in exchange for the investment, as Complaint Counsel claims. Rather, the August 19 term sheet explicitly exempted Altria's existing products from the noncompete, contemplating that they would remain on the market pending HSR review of the transaction. More specifically, the August 19 term sheet proposed that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the "Antitrust Clearance Matters" section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "[i]n the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22). The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864). And nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

Similarly, the August 22 joint issues list demonstrated that the parties had reached consensus (although not a binding agreement) on the treatment of Altria's existing e-vapor business in the event of a transaction. (RX1784 (PWP) at 002, 004; *see also* RFF ¶¶ 834-38). Regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784

(PWP) at 002 (comparing the parties' respective positions)). The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

Finally, as Valani's testimony made clear, the parties did not reach any kind of agreement at the August 18 meeting. Describing the likelihood of the deal at this point in the negotiations, Valani explained:

> [A.] [W]e were still skeptical of whether or not . . . this was, A, something that could get done and, B, something that we wanted.
>
> And . . . at the time, . . . [the] alternative in our head was just doing . . . a large, nonstrategic capital raise, you know, probably at values in the same ballpark, and so . . . [the Altria investment] was still like kind of plan B for us.
>
> Q. At what point did it become plan A?
>
> A. Probably in October.

(PX7011 Valani (JLI) IHT at 103-04).

956. In Altria's "Notes/Outline" for the August 18, 2018 meeting with JLI, Willard's opening remarks explain that Altria's removal of the term requiring it divest, contribute, or cease to operate its e-cigarette business was driven by antitrust concerns and not by substantive disagreement. (PX1493 (Altria) at 002). Willard's talking points then reaffirm that upon receiving antitrust approval, Altria will contribute MarkTen to JLI and become subject to a robust non-compete:

> - Some of the points you flagged in the document sent Wednesday also seem to boil down to miscommunication rather than substantive disagreement
>   - For example, our approach on MarkTen was driven by antitrust and for the protection of both companies. Upon receiving antitrust approval, we would contribute MarkTen to Jack and become subject to a robust non-compete that makes Jack our exclusive e-vapor play. We can't agree to these terms under antitrust laws prior to receiving HSR approval, which was driving our clarifications in the term sheet

(PX1493 (Altria) at 002).

Response to Proposed Finding No. 956:

The Proposed Finding is incomplete and misleading without additional context. *First*, the excerpted bullet is not evidence of any agreement with respect to Altria's existing products. To the contrary, the excerpted bullet undermines Complaint Counsel's theory that there was an agreement for Altria to do anything with its e-vapor business prior to HSR approval of any transaction.

Second, Willard did not write these talking points, and neither he nor any other Altria negotiator is copied on the email cited by Complaint Counsel. (PX1493 (Altria) at 001). As Willard testified at trial, talking points were sometimes prepared for him in advance of meetings, including some meetings with JLI, by members of Altria's team who wanted to "provide their perspective on what they would say if they were in a meeting." (Willard (Altria) Tr. 1180). These talking points were not intended to be scripts; instead, Willard would "incorporate anything [he] thought was helpful and obviously leave out anything that [he] didn't think was appropriate." (Willard (Altria) Tr. 1180). In practice, such talking points were "rarely what [he] actually said at the meeting." (Willard (Altria) Tr. 1405).

Indeed, despite relying on PX1493 in both its pre-trial and post-trial briefing, Complaint Counsel has never asked Willard (or any other witness) about this document, either in depositions or at trial. Accordingly, the talking points prepared by lawyers and circulated on August 17, (PX1493 (Altria) at 001), are not evidence of what Willard said at the August 18 meeting, (Willard (Altria) Tr. 1406-07).

957. The revised August 18, 2018 term sheet circulated by JLI after the August 18 meeting required Altria to contribute its e-cigarette assets to JLI upon antitrust clearance, and if antitrust clearance was not obtained by nine months after the purchase, to divest its e-cigarette assets within six months thereafter. (PX2185 (JLI) at 006); *see also* CCFF ¶ 733, above). The August 18, 2018 term sheet also included a non-competition term. (PX2185 (JLI) at 007-08; *see also* CCFF ¶ 734, above).

Response to Proposed Finding No. 957:

The Proposed Finding is incomplete and misleading without additional context. Like the previous term sheets, the August 18 term sheet continued to require the parties to "cooperate with the FTC," "use reasonable best efforts to seek Antitrust Clearance," and to "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2185 (JLI) at 021). The term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment, (PX2185 (JLI) at 020-21), and nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction, (PX2185 (JLI); Pritzker (JLI) Tr. 853-54).

Respondents further note that the noncompete provision in the August 18 term sheet contained a carve-out for MarkTen cig-a-like and MarkTen Elite "prior to their contribution or divestiture as described above." (PX2185 (Altria) at 007-08). This revision rejected Altria's effort from the August 9 term sheet to expand the carve-out to include "under development products," but explicitly permitted Altria's existing products to remain in the market following the transaction. (PX1432 (Altria) at 024 (redlined version of August 18 term sheet)).

As Garnick testified, this term sheet demonstrated to Altria that JLI "had no problem with our continuing to compete against them with the products we currently had on the market. What they wanted, though, is for that to stop once we got HSR approval and . . . participated on their board." (Garnick (Altria) Tr. 1750). Altria "understood" this position and believed contributing upon HSR approval was "appropriate." (PX7036 Garnick (Altria) Dep. at 54).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 733-34, Respondents incorporate their responses to those Proposed Findings herein.

958. On August 21, 2018, on behalf of Altria's Crosthwaite, Altria's outside counsel sent JLI CEO Burns a Term Sheet Issues List based on the August 18, 2018 draft term sheet circulated by JLI. (PX2506 (JLI) at 001, 003). The issues list confirms that Altria agreed to exit its e-cigarette business—in that instance either by contribution to JLI or by divestiture:

No.	Topic	Jack Position	Richard Position
3.	**Antitrust Clearance Matters**	• Richard to grant worldwide IP license concurrently with closing. • Upon receipt of antitrust clearance, Richard to contribute to Jack all Richard e-vapor assets at no cost to Jack. • If antitrust clearance for contribution is not received within nine months, Richard to divest e-vapor assets within six months. • Parties to use reasonable best efforts to obtain antitrust clearance for at least nine months. • Richard to have information rights consistent with antitrust laws.	• In general, we do not see any material substantive difference on these antitrust points. As has been discussed with antitrust counsel, we have a few suggestions for how the process might be improved, as noted in the succeeding bullets. • Instead of granting IP license, Richard would irrevocably waive any claims that Jack has violated any Richard IP rights. • Efforts obligation should last at least 18 months. • Parties would agree on specific information and consultation rights in the definitive transaction documents.
4.	**Richard Support Obligations**	• Support obligations pre-antitrust clearance include assisting with direct marketing programs / inserts and onserts. • Services provided at actual cost.	• We are generally agreed with the scope of support obligations described in Jack's draft. Antitrust counsel advises that direct marketing should be a post-clearance service (and should not commence at closing). • Rather than being tied to antitrust clearance, ability to provide full suite of services would be triggered by completion of contribution / divestiture (this is more of an antitrust technical point than a substantive one). • Services to be provided at cost plus 5% (which is consistent with Altria intra-group services pricing)

(PX2506 (JLI) at 004).

Response to Proposed Finding No. 958:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Contrary to Complaint Counsel's insinuation, the issues list makes clear that both parties contemplated Altria would *continue competing* with Nu Mark's existing e-vapor products after the transaction, until it either received HSR approval or divested its products in order to obtain HSR approval. (PX2506 (JLI) at 004).

Moreover, Complaint Counsel ignores the final version of this issues list, found at RX1783 (PWP) and RX1784 (PWP). After receiving PX2506, JLI's outside counsel circulated a revised version on August 22 containing JLI's responses to Altria's positions in the issues list. This

document further evidences the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the proposed noncompete provision and would remain in the market prior to HSR approval—JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

959. The August 21, 2018 Issues List from Altria also noted that "Rather than being tied to antitrust clearance, ability to provide full suite of services would be triggered by completion of contribution/divestiture (this is more of an antitrust technical point than a substantive one)." (PX2508 (JLI) at 004).

Response to Proposed Finding No. 959:

The Proposed Finding is incomplete and misleading without additional context. *First*, Respondents note that PX2508, cited by Complaint Counsel in this Proposed Finding, is not an exhibit on JX0002 or JX0003.

Second, to the extent Complaint Counsel intended to cite to PX2506, Garnick explained this point in his deposition:

> Q. What does that mean, the ability to provide full suite of services?
>
> A. Altria was going to provide services to JUUL. The services fell into two categories; those that we could provide while still being a competitor and those that we could not provide while being a competitor.
>
> This bullet point addressed a technical point that the tie should be when contribution or divestiture was completed and not be the antitrust clearance, even [though] those two might be pretty much simultaneous. And that's why I think it was called a technical point. That was my understanding.

(PX7036 Garnick (Altria) Dep. at 66). This note in the issues list was an effort to abide by the antitrust laws by making the trigger for providing services in the second category (those that could not be provided while the parties remained competitors) align with when the parties were no longer competing. Because the parties expected that a contribution or divestiture would occur as part of the HSR review process (making the two events practically "simultaneous," (PX7036 Garnick (Altria) Dep. at 66)), Altria's outside counsel viewed this revision as a "technical point" that would

not change the timing of when the "full suite" of services could be provided, (PX7036 Garnick (Altria) Dep. at 66; PX2506 (JLI) at 004).

960. On August 22, 2018, JLI's outside counsel sent to Altria a revised issues list reflecting JLI's updated positions. (PX1496 (Altria) at 001-02). Like the issues list circulated by Altria the prior day, JLI's list contains the statement that "If antitrust clearance for contribution is not received within nine months, Richard [Altria] to divest e-vapor assets within six months." (PX1496 (Altria) at 005). JLI's list also added a bullet stating "[p]arties to discuss relative advantage of divestiture v. contribution." (PX1496 (Altria), at 005-06).

Response to Proposed Finding No. 960:

Respondents have no specific response except to note that this document can be better seen in chart form at RX1784. (*See* RX1783 (PWP) at 001 (cover email); RX1784 (PWP) at 002-03 (Aug. 22 issues list)). This format makes it easier to see which bullets are in the "Jack Position in Aug. 18 Draft" column, which summarizes terms from the latest term sheet circulated by JLI, and which bullets describe Altria and JLI's respective positions.

As the revised issues list makes clear, both parties contemplated that Altria would *continue competing* with its existing e-vapor products after the transaction, until it either received HSR approval or divested its products in order to obtain HSR approval. (RX1784 (PWP) at 002-03). Both parties also understood that MarkTen cig-a-like and MarkTen Elite were exempted from the proposed noncompete provision—JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

961. Willard's October 5, 2018 letter to JLI reaffirmed Altria's commitment not to compete in e-cigarettes, with Term 6 of the letter stating:

> 6. Altria would agree that it and its current and future subsidiaries will not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market for any period, exclusive of the aforementioned transition period, during which it provides support services.

(PX2152 (JLI) at 003 (letter from Altria)); *see also* CCFF ¶ 782, above).

Response to Proposed Finding No. 961:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, it is not correct to say that the October 5 letter "reaffirmed Altria's commitment not to compete in e-cigarettes." (CCFF ¶ 961). Altria had not committed or agreed to do anything—with respect to the noncompete and its e-vapor products, or any other aspect of the potential transaction absent executing a final agreement—and Complaint Counsel has provided no evidence to the contrary. Each of the draft term sheets exchanged by the parties were expressly nonbinding. (PX1300 (Altria) at 002 n.1 (July 30 term sheet); PX2570 (JLI) at 002 n.1 (Aug. 4 term sheet); PX2313 (JLI) at 002 nn.1-2 (Aug. 9 term sheet); PX1432 (Altria) at 004 nn.1-2 (Aug. 19 term sheet); *see also* Pritzker (JLI) Tr. 814 (explaining terms in a term sheet "are fluid and subject to significant expansion and revision by business and legal teams")). Nor was the October 5 letter itself an agreement; as Pritzker explained at trial, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863).

Second, the Proposed Finding is incomplete and misleading because it omits the necessary context of how JLI understood the phrase "consistent with our previous discussions" in the October 5 letter. Pritzker testified that he understood the reference to mean "consistent with [the] prior draft of the term sheets," which was the August 19 term sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 862-63 (noting that "looking at the last term sheet" was "instructive" on the meaning of "our previous discussions" in the October 5 letter)). The August 19 term sheet explicitly exempted Altria's existing products from the noncompete, contemplating that they would remain on the market until HSR review of the transaction. More specifically, the August 19 term sheet proposed that Altria would "refrain . . . from competing (or preparing to compete

including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "[i]n the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (Altria) at 021-22). The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (PX1432 (Altria); Pritzker (JLI) Tr. 853-54).

Similarly, the August 22 joint issues list demonstrated that the parties had reached consensus (although not a binding agreement) on the treatment of Altria's existing e-vapor business in the event of a transaction. (RX1784 (PWP) at 002, 004; *see also* RFF ¶¶ 834-38). Regarding the Antitrust Clearance Matters section of the August 19 term sheet, Altria wrote: "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions)). The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 782, Respondents incorporate their response to that Proposed Finding herein.

962. Willard testified that Term 6 of his October 5, 2018 letter was referring to a topic "which it sounds like we had come to prior agreement on [. . .] ." (Willard (Altria) Tr. 1214).

Response to Proposed Finding No. 962:

The Proposed Finding is incomplete and misleading without additional context. Willard was unequivocal that there was no "agreement" until the deal was actually executed on December 20: "There was no agreement, and there was no deal, and we didn't -- we didn't have an understanding that a deal with JLI was possible until, ultimately, we came to a final agreement in December." (PX7031 Willard (Altria) Dep. at 272). Altria had not committed or agreed to do anything—with respect to the noncompete and its e-vapor products, or any other aspect of the potential transaction absent executing a final agreement—and Complaint Counsel has provided no evidence to the contrary. (*See* RFF ¶¶ 1152-61).

To be sure, the parties resolved various issues and settled on deal terms throughout the course of the negotiations; that is the point of negotiating. But none of these resolutions were binding until the final agreements were executed. Each of the draft term sheets exchanged by the parties were expressly nonbinding. (PX1300 (Altria) at 002 n.1 (July 30 term sheet); PX2570 (JLI) at 002 n.1 (Aug. 4 term sheet); PX2313 (JLI) at 002 nn.1-2 (Aug. 9 term sheet); PX1432 (Altria) at 004 nn.1-2 (Aug. 19 term sheet); *see also* Pritzker (JLI) Tr. 814 (explaining terms in a term sheet "are fluid and subject to significant expansion and revision by business and legal teams")). Nor was the October 5 letter itself an agreement; as Pritzker explained at trial, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863).

Further, Complaint Counsel offers no evidence to support its insinuation that the October 5 letter represented a "prior agreement," (CCFF ¶ 962), for Altria to pull its e-vapor products. To the contrary, as Willard testified, it was his understanding that JLI would allow Altria to keep its existing e-vapor products on the market during the antitrust process. (Willard (Altria) Tr. 1410). Altria's decisions to discontinue Elite and nontraditionally flavored MarkTen cig-a-like products had "no connection to any agreement with JLI." (PX7031 Willard (Altria) Dep. at 272). It was never "[Willard's] understanding" at any point in the negotiations that to get a deal done with JLI, Altria had to pull its e-vapor products before it was allowed to invest in the company. (PX7031 Willard (Altria) Dep. at 279). "The principals at [JLI] had never expressed a concern about the impact our existing products might have on JUUL's performance in the marketplace." (PX7031 Willard (Altria) Dep. at 279-80).

963. Valani viewed this Term 6 of Willard's October 5, 2018 letter "similarly to the other provisions in the previous term sheet, which is that their 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." (PX7011 (Valani (JLI), IHT at 118)).

Response to Proposed Finding No. 963:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel takes Valani's testimony out of context; he was explaining that Term 6 in Altria's October 5 letter was *not* "a change from Altria's prior position," in response to a question from Complaint Counsel. (PX7011 Valani (JLI) IHT at 118).

Second, Complaint Counsel omits the necessary context of what "the previous term sheet" provided, which it makes it clear that there was no "obligation" for Altria to pull any products. (CCFF ¶ 963). The "previous term sheet" was the August 19 term sheet sent by JLI, which explicitly exempted Altria's existing products from the noncompete, contemplating that they

would remain on the market until HSR review of the transaction. (*See* PX1432 (Altria) at 001, 021-22, 024; *see also* RFF ¶¶ 824-30).

More specifically, the August 19 term sheet proposed that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." (PX1432 (Altria) at 024). In the Antitrust Clearance Matters section of the term sheet, JLI proposed that Altria would contribute its existing e-vapor products to JLI "upon receipt of Antitrust Clearance," and that "in the event Antitrust Clearance for the foregoing contribution [was] not obtained within nine months after the Purchase," then Altria would agree to divest its e-vapor assets "within six months thereafter." (PX1432 (JLI) at 021-22). The August 19 term sheet did not contemplate that Altria would cease to operate its existing e-vapor business as a precondition to the investment. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852, 864)). And nothing in the term sheet suggested that Altria would take any action with regard to Nu Mark's e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (PX1432 (Altria); Pritzker (JLI) Tr. 853-54).

Third, the undisputed record demonstrates that not only did the parties' contemplated agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see* Pritzker (JLI) Tr. 821-23, 853, 874). JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032

Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")). Valani agreed that neither he nor anyone else he knows at JLI ever "reach[ed] any kind of agreement with anyone at Altria about withdrawing products" before the transaction was executed. (Valani (JLI) Tr. 956-57). Valani testified that he "absolutely [did] not" ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his knowledge. (Valani (JLI) Tr. 956). He had no prior notice "whatsoever" that Altria would be discontinuing any products, and no one from Altria had given him an "indication" that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria's December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

964. Regarding Term 6 in Willard's October 5, 2018 letter, Pritzker testified that his prior conversations with Willard suggested that Altria was willing to divest if necessary, and that it had not "gotten to the point where there was any additional agreement required, as far as I was concerned, on that issue." (PX7021 (Pritzker (JLI), Dep. at 132-33)).

Response to Proposed Finding No. 964:

The Proposed Finding is incomplete and misleading without additional context. To the extent Complaint Counsel implies that at the time of the October 5 letter, there was already an "agreement" regarding the treatment of Altria's existing products in the event of a transaction, (CCFF ¶ 964), there was not, (*see* Pritzker (JLI) Tr. 863). Altria had not agreed to do anything—with respect to the noncompete and its e-vapor products, or any other aspect of the potential transaction—absent executing a final agreement, and Complaint Counsel has provided no evidence to the contrary. (*See* RFF ¶¶ 1152-61).

To be sure, the parties resolved various issues and settled on deal terms throughout the course of the negotiations; that is the point of negotiating. But none of these resolutions were binding until the final agreements were executed. Each of the draft term sheets exchanged by the

parties were expressly nonbinding. (PX1300 (Altria) at 002 n.1 (July 30 term sheet); PX2570 (JLI) at 002 n.1 (Aug. 4 term sheet); PX2313 (JLI) at 002 nn.1-2 (Aug. 9 term sheet); PX1432 (Altria) at 004 nn.1-2 (Aug. 19 term sheet); *see also* Pritzker (JLI) Tr. 814 (explaining terms in a term sheet "are fluid and subject to significant expansion and revision by business and legal teams")).

Nor was the October 5 letter itself an agreement; as Pritzker explained at trial, "I knew what this meant was we still needed to agree but that we had some principles outlined that I thought were -- were promising in terms of being able to agree on something." (Pritzker (JLI) Tr. 863). And as Pritzker testified, those "principles" were "outlined" in the August 19 term sheet. (Pritzker (JLI) Tr. 862-63 (noting that "looking at the last term sheet" was "instructive" on the meaning of "our previous discussions" in the October 5 letter); *see also* Pritzker (JLI) Tr. 715). The August 19 term sheet explicitly exempted Altria's existing products from the noncompete, contemplating that they would remain on the market until HSR review of the transaction. (PX1432 (Altria) at 020-21, 024). Nothing in this term sheet contemplated that Altria would cease to operate its existing e-vapor business as a precondition to the investment, or that it would take any action with regard to its e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (PX1432 (Altria) at 021-22; Pritzker (JLI) Tr. 852-54, 864)).

Moreover, JLI viewed Altria's October 25 announcements regarding its products as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874; Valani (JLI) Tr. 944-45; PX7021 Pritzker (JLI) Dep. at 150; *see also* RFF ¶¶ 1008-19). Indeed, the undisputed evidence—both from testimony and contemporaneous documents—demonstrates JLI was "shocked" to learn of Altria's decision and viewed the letter as a "hostile action towards JUUL." (PX7011 Valani (JLI) IHT at 124-26; *see also, e.g.*, PX2473 (JLI) at 001).

965. In Altria's October 15, 2018 term sheet, Altria continued to commit to exit e-cigarettes by contributing its existing e-cigarette business to JLI upon antitrust clearance, if it had not already divested the assets in order to achieve antitrust clearance. (PX2147 (JLI) at 022-23 (Altria term sheet sent to JLI); *see also* CCFF ¶ 798, above).

Response to Proposed Finding No. 965:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Altria did not "commit to exit e-cigarettes" in the October 15 term sheet. To the contrary, the October 15 term sheet explicitly *exempted* Altria's existing products from the noncompete, contemplating that they would remain on the market until HSR review of the transaction. (*See* PX1269 (Altria) at 008; *see also* RFF ¶¶ 994-96).

More specifically, the October 15 term sheet proposed that Altria would "refrain, and . . . cause its current and future subsidiaries to refrain, from competing in the e-vapor business (*other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above*). . . . The non-compete will terminate upon the termination of the Services Term." (PX1269 (Altria) at 008-09 (emphasis added)). The carve-out for "MarkTen and MarkTen Elite prior to their contribution or divestiture" was identical to the one in the August 19 term sheet. (*See* PX1269 (Altria) at 008; PX1432 (Altria) at 024; *see also* RFF ¶¶ 824-38).

Regarding antitrust clearance, the October 15 term sheet continued to propose that both parties would "use reasonable best efforts to seek Antitrust Clearance" and would "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX1269 (Altria) at 006-07). "[I]f necessary to obtain Antitrust Clearance," Altria would offer to divest its e-vapor assets, and if those assets were not otherwise transferred to a third party, Altria would contribute such assets to JLI upon receipt of antitrust clearance. (PX1269 (Altria) at 006-07; *see also* Pritzker (JLI) Tr. 868).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 798, Respondents incorporate their response to that Proposed Finding herein.

966. In the same October 15, 2018 term sheet, Altria added language referring to Altria "otherwise exiting the marketing and sale of products in the Field." (PX2147 (JLI) at 008 (redline version showing changes against August 18 term sheet), 024 (clean copy reflecting Altria's edits); *see also* CCFF ¶ 800, above).

Response to Proposed Finding No. 966:

The Proposed Finding is incomplete and misleading without additional context. The October 15 term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1269 (Altria) at 007-08; PX7036 Garnick (Altria) Dep. at 193-94). The October 28 and October 30 term sheets similarly contained this distinction. (PX2503 (JLI) at 008-09 (Oct. 28 term sheet); RX0285 (Altria) at 022-23 (Oct. 30 term sheet)).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1269 (Altria) at 007); *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 023). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution, display, and in-store support"; and providing JLI with access to Altria's "best in class infrastructure (including distribution)." (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

As a result of this distinction between certain services, Altria's counsel added a provision to the term sheet to clarify when the enhanced services could begin. (*See* RFF ¶¶ 1062-67). Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced

services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). The October 28 and October 30 term sheets contained similar language but replaced "contribution" with "Antitrust Clearance." (PX2503 (JLI) at 009; RX0285 (Altria) at 023).

These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before . . . [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 007-08).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 800, Respondents incorporate their response to that Proposed Finding herein.

967. The final term sheet, dated October 31, 2018, continued to require Altria to exit e-cigarettes via contribution or divestiture, and still contained the language referring to Altria "otherwise exiting the marketing and sale of products in the Field." (PX1271 (Altria) at 022-23); *see also* CCFF ¶¶ 826, 828, above).

Response to Proposed Finding No. 967:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the final nonbinding term sheet was circulated on October 30, not October 31. (*See* PX1271 (Altria) at 001).

Second, the October 30 term sheet did not "require Altria to exit e-cigarettes." (CCFF ¶ 967). To the contrary, and like every other term sheet and deal document exchanged by the parties, the October 30 term sheet explicitly *exempted* Altria's existing products from the noncompete, contemplating that they would remain on the market until HSR review of the transaction. (*See* PX1271 (Altria) at 022, 024; *see also* RFF ¶¶ 1049, 1192).

Third, the Proposed Finding's reference to "Altria 'otherwise exiting the marketing and sale of products in the Field'" lacks necessary context. (CCFF ¶ 967). Like the October 15 and October 28 term sheets, the October 30 term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1271 (Altria) at 022-23 (Oct. 30 term sheet); *see also* PX1269 (Altria) at 007-08 (Oct. 15 term sheet); PX2503 (JLI) at 008-09 (Oct. 28 term sheet); PX7036 Garnick (Altria) Dep. at 193-94).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1271 (Altria) at 022-23). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution, display, and in-store support"; and providing JLI with access to Altria's "best in class infrastructure (including distribution)." (PX1271 (Altria) at 023).

As a result of this distinction between certain services, beginning with the October 15 term sheet, Altria's counsel inserted a provision to clarify when the enhanced services could begin. (*See* RFF ¶¶ 1062-67). Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). The October 30 term sheet contained similar language but replaced "contribution" with "Antitrust Clearance." (PX1271 (Altria) at 023).

These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before . . . [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1271 (Altria) at 023).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 826 and 828, Respondents incorporate their responses to those Proposed Findings herein.

2. Altria Indicated That It Might Comply with JLI's Demand by Ceasing to Operate Its E-Cigarette Business

968. During negotiations, several options were discussed regarding how Altria could comply with JLI's demand that it not compete in e-cigarettes. (*See* CCFF ¶¶ 969-86, below). One of the options discussed was that Altria could cease to operate its e-cigarette business. (*See* CCFF ¶¶ 969-86, below). On several occasions, Altria indicated to JLI that it might meet JLI's noncompetition demand by ceasing to operate its e-cigarette business. (*See* CCFF ¶¶ 969-86, below).

Response to Proposed Finding No. 968:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, JLI did not "demand that [Altria] not compete in e-cigarettes." (CCFF ¶ 968). To the contrary, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see, e.g.*, Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49-51). As Pritzker confirmed at trial, the carve-out to the noncompete provision reflected the expectation that Altria would "leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s]." (Pritzker (JLI) Tr. 853). JLI was

"perfectly happy" with this; "[they] were expecting it." (Pritzker (JLI) Tr. 874; *see also* RFF ¶¶ 1189-210).

The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop *new* e-vapor products. (Pritzker (JLI) Tr. 674-75, 821-22; *see also* PX7021 Pritzker (JLI) Dep. at 70, 151-52; PX7025 Burns (JLI) Dep. at 122-23). But this concern did not apply to Altria's existing products, which JLI believed were "terrible," (PX7011 Valani (JLI) IHT at 134), and to which it "attributed no value," (PX7021 Pritzker (JLI) Dep. at 87). JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market prior to HSR approval, and JLI believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 821-23; 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55; PX7035 Masoudi (JLI) Dep. at 73; *see also* RFF ¶¶ 1189-210).

Additionally, JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

Second, Altria and JLI did not discuss that Altria could "cease to operate its e-cigarette business" as "[o]ne of the options" "regarding how Altria could comply with JLI's demand that it not compete in e-cigarettes." (CCFF ¶ 968). As explained above, there was no such demand, and every draft of the term sheets and deal documents exchanged between the parties explicitly

exempted Altria's existing products from the noncompete provision pending HSR review of the transaction. (RFF ¶ 1192).

The parties addressed the treatment of Altria's existing e-vapor products in the event of a transaction through the "Antitrust Clearance Matters" section of each draft term sheet, and these communications were in the context of "what might be allowed or required by the FTC" *after* the contemplated transaction was executed *as part of the HSR review process*. (Pritzker (JLI) Tr. 686; *see also* PX7021 Pritzker (JLI) Dep. at 85-87). There is no evidence whatsoever that Altria and JLI ever discussed Altria taking any action with respect to its existing e-vapor products *prior to the transaction*, or prior to HSR approval of any transaction. (*See* RFF ¶¶ 1189-211).

Finally, Altria never "indicated to JLI that it might meet JLI's noncompetition demand by ceasing to operate its e-cigarette business," (CCFF ¶ 968), and Altria did not discontinue any of its e-vapor products as a condition to its investment in JLI. To the contrary, Altria struck the "cease to operate" provision in the August 9, 2018 draft term sheet, and it never returned to any subsequent draft term sheet, draft deal document, or the final agreement. (RFF ¶ 804). Indeed, Burns does not recall the parties ever discussing "ceasing to operate" after it was removed from the term sheet. (PX7025 Burns (JLI) Dep. at 207-08). And every single witness involved in the negotiations testified that there was no agreement for Altria to pull its e-vapor products in exchange for an investment in JLI. (RFF ¶¶ 1152-61).

Moreover, JLI viewed Altria's October 25 announcements regarding its products as both unexpected and unwelcomed. (Pritzker (JLI) Tr. 874; Valani (JLI) Tr. 944-45; PX7021 Pritzker (JLI) Dep. at 150; *see also* RFF ¶¶ 1008-19). Indeed, the undisputed evidence—both from testimony and contemporaneous documents—demonstrates JLI was "shocked" to learn of Altria's

decision and viewed the letter as a "hostile action towards JUUL." (PX7011 Valani (JLI) IHT at 124-26; *see also, e.g.*, PX2473 (JLI) at 001).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 969-86, Respondents incorporate their responses to those Proposed Findings herein.

969. Peter Gross, JLI's transaction adviser at Goldman Sachs, had discussions directly with Altria's negotiators. (PX7043 (Gross (Goldman Sachs), Dep. at 17); *see also* CCFF ¶¶ 609-13, above).

Response to Proposed Finding No. 969:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Gross ever discussed antitrust matters, the proposed noncompete provision, or the treatment of Altria's existing products in the event of a transaction with Altria's negotiators. (*See* PX7043 Gross (Goldman Sachs) Dep. at 35). To the contrary, as an investment banker, Gross's focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross explained, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 609-13, Respondents incorporate their responses to those Proposed Findings herein.

970. On July 24, 2018, Altria's PWP adviser James Wappler sent an email to Altria CEO Willard, referring to a planned conversation between Willard and JLI adviser Gross. (PX3170 (PWP) at 001; *see also* CCFF ¶ 673, above).

Response to Proposed Finding No. 970:

The Proposed Finding is incomplete and misleading without additional context. As Wappler's email in PX3170 makes clear, and as Complaint Counsel acknowledged in CCFF ¶ 673, Willard and Gross planned to speak about JLI's valuation. (PX3170 (PWP) at 001; *see also* CCFF ¶ 673). There is no evidence that Gross ever discussed antitrust matters, the proposed noncompete

provision, or the treatment of Altria's existing products in the event of a transaction with Altria's negotiators, either on this planned call with Willard or in any other discussion. (*See* PX7043 Gross (Goldman Sachs) Dep. at 35).

To the contrary, the purpose of Wappler's email in PX3170 was to send Willard "valuation-related discussion topics" for the call. As an investment banker, Gross's focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross explained, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 673, Respondents incorporate their response to that Proposed Finding herein.

971. On July 27, 2018, Gross told JLI's Pritzker via email that he was "under the impression that [Altria] would just shut down Mark 10." (PX2330 (JLI) at 001). Pritzker understood "Mark 10" to be referring generally to Altria's competitive products, and understood "shut down" to mean the products would be gone and Altria no longer competing. (Pritzker (JLI) Tr. 678-81).

Response to Proposed Finding No. 971:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, despite Complaint Counsel's repeated reliance on this isolated line from Gross's email, it declined to call Gross as a witness in the evidentiary hearing in this matter so that the Court could hear from Gross directly.

Second, Complaint Counsel ignores Gross's deposition testimony explaining that he had not heard from anyone, either at Altria or JLI, that Altria was planning to "shut down" MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, as Pritzker explained at trial, he did not know where Gross had "got[ten] any of these ideas"; no one, including Gross, had ever told Pritzker that Altria would discontinue any products. (Pritzker (JLI) Tr. 796).

Third, Complaint Counsel takes this single line of Gross's email out of context. Gross's email continued: "We don't want them thinking that they will receive any consideration for co[n]tributing it to newco." (PX2330 (JLI) at 001). Gross's focus was on whether Altria would contribute its e-vapor products to JLI in exchange for payment or other consideration from JLI. Gross explained in his deposition that as an investment banker, his focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross testified, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38). Because Gross had "heard . . . that [Altria's e-vapor] products, including MarkTen, were inferior products that had no traction in the market," (PX7043 Gross (Goldman Sachs) Dep. at 36), "[w]hat [he] wanted to avoid was Altria believing that they could" pay a lower price in exchange for contributing their "inferior product[s]" to JLI, (PX7043 Gross (Goldman Sachs) Dep. at 38, 36). Gross "assumed [Altria] attributed no value to MarkTen." (PX7043 Gross (Goldman Sachs) Dep. at 34).

Fourth, Gross's email must be read in context with Pritzker's response: "I think they may need to sell it." (PX2330 (JLI) at 001). As Pritzker explained at trial, "by 'sell it,' what [he] was referring to was divestiture, . . . selling the product to another company so that those products would remain in the market." (Pritzker (JLI) Tr. 680). This is consistent with Pritzker's expectation that "the FTC would require a divestiture and that the product would then stay in the market with a different ownership," and that Altria should be obligated to cooperate with the FTC in that regard. (Pritzker (JLI) Tr. 681; *see also* Pritzker (JLI) Tr. 797 ("I didn't understand where [Gross] was coming from with this notion of receiving consideration for contributing, because, as I testified, the company didn't want them. . . . [M]y response was, as I testified, I assumed from

the beginning that divestiture was going to be the appropriate thing and that which the FTC would be likely to require or be the right thing in any event."); *see also* RFF ¶¶ 1208-14).

Finally, Complaint Counsel takes Pritzker's testimony out of context regarding his understanding of "shut down" compared to divesting the products. The cited testimony comes from the following exchange with the Court, where Pritzker made clear that he believed the FTC would likely require Altria to divest its existing products so they could remain in the market:

> JUDGE CHAPPELL: Hold that question for a second. Sir, the Goldman Sachs vice chairman says "shut down Mark 10." In your reply, you say, "sell it."
>
> THE WITNESS: Yes.
>
> JUDGE CHAPPELL: What was the difference to you? One is shut down and one is sell, which obviously are two different things.
>
> THE WITNESS: For sure. Your Honor, we had -- we had considered what it is that the FTC might require as part of an HSR process, and it was important that Altria -- that both parties would agree to whatever it was that -- that the FTC would require. And by "sell it," what I was referring to was divestiture, divesting the product. In other words, as I understood it, selling -- selling the product to another company so that those products would remain in the market.
>
> JUDGE CHAPPELL: So just to be clear, when you sent this reply, in your mind, he was saying shut it down, meaning it's gone; it won't be competing.
>
> THE WITNESS: Right. Correct.
>
> JUDGE CHAPPELL: And you say "sell it," meaning it still exists and it's out there competing, if necessary?
>
> THE WITNESS: Yeah, what I meant -- yes, yes.

(Pritzker (JLI) Tr. 680-81).

972. JLI's Pritzker testified that prior to Gross's July 27, 2018 email, there must have been conversations about what would happen to Altria's existing e-cigarette products if JLI insisted on a non-compete. (PX7021 (Pritzker (JLI), Dep. at 82-83)).

Response to Proposed Finding No. 972:

The Proposed Finding is incomplete and misleading without additional context. *First*, to the extent Complaint Counsel insinuates that any such "conversations" prior to Gross's July 27

email involved discussions of Altria pulling any products as a precondition of the transaction, there is no evidence whatsoever to support this theory. To the contrary, Gross testified in his deposition that he had not heard from anyone, either at Altria or JLI, that Altria was planning to "shut down" MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, Pritzker explained at trial that no one, including Gross, had ever told Pritzker that Altria would discontinue any products. (Pritzker (JLI) Tr. 796).

Second, Pritzker testified that prior to Gross's email, there must have been either "conversations . . . or terms in a term sheet" about what would happen to Altria's existing products following a transaction if the agreement contained a noncompete provision. (PX7021 Pritzker (JLI) Dep. at 82). Indeed, Gross's July 27 email appears to be Gross's reactions to draft terms, including a term providing for Altria to contribute its existing products to JLI. (*See* PX2330 (JLI) at 001). But as Pritzker explained, "I don't think Peter was very conversant with the conversations we were having. His . . . involvement was not very deep. So what he thought and didn't think about the transaction . . . did not necessarily reflect what was top-of-mind for me." (PX7021 Pritzker (JLI) Dep. at 83). This is consistent with Gross's role in the negotiations: As an investment banker, Gross's focus "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross explained, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38).

973. Pritzker acknowledged that Altria ceasing to operate its e-cigarette business "might have come up as an idea of one thing that they [] might be able to do." (PX7021 (Pritzker (JLI), Dep. at 86); *see also* Pritzker (JLI) Tr. 686 (although he didn't think cease to operate was a "likely candidate," it "might have come up in the course of thinking through various things that might be done with [Altria's] products."). Pritzker never thought that ceasing to operate would be viable, because he assumed that Altria would be required to divest its e-cigarette products. (PX7021 (Pritzker (JLI), Dep. at 86)).

Response to Proposed Finding No. 973:

The Proposed Finding is incomplete and misleading without additional context. As Pritzker testified, discussions relating to Altria's e-vapor products were in the context of "what might be allowed or required by the FTC" as part of the HSR review process. (Pritzker (JLI) Tr. 686; *see also* PX7021 Pritzker (JLI) Dep. at 85-86). In other words, ceasing to operate following HSR review "might have come up as an idea" if it were permitted by the FTC, (PX7021 Pritzker (JLI) Dep. at 85-87), but Pritzker did not "think [it] was a likely candidate" because he expected that the FTC would require Altria to divest before approving the transaction, (Pritzker (JLI) Tr. 686; *see also* PX7021 Pritzker (JLI) Dep. at 85-87). There is no evidence whatsoever that Altria and JLI ever discussed Altria "ceasing to operate its e-cigarette business" *prior to the transaction*, or prior to HSR approval of any transaction.

974. When asked about Gross's comment about being under the impression that Altria would shut down MarkTen, Pritzker testified that "there were all kinds of ideas circulating about how we would deal with a lot of issues, and [Gross] must have pulled that one down." (PX7021 (Pritzker (JLI), Dep. at 83-84)).

Response to Proposed Finding No. 974:

The Proposed Finding is incomplete and misleading without additional context. *First*, despite Complaint Counsel's repeated reliance on this isolated line from Gross's email, it declined to call Gross as a witness in the evidentiary hearing in this matter so that the Court could hear from Gross directly.

Second, Complaint Counsel ignores Gross's deposition testimony explaining that he had not heard from anyone, either at Altria or JLI, that Altria was planning to "shut down" MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, as Pritzker explained at trial, he did not know where Gross had "got[ten] any of these ideas"; no one, including Gross, had ever told Pritzker that Altria would discontinue any products. (Pritzker (JLI) Tr. 796).

Third, Complaint Counsel takes this single line of Gross's email out of context. Gross's email continued: "We don't want them thinking that they will receive any consideration for co[n]tributing it to newco." (PX2330 (JLI) at 001). Gross's focus was on whether Altria would contribute its e-vapor products to JLI in exchange for payment or other consideration from JLI. Gross explained in his deposition that as an investment banker, his focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross testified, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38). Because Gross had "heard . . . that [Altria's e-vapor] products, including MarkTen, were inferior products that had no traction in the market," (PX7043 Gross (Goldman Sachs) Dep. at 36), "[w]hat [he] wanted to avoid was Altria believing that they could" pay a lower price in exchange for contributing their "inferior product[s]" to JLI, (PX7043 Gross (Goldman Sachs) Dep. at 38, 36). Gross "assumed [Altria] attributed no value to MarkTen." (PX7043 Gross (Goldman Sachs) Dep. at 34).

Fourth, Pritzker's full answer to Complaint Counsel's question was: "I don't think Peter was very conversant with the conversations we were having. His -- his, his involvement was not very deep. So what he thought and didn't think about the transaction . . . did not necessarily reflect what was top-of-mind for me. And I think that's reflected in the -- in my short comment back to him. So, you know, at the time, there were all kinds of ideas circulating about how we would deal with a lot of issues, and he must have pulled that one down. But I don't know what he had in mind when he wrote this." (PX7021 Pritzker (JLI) Dep. at 83-84). As Pritzker testified, any discussions about the future of Altria's e-vapor products in the event of a transaction were in the context of "what might be allowed or required by the FTC" *as part of the HSR review process*. (Pritzker

(JLI) Tr. 686; *see also* PX7021 Pritzker (JLI) Dep. at 85-87). There is no evidence whatsoever that Altria and JLI ever discussed Altria shutting down or ceasing to operate its e-vapor business *prior to the transaction*, or prior to HSR approval of any transaction.

Finally, Gross's email must be read in context with Pritzker's response: "I think they may need to sell it." (PX2330 (JLI) at 001). As Pritzker explained at trial, "by 'sell it,' what [he] was referring to was divestiture, . . . selling the product to another company so that those products would remain in the market." (Pritzker (JLI) Tr. 680). This is consistent with Pritzker's expectation that "the FTC would require a divestiture and that the product would then stay in the market with a different ownership," and that Altria should be obligated to cooperate with the FTC in that regard. (Pritzker (JLI) Tr. 681; *see also* Pritzker (JLI) Tr. 797 ("I didn't understand where [Gross] was coming from with this notion of receiving consideration for contributing, because, as I testified, the company didn't want them. . . . [M]y response was, as I testified, I assumed from the beginning that divestiture was going to be the appropriate thing and that which the FTC would be likely to require or be the right thing in any event."); *see also, e.g.*, RFF ¶¶ 1208-14).

975. On July 30, 2018, just three days after Gross wrote that he was under the impression Altria would shut down MarkTen, JLI sent Altria the first term sheet, which included "cease to operate" as one of the three paths by which Altria could exit the e-cigarette business. (PX1300 (Altria) at 005 (Altria copy of term sheet); PX2173 (JLI) at 005 (JLI copy of term sheet); *see also* CCFF ¶ 680, above).

Response to Proposed Finding No. 975:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Despite Complaint Counsel's repeated reliance on this isolated line from Gross's email, it declined to call Gross as a witness in the evidentiary hearing in this matter so that the Court could hear from Gross directly. Complaint Counsel also ignores Gross's deposition testimony explaining that he had not heard from anyone, either at Altria or JLI, that Altria was planning to "shut down" MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, as Pritzker

explained at trial, he did not know where Gross had "got[ten] any of these ideas"; no one, including Gross, had ever told Pritzker that Altria would discontinue any products. (Pritzker (JLI) Tr. 796). Further, Complaint Counsel provides no evidence to support its insinuation that the reference to "cease to operate" in the July 30 term sheet had any connection to Gross's email.

Despite Complaint Counsel's assertion, the July 30 term sheet did not "include[] 'cease to operate' as one of the three paths by which Altria could exit the e-cigarette business." To the contrary, throughout negotiations, JLI believed Altria's existing e-vapor products "would be scrutinized by the FTC" as part of the antitrust clearance process for the transaction, and it intended for Altria "to keep those products on the market" as that process unfolded. (Pritzker (JLI) Tr. 822-23). To that end, the divest/contribute/"cease to operate" provision of the July 30 term sheet proposed a ranked process for the treatment of Altria's existing e-vapor assets *after* the contemplated transaction was executed, *as part of the HSR review process*. (PX1300 (Altria) at 005).

But the provision did not provide three equal "paths" that Altria could select from, (CCFF ¶ 975); it proposed a clearly ranked process beginning with divestiture, and the parties would only move on to the next step in the process if divestiture were "not reasonably practicable." (PX1300 (Altria) at 005; Valani (JLI) Tr. 918 (noting that the provision is "constructed sequentially")). "[T]he prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route" that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918). And in any event, JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12). Notably, the two bullet points immediately below this term state: (1) "Richard

[Altria] and Jack [JLI] would be required to use reasonable best efforts to seek Antitrust Clearance for a period of at least nine months after the Purchase"; and (2) "During the Antitrust Clearance process, Richard [Altria] and Jack [JLI] will cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in Richard's [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005; *see also* RFF ¶ 784).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 680, Respondents incorporate their response to that Proposed Finding herein.

976. In the revised term sheet that Pritzker sent Willard on August 4, 2018, the word "shutdown" was added to the term that reads "Richard [Altria] agrees, for so long as it owns at least 5% of Jack's [JLI'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 described above)." (PX2570 (JLI) at 007; Pritzker (JLI) Tr. 704-06; *see also* CCFF ¶ 694, above).

Response to Proposed Finding No. 976:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel did not ask any Altria witnesses at trial or in depositions whether they discussed this revision with JLI in the August 1 meeting that resulted in the revised August 4 term sheet, and there is no evidence that it was discussed. (RFF ¶ 797). Pritzker testified that the addition of "shutdown" was not a subject of discussion with Altria, and he did not remember why the word was added. (Pritzker (JLI) Tr. 829-30). Based on the process of the revisions, however, Pritzker believed that a lawyer added the word "to make this draft compatible" with the three ranked scenarios in the divest/contribute/"cease to operate" Antitrust Clearance provision. (Pritzker (JLI) Tr. 829-30). The divest/contribute/"cease to operate" provision in the Antitrust Clearance Matters section of the August 4 term sheet remained unchanged from the July 30 term sheet. (PX2570 (JLI) at 005; *see also* RFF ¶¶ 802-03).

Notably, August 4 was the last proposed term sheet to make any reference to "cease to operate" or "shutdown"; those terms did not appear in any subsequent draft term sheet, draft deal document, or the final agreement. (*See* PX1432 (Altria) at 021-22, 024 (Aug. 19 term sheet); PX1269 (Altria) at 006, 008 (Oct. 15 term sheet); PX2503 (JLI) at 027-28, 030 (Oct. 28 term sheet); RX0285 (Altria) at 022, 024 (Oct. 30 term sheet); RX0838 (Altria) at 327-28, 373 (Nov. 15 draft purchase agreement); PX2141 (JLI) at 036-37 (Dec. 20 final purchase agreement); *see also* RFF ¶ 804). Burns testified in his deposition that he does not recall the parties ever discussing "ceasing to operate" after it was removed from the term sheet. (PX7025 Burns (JLI) Dep. at 207-08).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 694, Respondents incorporate their response to that Proposed Finding herein.

977. On August 6, 2018, Altria's Willard and Gifford spoke to JLI's Pritzker and Valani by phone. (PX2312 (JLI); *see also* PX3202 (PWP); CCFF ¶ 702, above).

Response to Proposed Finding No. 977:

Respondents have no specific response except to note that to the extent Complaint Counsel insinuates that the noncompete or the treatment of Altria's existing products in the event of a transaction was discussed on the call, it provides no evidence whatsoever to support this claim. To the contrary, contemporaneous evidence suggests that the call was unrelated to the noncompete: According to notes written by Wappler about the call, Willard "indicated that [Altria] need[ed] to approve any potential sale of Tree in the future (i.e., not a ROFR [right of first refusal]—[Willard] indicated that [Altria] need[ed] to approve any sale transaction). Pritzker said he understood [Willard's] concern and would get back to [Altria] tomorrow." (PX3202 (PWP) at 001).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 702, Respondents incorporate their response to that Proposed Finding herein.

978. Willard's talking points for the August 6, 2018 call with JLI stated: "If we establish this partnership, then we expect that Altria will: [. . .] potentially exit our own vapor business . . . ." (PX1390 (Altria) at 003; *see also* CCFF ¶¶ 698-701, above).

Response to Proposed Finding No. 978:

The Proposed Finding is incomplete and misleading without additional context. *First*, the draft proposed talking points were circulated the day before the call and are therefore not a record of what Willard said on the call with JLI. To the contrary, Willard testified that the proposed talking points included in this document reflected the viewpoints "of the parties who drafted this document"—not Willard or the other principal Altria negotiators—and he could not recall whether specific points "w[ere] ultimately something that we shared on the -- on the phone call." (Willard (Altria) Tr. 1191; *see also* PX7004 Willard (Altria) IHT at 185 ("At this stage, I don't know whether we had a dialogue related to this script or not.")).

Second, regarding the reference that Altria would "potentially exit [its] own vapor business," (CCFF ¶ 978), the term sheets exchanged by the parties on July 30 and August 4 both contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business," (PX1300 (Altria) at 005; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 784). Such divestiture or contribution would amount to Altria eventually "exit[ing]" its e-vapor business, but only after the transaction as part of the FTC review process.

Finally, the Proposed Finding omits the context of the draft talking points, which was unrelated to the noncompete and the treatment of Altria's existing products in the event of a transaction. (PX1390 (Altria) at 003). The purpose of the call was to secure minority protections for Altria against a potential sale of JLI: "[T]here is one point that I wanted to discuss today

because we consider it foundational… and it probably doesn't make sense to negotiate the other terms unless we agree on this particular item"; "The current term sheet assumes that the non-Altria shareholders can sell [JLI] without Altria's approval . . . . That's highly problematic for us." (PX1390 (Altria) at 003 (first ellipsis in original)). Indeed, the full sentence of the quote excerpted by Complaint Counsel makes this context clear: "If we establish this partnership, then we expect that Altria will: accelerate [JLI's] growth, contribute meaningful synergies, potentially exit our own vapor business, and cannibalize our own combustible business – and then could potentially be forced to sell our stake in [JLI] to a 3rd party, at a valuation to a large degree the result of our various contributions to [JLI]." (PX1390 (Altria) at 003).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 698-701, Respondents incorporate their responses to those Proposed Findings herein.

979. When asked about the draft script containing the "potentially exit our own vapor business" language, Willard confirmed that the script indicates that Altria exiting e-cigarettes was one outcome that was being considered. (PX7004 (Willard (Altria), IHT at 184-85)).

Response to Proposed Finding No. 979:

The Proposed Finding is incomplete and misleading without additional context. *First*, Willard's complete testimony in response to Complaint Counsel's question indicates that PX7004 was a draft document identifying potential outcomes that never materialized. Willard testified that he did not "know whether we had a dialogue related to this script or not. But certainly it sounds like from this document that that was one outcome that being considered. But I don't know whether this was ever executed or not. I know that ultimately this deal structure fell apart. So it never came to pass." (PX7004 (Willard) Altria IHT at 185.)

Second, regarding the reference that Altria would "potentially exit [its] own vapor business," (CCFF ¶ 979), the term sheets exchanged by the parties on July 30 and August 4 both contemplated that Altria would divest or contribute its e-vapor business in conjunction with the

HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802). Such divestiture or contribution would amount to Altria eventually "exit[ing]" its e-vapor business, but only after the transaction as part of the FTC review process.

980. Altria's August 5, 2018 draft talking points for Willard's call with JLI also state: "I think you'll agree that Altria has come a long way to accommodate you in this process, including: . . . [Demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.]" (PX1390 (Altria) at 003-04 (brackets in original)).

Response to Proposed Finding No. 980:

The Proposed Finding is incomplete and misleading without additional context. *First*, the draft proposed talking points were circulated the day before the call and are therefore not a record of what Willard said on the call with JLI. To the contrary, Willard testified that the proposed talking points included in this document reflected the viewpoints "of the parties who drafted this document"—not Willard or the other principal Altria negotiators—and he could not recall whether specific points "w[ere] ultimately something that we shared on the -- on the phone call." (Willard (Altria) Tr. 1191; *see also* PX7004 Willard (Altria) IHT at 185 ("At this stage, I don't know whether we had a dialogue related to this script or not.")).

Second, the term sheets exchanged by the parties on July 30 and August 4 both contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802).

981. On August 6, 2018, Garnick circulated his comments to the draft talking points. (PX1304 (Altria) at 003). The version Garnick circulated also included the statement that "[i]f we establish this partnership, then we expect that Altria will: [. . .] potentially exit our own vapor business . . . ." (PX1304 (Altria) at 003).

Response to Proposed Finding No. 981:

The Proposed Finding is incomplete and misleading without additional context. *First*, regarding "potentially exit[ing]" the e-vapor business, (CCFF ¶ 981), the term sheets exchanged by the parties on July 30 and August 4 both contemplated that Altria would divest or contribute its e-vapor business in conjunction with the HSR clearance process if required by the FTC, and otherwise "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005; PX2570 (JLI) at 005-06; *see also* RRFF ¶¶ 680, 684; RFF ¶¶ 772-85, 802). Such divestiture or contribution would amount to Altria eventually "exit[ing]" its e-vapor business, but only after the transaction as part of the FTC review process.

Second, the Proposed Finding omits the context of the draft talking points, which was unrelated to the noncompete and the treatment of Altria's existing products in the event of a transaction. (PX1304 (Altria) at 003). The purpose of the call was to secure minority protections for Altria against a potential sale of JLI: "[T]here is one point that I wanted to discuss today because we consider it foundational… and it probably doesn't make sense to negotiate the other terms unless we agree on this particular item"; "The current term sheet assumes that the non-Altria shareholders can sell [JLI] without Altria's approval . . . . That's unacceptable to us. It is a deal breaker." (PX1304 (Altria) at 003 (first ellipses in original)). Indeed, the full sentence of the quote excerpted by Complaint Counsel makes this context clear: "If we establish this partnership, then we expect that Altria will: accelerate [JLI's] growth, contribute meaningful synergies, potentially exit our own vapor business, and cannibalize our own combustible business – and then could

potentially be forced to sell our stake in [JLI] to a 3rd party, at a valuation to a large degree the result of our various contributions to [JLI]." (PX1304 (Altria) at 003).

982. [redacted]

Response to Proposed Finding No. 982:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel did not depose Weinberg and thus there is no testimony about what he meant by this statement. *Second*, when asked about this document in his deposition, Wappler explained that there was "no plan" to "shut down" Altria's e-vapor business, particularly its existing products, which would be subject to FTC oversight. (PX7028 Wappler (PWP) Dep. at 55-56). Instead, Wappler understood Weinberg to be referencing Altria's development of *new* e-vapor products in the event of a transaction:

> Q. Do you know when Mr. Weinberg referenced shutting down the e-vapor business what he's referencing?
>
> A. I think -- my understanding was that JLI argued or expressed some concerns that, if Altria owned a large stake in Juul or JLI, that they would perhaps use that to Altria's advantage to kind of gain information and leverage those learnings to develop reduced harm products. So Juul had communicated to us that they didn't necessarily want us developing new e-vapor products over time and I think that's what Peter was referencing.
>
> Q. But at this time, it was not necessarily your understanding that Altria would shut down its e-vapor business, correct?
>
> A. Correct.

(PX7028 Wappler (PWP) Dep. at 56).

983. In the October 15, 2018 term sheet that Altria sent to JLI, Altria added language referring to Altria "otherwise exiting the marketing and sale of products in the Field." (PX2147 (JLI) at 008 (redline version showing changes against August 18 term sheet), 024 (clean copy reflecting Altria's edits); Pritzker (JLI) Tr. 726-27).

Response to Proposed Finding No. 983:

The Proposed Finding is incomplete and misleading without additional context, because it omits necessary context regarding the October 15 term sheet's provisions related to enhanced services. (*See* RFF ¶¶ 1062-73). This term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1269 (Altria) at 007-08; PX7036 Garnick (Altria) Dep. at 193-94).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1269 (Altria) at 007-08; *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 022-23). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing and assisting with JLI's "efforts to gain distribution, display, and in-store support." (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

As a result of this distinction between certain services, Altria's counsel added a provision to the term sheet to clarify when the enhanced services could begin. Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when

enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 008). For JLI's part, Pritzker does not recall noticing this language when it was added to the October 15 term sheet, and he does not know why it was added. (Pritzker (JLI) Tr. 872).

984. The full sentence added by Altria in its October 15, 2018 term sheet states: "Services Provided upon earlier of (i) contribution described above or (ii) Richard [Altria] otherwise exiting the marketing and sale of products in the Field." (PX2147 (JLI) at 008 (redline version showing changes against August 18 term sheet), 024 (clean copy reflecting Altria's edits)). The services subject to this are the marketing and distribution services, including inserts and onserts. (PX2147 (JLI) at 008). [redacted] (PX7042 (Danaher (JLI), Dep. at 155 (*in camera*)); PX4408 (Altria) [redacted]) (*in camera*); PX2115 (JLI) (Burns Email to JLI stockholders describing transaction's benefits); PX7011 (Valani (JLI), IHT at 137-39 (testifying that Altria had "a huge customer database [] that they were offering to us that we thought had big benefit to us")).

Response to Proposed Finding No. 984:

The Proposed Finding is incomplete and misleading without additional context. *First*, the Proposed Finding omits necessary context regarding the October 15 term sheet's provisions related to enhanced services. (*See* RFF ¶¶ 1062-73). The October 15 term sheet distinguished between two types of services that Altria could provide to JLI: those that could be provided immediately upon closing the transaction, and those that, because of antitrust considerations, could not be provided so long as Altria and JLI remained competitors in the e-vapor category. (PX1269 (Altria) at 007-08; PX7036 Garnick (Altria) Dep. at 193-94).

The services that could be provided immediately upon closing the transaction included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1269 (Altria) at 007-08; *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 022-23). By contrast, the services that could not be provided while Altria and JLI remained competitors were known as enhanced services. These included assisting with JLI's marketing and assisting with JLI's "efforts

to gain distribution, display, and in-store support." (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

As a result of this distinction between certain services, Altria's counsel added a provision to the term sheet to clarify when the enhanced services could begin. Specifically, the October 15 term sheet proposed that Altria would not provide the enhanced services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). These revisions were added by Altria's counsel "to ensure that [Altria was] protected and in compliance with the antitrust laws before [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria's outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. (*See* PX7036 Garnick (Altria) Dep. at 194; PX1269 (Altria) at 008). For JLI's part, Pritzker does not recall noticing this language when it was added to the October 15 term sheet, and he does not know why it was added. (Pritzker (JLI) Tr. 872).

Second, there is no evidence that the timing of inserts and onserts was important to JLI. Indeed, the record reflects that neither JLI nor Altria was concerned about delaying the start of enhanced services due to a delay in filing for HSR review. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13). It was the regulatory support services, which could be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI. (Pritzker (JLI) Tr. 820; PX7025 Burns (JLI) Dep. at 212). As Pritzker explained, "getting PMTA approval is literally existential for the company. . . . Altria's team was the best in the country, and . . . their willingness to provide services through that team was invaluable." (Pritzker (JLI) Tr. 820; *see also* PX7025 Burns (JLI) Dep. at 212). By contrast, Pritzker viewed the enhanced services as

"valuable services but not the critical service." (Pritzker (JLI) Tr. 871). He "would not have seen [delaying the start of enhanced services] as a problem." It was "important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer [the enhanced] services, but when they started would not have been consequential to [him]." (Pritzker (JLI) Tr. 871-72). Similarly, Willard recalled that JLI wanted Altria's services, but both sides understood that "there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that." (Willard (Altria) Tr. 1213).

[redacted] As of December 19, Altria had already removed its products from the market for independent business reasons. (RFF ¶¶ 1074-92). Following the withdrawal, Altria and JLI were no longer competing in the e-vapor market, (Garnick (Altria) Tr. 1678), which changed when could Altria provide enhanced services, (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria) Dep. at 222-23; PX1734 (Altria) at 001). And, although JLI had not pushed for Altria to accelerate that timeline, (Garnick (Altria) Tr. 1677), Altria and JLI began rethinking the timing of various services to "address the reality" after Altria's unilateral withdrawal, (PX7036 Garnick (Altria) Dep. at 223).

985. [redacted] (PX4408 (Altria) (Dec. 19, 2018 Email from JLI's Robbins) (*in camera*)).

[redacted] (PX4408 (Altria) (Dec. 19, 2018 Email from JLI's Robbins) (*in camera*)). Shortly after closing on the transaction, Altria began providing JLI with enhanced services such as product inserts. (Garnick (Altria) Tr. 1,679; Willard (Altria) Tr. 1,232-33; PX7011 (Valani (JLI), IHT at 182-83)).

Response to Proposed Finding No. 985:

The Proposed Finding is incomplete and misleading without additional context. The record reflects that neither JLI nor Altria was concerned about delaying the start of enhanced services due to a delay in filing for HSR review. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13). It was the regulatory support services, which could be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI. (Pritzker (JLI) Tr. 820; PX7025 Burns (JLI) Dep. at 211-12). As Pritzker explained, "getting PMTA approval is literally existential for the company. . . . Altria's team was the best in the country, and . . . their willingness to provide services through that team was invaluable." (Pritzker (JLI) Tr. 820; *see also* PX7025 Burns (JLI) Dep. at 212). By contrast, Pritzker viewed the enhanced services as "valuable services but not the critical service." (Pritzker (JLI) Tr. 871). He "would not have seen [delaying the start of enhanced services] as a problem." It was "important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer [the enhanced] services, but when they started would not have been consequential to [him]." (Pritzker (JLI) Tr. 871-72). Similarly, Willard recalled that JLI wanted Altria's services, but both sides understood that "there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that." (Willard (Altria) Tr. 1213).

The cited email, which merely shows that Altria and JLI were discussing the timing for inserts and onserts that Altria might provide as part of the services, (PX4408 (Altria) at 001), is not to the contrary. As of December 19, Altria had already removed its products from the market for independent business reasons. (RFF ¶¶ 1074-92). Following the withdrawal, Altria and JLI were no longer competing in the e-vapor market, (Garnick (Altria) Tr. 1678), which changed when Altria could provide enhanced services, (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria)

Dep. at 222-23; PX1734 (Altria) at 001). And, although JLI had not pushed for Altria to accelerate that timeline, (Garnick (Altria) Tr. 1677), Altria and JLI began rethinking the timing of various services to "address the reality" after Altria's unilateral withdrawal, (PX7036 Garnick (Altria) Dep. at 223).

986. Only 10 days later, on October 25, 2018, Altria announced that it was pulling its pod-based e-cigarettes MarkTen Elite and Apex by MarkTen. (PX2022 (JLI) at 002-03 (Altria letter to FDA, as forwarded to JLI); *see also* CCFF ¶ 812, above).

Response to Proposed Finding No. 986:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Altria's October 25, 2018 letter to Commissioner Gottlieb was a response to FDA's September 12 letter demanding manufacturers take prompt action to address youth vaping within 60 days. (PX2022 (JLI) at 003; RX1120 (FDA) at 003). In that October 25 letter, Altria discontinued not only its pod products, but also its nontraditionally flavored cig-a-like products. (PX2022 (JLI) at 002-03). As Altria explained in its letter, although it recognized the "long-term promise of e-vapor products and harm reduction" for "adult smokers to switch from combustible cigarettes," Altria discontinued these products because it did "not want to risk contributing" to the youth issue. (PX2022 (JLI) at 003). As Garnick explained at trial, Altria removed these products because in addition to concerns about youth usage of these types of products, they were "not converting smokers, losing money," not "going anywhere," and "wouldn't get a PMTA." (Garnick (Altria) Tr. 1771; *see also* Garnick (Altria) Tr. 1758 ("[I]t was my immediate response [to the FDA letter] that enough is enough. This is yet another compelling reason to stop selling these products . . . .")).

Second, the evidence shows that there was no connection between the October 15 term sheet and Altria's decision to discontinue its pod-based products and non-traditional flavors. Altria leadership internally decided to take these steps on September 26, 2018. (RFF ¶¶ 938-51).

Contemporaneous documents show that Altria resolved to take these actions regardless of what came of its negotiations with JLI, which had broken down at the end of August. (RFF ¶¶ 878-81). A slide presented by Quigley on September 26 summarized that, "in response to FDA," Altria would "[r]emove Elite & Apex from the Marketplace." (RX1176 (Altria) at 024; *see also* RX0314 (Altria) at 003-04 (October 1 outline for FDA meeting explaining that Altria would discontinue Elite and nontraditional flavored cig-a-likes)). And Altria leadership communicated this decision to its Board on October 4. (PX1010 (Altria) at 002-03; PX7036 Garnick (Altria) Dep. at 242-43). The company only delayed the announcement so it could first discuss its plans with FDA at an October 18 meeting and then time the announcement to coincide with the company's third quarter earnings call on October 25. (RFF ¶¶ 952, 997-1007; *see also* Quigley (Altria) Tr. 2082 (management "didn't think it would be appropriate to announce [the decision] before telling the FDA"); Willard (Altria) Tr. 1238 ("[W]e thought the cleanest way to communicate this set of actions to the investment community was to time it on the same day that we sent the letter to coincide with our earnings call, so if investors had questions, Mr. Gifford and I would be on the phone with them . . . ."); Gifford (Altria) Tr. 2814 (explaining that Altria based the timing of its announcement on considerations related to the timing of "SEC filings")).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 812, Respondents incorporate their response to that Proposed Finding herein.

3. On October 25, 2018, Altria Stopped Selling Its Pod-Based Products MarkTen Elite and Apex, and Its Non-Traditional Flavors of MarkTen Cigalikes

987. On October 25, 2018, Altria informed the FDA (and publicly announced) that it was removing its pod-based products MarkTen Elite and Apex by MarkTen from the market:

> "Based on the publicly available information from FDA and others, we believe that pod-based products significantly contribute to the rise in youth use of e-vapor products. Although we do not believe we have a current issue with youth access to or use of our pod-based products, we do not want to risk contributing to the issue. To avoid such a risk, **we will remove from the market our *MarkTen Elite* and *Apex by MarkTen* pod-based products until we receive a market order from FDA or the youth issue otherwise addressed.**"
>
> (PX2022 (JLI) at 003) (Altria letter to FDA, as forwarded to JLI) (emphasis in original); *see also* CCFF ¶ 812, above).

Response to Proposed Finding No. 987:

The Proposed Finding is incomplete and misleading without additional context. *First*, in response to FDA's September 12 letter demanding manufacturers take prompt action to address youth vaping, Altria discontinued not only its pod products, but also its nontraditionally flavored cig-a-like products. (PX2022 (JLI) at 003). As Altria explained in its letter, although it recognized the "long-term promise of e-vapor products and harm reduction" for "adult smokers to switch from combustible cigarettes," Altria discontinued these products because it did "not want to risk contributing" to the youth issue. (PX2022 (JLI) at 002-03). As Garnick explained at trial, Altria removed these products because in addition to concerns about youth usage of these types of products, they were "not converting smokers, losing money," not "going anywhere," and "wouldn't get a PMTA." (Garnick (Altria) Tr. 1771; *see also* Garnick (Altria) Tr. 1758 ("[I]t was my immediate response [to the FDA letter] that enough is enough. This is yet another compelling reason to stop selling these products . . . .")).

Second, the evidence shows that there was no connection between the October 15 term sheet and Altria's decision to discontinue its pod-based products and non-traditional flavors. Altria

leadership internally decided to take these steps on September 26, 2018. (RFF ¶¶ 938-51). Contemporaneous documents show that Altria resolved to take these actions regardless of what came of its negotiations with JLI, which had broken down at the end of August. (RFF ¶¶ 878-81). A slide presented by Quigley on September 26 summarized that, "in response to FDA," Altria would "[r]emove Elite & Apex from the Marketplace" and withdraw non-traditional flavors of cig-a-likes. (RX1176 (Altria) at 024; *see also* RX0314 (Altria) at 003-04 (Oct. 1 outline for FDA meeting explaining that Altria would discontinue Elite and nontraditionally flavored cig-a-likes)).

[redacted] The company only delayed the announcement so it could first discuss its plans with FDA at an October 18 meeting and then time the announcement to coincide with the company's third quarter earnings call on October 25. (RFF ¶¶ 952, 997-1007; *see also* Quigley (Altria) Tr. 2082 (management "didn't think it would be appropriate to announce [the decision] before telling the FDA"); Willard (Altria) Tr. 1238 ("[W]e thought the cleanest way to communicate this set of actions to the investment community was to time it on the same day that we sent the letter to coincide with our earnings call, so if investors had questions, Mr. Gifford and I would be on the phone with them . . . ."); Gifford (Altria) Tr. 2814 (explaining that Altria based the timing of its announcement on considerations related to the timing of "SEC filings")).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 812, Respondents incorporate their response to that Proposed Finding herein.

988. In its October 25, 2018 letter to the FDA, Altria also announced that it would discontinue sales of its non-traditional flavors of MarkTen cigalikes, leaving only tobacco, menthol, and mint flavors on the market. (PX2022 (JLI) at 002-03 (Altria letter to FDA, as forwarded to JLI)).

Response to Proposed Finding No. 988:

Respondents have no specific response.

4. Altria Discontinued All of Its E-Cigarette Products in December 2018

989. On December 7, 2018, Altria announced the "discontinuation of production and distribution of all *MarkTen* and *Greensmoke* e-vapor products." (PX9080 at 001 (Altria press release) (italics in original); *see also* CCFF ¶ 848, above).

Response to Proposed Finding No. 989:

The Proposed Finding is incomplete and misleading without additional context. Altria announced the discontinuation of not just Nu Mark's e-vapor products, but also Nu Mark's oral nicotine-containing product, Verve. (PX9080 (Altria) at 001; *see also* PX7036 Garnick (Altria) Dep. at 221). Because Verve was not an e-vapor product, it would not have been included in the noncompete under discussion between the parties. (*See* PX7036 Garnick (Altria) Dep. at 221; RFF ¶ 1094).

As the press release explained, Altria's decision was "based upon the current and expected financial performance of these products, coupled with regulatory restrictions that burden Altria's ability to quickly improve these products. The company will refocus its resources on more compelling reduced-risk tobacco product opportunities." (PX9080 (Altria) at 001). Altria decided to stop making these products due to poor market performance and a need for cost savings to fund either the Growth Teams or, if the parties came to an agreement, the JLI investment. (*See* RFF ¶¶ 1074-98).

But Altria did not make this decision in response to any demand from or agreement with JLI, (*see* Gifford (Altria) Tr. 2774, 2843-44)—to the contrary, it was done for "[s]eparate, independent business reasons," (Gifford (Altria) Tr. 2850). As Willard explained, "[Altria was] making hard decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products" because "[it was] not in the business of losing money;

[it was] in the business of making money." (Willard (Altria) Tr. 1460; *see also* Gifford (Altria) Tr. 2841 ("[L]et's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space."); PX7024 Crosthwaite (Altria/JLI) Dep. at 283 (recalling Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform"); PX7031 Willard (Altria) Dep. at 281; *see also* [redacted]). And JLI's principal negotiators did not even notice Altria's announcement—indeed, neither Pritzker nor Valani could recall learning prior to this litigation that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. (RFF ¶¶ 1101-02).

990. On December 7, 2018, Altria stated that it would "begin working with retailers, wholesalers, contract manufacturers and suppliers to ensure an orderly [wind down] process." (PX9080 at 001 (Altria press release); *see also* CCFF ¶ 848, above).

Response to Proposed Finding No. 990:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 848, Respondents incorporate their response to that Proposed Finding herein.

991. In Altria's press release, Willard remarked, "We remain committed to being the leader in providing adult smokers innovative alternative products that reduce risk, including e-vapor," adding, "We do not see a path to leadership with these particular products and believe that now is the time to refocus our resources." (PX9080 at 001 (Altria press release)).

Response to Proposed Finding No. 991:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). There

is thus nothing inconsistent with Altria's December 7, 2018 decision to withdraw its unsuccessful cig-a-like products, which had no path to profitability, and investing in "two pathways" with better prospects for success in the e-vapor industry—developing a leap frog product through the Growth Teams or the potential investment in JLI. (RFF ¶ 1074 (quoting Gifford (Altria) Tr. 2842)).

992. In a December 10, 2018 email, Altria's Senior Director of e-Vapor Product Engineering, Bob Arents, remarked to one of Altria's e-cigarette development partners (Jabil) that Altria's December 7, 2018 announcement "clearly discontinues products already in retail and improvements to same [], but does not rule out development of future e-vapor products and technologies[]." (PX1026 (Altria) at 001).

Response to Proposed Finding No. 992:

Respondents have no specific response.

993. By December 10, 2018, Nu Mark was working with its contract manufacturer to stop production of MarkTen cigalikes and to wind down the associated supply chain. (PX1530 (Altria) (Dec. 10, 2018 Email chain discussing procurement issues)).

Response to Proposed Finding No. 993:

The Proposed Finding is incomplete and misleading without additional context. The email also notes that Altria was continuing to work with contract manufacturers to manufacture parts for exploratory work being conducted by the Growth Teams. (PX1530 (Altria) at 001-02).

994. When Altria's Garnick was asked at trial if Altria's outside counsel ever advised that Altria's course of action in removing its e-cigarette products might give rise to antitrust liability, Altria's counsel objected on privilege grounds and directed Garnick not to answer. (Garnick (Altria) Tr. 1815-16).

Response to Proposed Finding No. 994:

The Proposed Finding, which invites the Court to make an adverse inference on the basis of the invocation of attorney-client privilege, is improper and should be disregarded. Courts have consistently "declined to impose adverse inferences on invocation of the attorney-client privilege." *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH* v. *Dana Corp.*, 383 F.3d 1337, 1345 (Fed. Cir. 2004) (collecting cases). The reasons for this are obvious. The privilege's "purpose is to

encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). "To protect that interest, a client asserting the privilege should not face a negative inference about the substance of the information sought." *Parker* v. *Prudential Ins. Co. of Am.*, 900 F.2d 772, 775 (4th Cir. 1990).

Moreover, the invocation of the privilege was correct. Any advice given by lawyers about potential antitrust liability is classic attorney-client communication that is protected from disclosure.

N. THE TRANSACTION INCLUDED A NON-COMPETE PROHIBITING ALTRIA FROM PARTICIPATING IN THE E-CIGARETTE BUSINESS EXCEPT THROUGH JLI

995. The December 20, 2018 final transaction documents do not include a term requiring Altria to divest or contribute (or cease to operate) its e-cigarette products. (*See* CCFF ¶¶ 862-64, above). By the time the final transaction was executed, Altria had already discontinued the production and distribution of all of its e-cigarette products. (*See* CCFF ¶¶ 848, 858, above). The final transaction documents did include a 6-year non-compete prohibiting Altria and its subsidiaries from any participation in the e-cigarette market, including research and development. (*See* CCFF ¶¶ 998-1001, below). The terms of the non-compete ensured that Altria would only be permitted to continue the wind-down of its e-cigarette business, and that it would not be able to otherwise compete through its existing MarkTen Elite, MarkTen cigalikes, or Green Smoke e-cigarettes. (*See* CCFF ¶¶ 1002-05, below). Because of the non-compete, Altria stopped all research and development work relating to e-cigarettes. (*See* CCFF ¶¶ 1006-15, below).

Response to Proposed Finding No. 995:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Complaint Counsel is incorrect that the final agreement "d[id] not include a term requiring Altria to divest" its e-vapor products." (CCFF ¶ 995). To the contrary, like all of the draft agreements and term sheets, the final Purchase Agreement *did* include a provision requiring Altria to divest its e-vapor assets as needed to obtain HSR approval: "[Altria], to the extent permitted by the applicable Laws . . . shall, and shall cause its Affiliates to, (i) propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect) . . . the sale,

divestiture, license, disposition or hold separate of such assets or businesses of [Altria] or any of its Affiliates . . . in each case, as may be required in order to avoid the entry of any decree, judgment, injunction or other order . . . that would restrain, prevent or delay the Antitrust Conversion." (PX2141 (JLI) at 036 § 4.1(e) (emphasis added); *see also* RRFF ¶ 835 (Nov. 15 draft Purchase Agreement), ¶ 842 (Dec. 5 draft Purchase Agreement)). Similarly, the same section of the final Purchase Agreement, Section 4.1, stated that each party "shall use its reasonable best efforts" to take all necessary actions and do "all things reasonably necessary, proper or advisable" to obtain all necessary clearances "pursuant to all applicable Antitrust Laws, relating to the Antitrust Conversion." (PX2141 (JLI) at 034).

To date, the FTC has never asked Altria to divest or otherwise sell off its e-vapor assets. (Garnick (Altria) Tr. 1784-87; *see also* RX2031 (FTC) at 002). If the FTC had ever made such a request, nothing in the parties' deal would have prevented Altria from complying. (Garnick (Altria) Tr. 1787 (agreeing that the FTC never inquired to see whether Altria could divest "at any time," and "[c]ertainly" nothing would have prevented Altria from complying with an FTC divestiture request after July 2020); *see also* Valani (JLI) Tr. 935 ("I believe that the actual transaction documents still referred to the possibility of divestiture. I believe the term sheets after . . . [Altria discontinued Elite and non-traditional cig-a-like flavors in response to FDA's letter] still talk about divestment. I think, indeed, the assets that are there today could still be divested.")).

Second, regarding the noncompete and carve-out, the Proposed Finding is incomplete and misleading. (CCFF ¶ 995). Consistent with JLI's concern that those services would provide Altria with access to proprietary information about JUUL, the final Relationship Agreement included a noncompete provision: Altria agreed "not to, directly or indirectly[,] . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" while the service

agreement remained in effect. (PX1276 (JLI) at 025 § 3.1(a)). Consistent with the term sheets, however, the noncompete provision included a carve-out permitting Altria to "engage in the business relating to [its MarkTen, MarkTen Elite, and Green Smoke brands] . . . as such business is presently conducted," pending HSR approval. (PX1276 (JLI) at 026 § 3.1(a); Willard (Altria) Tr. 1194-95).

The noncompete provision was limited to Altria's activities in "the e-Vapor Business," and therefore did not limit Altria's ability to market other inhalable alternatives such as IQOS and oral alternatives such as the On! product. (*See* PX1276 (JLI) at 025 § 3.1(a); Willard (Altria) Tr. 1195; Gifford (Altria) Tr. 2709-10).

Additionally, the term for the noncompete in the final Relationship Agreement was specifically tied to the length of the Services Agreement. (PX1276 (JLI) at 025 § 3.1(a) (noting the noncompete provision terminates at "the termination or expiration of the Term (as set forth in the Services Agreement)")). Because the Services Agreement provided for a six-year initial term length, that meant both the Services Agreement and the noncompete provision were set to expire on December 20, 2024, unless extended by the parties. (*See* PX1275 (JLI) at 005, 014 (defining the "Initial Discretionary Termination Date" for the Services Agreement as "the date that is the sixth (6^{th}) anniversary of the date hereof"); PX1276 (JLI) at 025).

Further, it is not correct that "[t]he terms of the non-compete ensured that Altria would only be permitted to continue the wind-down of its e-cigarette business, and that it would not be able to otherwise compete through its existing MarkTen Elite, MarkTen cigalikes, or Green Smoke e-cigarettes." (CCFF ¶ 995). To the contrary, the language permitting Altria to engage in business related to its e-vapor products "as such business is presently conducted" was included in every draft of the deal documents the parties exchanged, starting with the November 15 initial draft

Relationship Agreement. (RFF ¶¶ 1107, 1109; Garnick (Altria) Tr. 1781-83 (explaining that the phrase "as such business is presently conducted" did not change between November 15 draft and the December 20 final agreement)).

Valani testified that he did not know where the "as such business is presently conducted" language came from. (PX7011 Valani (JLI) IHT at 140). As of November 15, however, Altria's business was selling MarkTen cig-a-likes in traditional flavors. Thus, at the time the language was added into the document, this provision would have unquestionably permitted Altria to keep MarkTen cig-a-like on the market through the antitrust review process with the FTC. (Garnick (Altria) Tr. 1782; Gifford (Altria) Tr. 2831).

And even after Altria withdrew its products, Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84). JLI understood this language to mean that both MarkTen cig-a-like and Elite were exempted from the noncompete provision prior to HSR approval: Pritzker's understanding was that even though Altria had announced that it was withdrawing its e-vapor products from the market, it could have put these products "back on the market if [it] wished." (Pritzker (JLI) Tr. 879).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 848, 858, 862-64, and 998-1015, Respondents incorporate their responses to those Proposed Findings herein.

996. Even though Altria had discontinued its e-cigarette products prior to the December 20, 2018 close of the transaction, JLI still wanted Altria to commit to a non-compete as part of the transaction. (Pritzker (JLI) Tr. 752-53). JLI did not want Altria to develop or buy other e-vapor products after the transaction. (Pritzker (JLI) Tr. 752-53).

Response to Proposed Finding No. 996:

The Proposed Finding is incomplete and misleading without additional context. As JLI witnesses repeatedly testified, the noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop *new* e-vapor products—it

did not prevent Altria from competing with its existing products pending HSR review. (Pritzker (JLI) Tr. 674-75, 821-23, 874; *see also* PX7021 Pritzker (JLI) Dep. at 70, 151-52; PX7025 Burns (JLI) Dep. at 122-23). To the contrary, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). Indeed, JLI thought Altria's existing products were "terrible," (PX7011 Valani (JLI) IHT at 134), and it "attributed no value" to them, (PX7021 Pritzker (JLI) Dep. at 87). JLI was simply not concerned with MarkTen cig-a-like and MarkTen Elite remaining in the market. (Pritzker (JLI) Tr. 821-23; 874-75; PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; *see also* PX7035 Masoudi (JLI) Dep. at 55-56; PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-202).

Thus, the fact that the final agreement contained a noncompete is entirely consistent with JLI's reason for seeking the noncompete in the first place: to protect its proprietary information from Altria using it to develop new products. (Pritzker (JLI) Tr. 674-75, 821-23, 874; *see also* PX7021 Pritzker (JLI) Dep. at 70, 151-52; PX7025 Burns (JLI) Dep. at 122-23). Altria's unilateral decision to withdraw Nu Mark's existing products had no effect on JLI's concern—those products were already exempted from the proposed noncompete pending HSR review. (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192).

997. Pritzker explained that if the transaction "involved Altria's receiving proprietary information about Juul and its products and its technology, then the concern is they could develop other products or even release once again MarkTen and [] MarkTen Elite back into the market. So there were still concerns about competition that I think were ultimately reflected in the [final deal] documentation." (PX7021 (Pritzker (JLI), Dep. at 150-51)).

Response to Proposed Finding No. 997:

Respondents have no specific response except to note that Pritzker's testimony on this point continued: "Q. And was part of your concern about what Altria would be able to do in the e-cigarette market in the future? A. Only to the extent that they had proprietary information from Juul. Otherwise, I had no concern about what they were going to do in the e-cigarette market in the future. It didn't bother me at all." (PX7021 Pritzker (JLI) Dep. at 151-52).

998. The final executed transaction documents include a non-compete barring Altria from participating in all aspects of the e-cigarette business, including R&D, for an initial term of 6 years. (PX1276 (Altria) at 025-27 (Dec. 20, 2018 Relationship Agreement); PX1275 (Altria) at 005, 014 (Dec. 20, 2018 Services Agreement)).

Response to Proposed Finding No. 998:

The Proposed Finding is incomplete and misleading without additional context. *First*, the noncompete runs for an initial six-year term concurrent with the Services Agreement because providing services granted Altria employees access to JLI's confidential information. (RFF ¶¶ 1129, 1243-46). As Valani testified, it would put JLI in a "precarious position" if Altria "[was] developing products" while it had access to the JLI product and technology roadmap and while JLI was "even slightly reliant on [Altria] for provision of services." (PX7032 Valani (JLI) Dep. at 54). Accordingly, the term of the noncompete provision is tied to the pendency of the Services Agreement; once the Services Agreement expires, the noncompete does as well. (RFF ¶ 1129; *see also* RRFF ¶¶ 995, 999).

Second, the noncompete section of the Relationship Agreement included an exception for Altria's "Green Smoke, MarkTen (or Solaris, which is the non-U.S. equivalent brand of MarkTen) and MarkTen Elite brands, in each case, as such business is presently conducted," pending HSR review. (PX1276 (JLI) at 026 § 3.1(a)). This language exempting Altria's existing products from the noncompete dates back to the initial draft deal documents exchanged between the parties on

November 15, 2018. (RFF ¶¶ 1107, 1109). Valani testified that he did not know where the "as such business is presently conducted" language came from. (PX7011 Valani (JLI) IHT at 140). As of November 15, however, Altria's business was selling MarkTen cig-a-likes in traditional flavors. Thus, at the time the language was added into the document, this provision would have unquestionably permitted Altria to keep MarkTen cig-a-like on the market through the antitrust review process with the FTC. (Garnick (Altria) Tr. 1782; Gifford (Altria) Tr. 2831).

And even after Altria withdrew its products, Garnick explained that Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84). Accordingly, JLI understood the carve-out to mean that both MarkTen cig-a-like and Elite were exempted from the noncompete provision prior to HSR approval: Pritzker's understanding was that even though Altria had announced that it was withdrawing its e-vapor products from the market, it could have put these products "back on the market if [it] wished." (Pritzker (JLI) Tr. 879).

999. The non-compete is indefinitely extendable by three-year increments if not terminated by either party. (PX1276 (Altria) at 025-27 (Dec. 20, 2018 Relationship Agreement); PX1275 (Altria) at 005, 014 (Dec. 20, 2018 Services Agreement) (defining "Discretionary Termination Date" as including "every third anniversary" after the initial six-year term)).

Response to Proposed Finding No. 999:

The Proposed Finding is incomplete and misleading without additional context. The Services Agreement is extendable by three-year increments, (PX1275 (JLI) at 005, 014), which similarly extends the noncompete provision while the Services Agreement remains in effect, (PX1276 (JLI) at 025-26). The term of the noncompete is tied to the term of the Services Agreement because providing services granted Altria employees access to JLI's confidential information. (RFF ¶¶ 1129, 1243-46). As Valani testified, it would put JLI in a "precarious position" if Altria "[was] developing products" while it had access to the JLI product and

technology roadmap and while JLI was "even slightly reliant on [Altria] for provision of services." (PX7032 Valani (JLI) Dep. at 54).

1000. The non-compete "commits [Altria] to conduct e-vapor operations exclusively through [JLI]." (PX1181 (Altria) at 067 (Dec. 2018 slide deck on Project Tree)).

Response to Proposed Finding No. 1000:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The language quoted by Complaint Counsel is a summary of selected proposed terms, not a comprehensive accounting of the agreed-upon terms. (*See* PX1181 (Altria) at 067 (showing a bulleted list of "Project Tree selected transaction terms" in a Board deck). Rather, the undisputed record demonstrates that not only did the parties' agreement explicitly permit Altria to compete against JLI with Nu Mark's existing products after the transaction pending the FTC's review and approval, (Pritzker (JLI) Tr. 821-23; *see also* RFF ¶ 1192), but that this was the outcome JLI expected, (*see* Pritzker (JLI) Tr. 821-23, 853, 874; PX7032 Valani (JLI) Dep. at 49, 51). JLI's request for a noncompete was "subject to complete and total regulatory sanction." (Valani (JLI) Tr. 934). It was "extremely . . . important to [JLI] that [Altria] used the appropriate means" to achieve that outcome "per regulatory sanction." (Valani (JLI) Tr. 911-12; *see also* PX7032 Valani (JLI) Dep. at 51 (noting that the "entire intent behind" the Antitrust Clearance Matters section of the term sheet was "to make sure that all of these efforts . . . were blessed by the regulator")).

JLI witnesses repeatedly testified that JLI was simply not concerned with Altria's existing products remaining in the market after the transaction, and it believed it was important for the FTC to review the transaction and decide what should happen with these products. (Pritzker (JLI) Tr. 874-75; PX7032 Valani (JLI) Dep. at 49 (noting that the treatment of Altria's existing products after the transaction would be "subject, of course, to the sanction of the regulator" as part of the

FTC review process); PX7021 Pritzker (JLI) Dep. at 151-52, 154-55, 163-64; PX7035 Masoudi (JLI) Dep. at 73; *see also* PX7011 Valani (JLI) IHT at 134-35; RFF ¶¶ 1189-210).

1001. The non-compete prohibits Altria from engaging in the following activities directly or indirectly:

> [Altria] shall not, and shall cause its Subsidiaries and controlled Affiliates not to, directly or indirectly: (1) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business; (2) take actions with the purpose of preparing to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities; or (3) Beneficially Own any equity interest in any Person, other than an aggregate of not more than four and nine-tenths percent (4.9%) of the equity interests of any Person which is publicly listed on a national stock exchange, that engages directly or indirectly in the e-Vapor Business . . . (all such actions set forth in clauses (1) through (3), to "**Compete**" or "**Competition**").
>
> (PX1276 (Altria) at 025-26 (Dec. 20, 2018 Relationship Agreement) (emphasis in original)).

Response to Proposed Finding No. 1001:

The Proposed Finding is incomplete and misleading without additional context. Consistent with the term sheets, the next sentence of the noncompete provision quoted by Complaint Counsel above included a carve-out permitting Altria to "engage in the business relating to [its existing e-vapor products] . . . as such business is presently conducted," pending HSR approval. (PX1276 (JLI) at 026 § 3.1(a); Willard (Altria) Tr. 1194-95).

Respondents further note that the noncompete provision was limited to Altria's activities in "the e-Vapor Business," and therefore did not limit Altria's ability to market other inhalable alternatives such as IQOS and oral alternatives such as the On! product. (*See* PX1276 (JLI) at 025 § 3.1(a); Willard (Altria) Tr. 1195; Gifford (Altria) Tr. 2709-10).

Additionally, the term for the noncompete in the final Relationship Agreement was specifically tied to the length of the Services Agreement. (PX1276 (JLI) at 025 § 3.1(a) (Relationship Agreement) (noting the noncompete provision terminates at "the termination or expiration of the term (as set forth in the Services Agreement)")). Because the Services Agreement

provided for a six-year initial term length, that meant both the Services Agreement and the noncompete provision were set to expire on December 20, 2024, unless extended by the parties. (*See* PX1275 (JLI) at 005, 014 (Services Agreement) (defining the "Initial Discretionary Termination Date" for the Services Agreement as "the date that is the sixth (6^{th}) anniversary of the date hereof"); PX1276 (JLI) at 025).

Although Altria had withdrawn MarkTen and MarkTen Elite from the market by this time, Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84). JLI believed that the final agreement's carve-out provision permitted Altria to bring back the products it had withdrawn from the market, (Pritzker (JLI) Tr. 879), which was permitted under the Deeming Rule because the products had been on the market as of August 8, 2016, (Murillo (Altria/JLI) Tr. 3022).

1. The Non-Compete Ensured That Altria Could Not Compete through Its MarkTen Elite and MarkTen E-Cigarettes

1002. The non-compete in the final executed transaction documents includes a provision that: "Notwithstanding the foregoing [prohibition of competition], (x) [Altria] and its Subsidiaries and Controlled Affiliates may engage in the business relating to (I) its Green Smoke, MarkTen [] and MarkTen Elite brands, in each case, as such business is presently conducted . . . ." (PX1276 (Altria) at 026 (Dec. 20, 2018 Relationship Agreement)).

Response to Proposed Finding No. 1002:

Respondents have no specific response.

1003. By the time the transaction was executed, Altria was not "presently conducting" any business relating to MarkTen Elite, which Altria had removed from the market in late October 2018. (Gifford (Altria) Tr. 2,876-77; PX9114 at 002 (Altria 2018 third-quarter press release) at 002); PX2022 (JLI) at 002-03 (JLI copy of Altria's October 25, 2018 letter to FDA)).

Response to Proposed Finding No. 1003:

The Proposed Finding is incomplete and misleading without additional context. JLI did not understand the "as such business is presently conducted" language in the draft and final deal

documents to prevent Altria from selling any of Nu Mark's e-vapor products. To the contrary, JLI understood the carve-out to mean that both MarkTen cig-a-like and Elite were exempted from the noncompete provision prior to HSR approval: Pritzker's understanding was that even though Altria had announced that it was withdrawing its e-vapor products from the market, it could have put these products "back on the market if [it] wished." (Pritzker (JLI) Tr. 879). Indeed, Garnick explained that even after Altria withdrew its products, Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84).

1004. By the time the transaction was executed, Altria had announced the discontinuation of MarkTen and Green Smoke cigalikes, was no longer distributing them to retailers, and was no longer selling them online. (Willard (Altria) Tr. 1,274; Gifford (Altria) Tr. 2,876-77; PX9080 at 001 (Altria press release); (PX2459 (JLI copy of Altria Email to MarkTen customers)). The only business being "presently conducted" with respect to MarkTen and Green Smoke e-cigarettes was for retailers to sell through any remaining inventory. (*See* PX9080 at 001 (Altria press release)).

Response to Proposed Finding No. 1004:

The Proposed Finding is incomplete and misleading without additional context. The carve-out from the noncompete permitting Altria to engage in business related to its e-vapor products "as such business is presently conducted" was included in every draft of the deal documents the parties exchanged, starting with the November 15 initial draft Relationship Agreement. (*See* PX2182 (JLI) at 385 (Nov. 15 draft agreement); Garnick (Altria) Tr. 1781-83 (explaining that the phrase "as such business is presently conducted" did not change between November 15 draft and the December 20 final agreement); RFF ¶¶ 1106-10; RRFF ¶ 835).

Valani testified that he did not know where the "as such business is presently conducted" language came from. (PX7011 Valani (JLI) IHT at 140). As of November 15, however, Altria's business was selling MarkTen cig-a-likes in traditional flavors. Thus, at the time the language was added into the document, this provision would have unquestionably permitted Altria to keep

MarkTen cig-a-like on the market through the antitrust review process with the FTC. (Garnick (Altria) Tr. 1782; Gifford (Altria) Tr. 2831).

And even after Altria withdrew its products, Garnick explained that Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84). Accordingly, JLI understood the carve-out to mean that both MarkTen cig-a-like and Elite were exempted from the noncompete provision prior to HSR approval: Pritzker's understanding was that even though Altria had announced that it was withdrawing its e-vapor products from the market, it could have put these products "back on the market if [it] wished." (Pritzker (JLI) Tr. 879).

1005. At the time the transaction was executed, Altria was already winding down its Nu Mark subsidiary. (Gifford (Altria) Tr. 2,876-77; PX9080 at 001 (Altria press release)).

Response to Proposed Finding No. 1005:

Respondents have no specific response except to note that Altria wound down its Nu Mark subsidiary in conjunction with its pivot to the Growth Teams. (*See* RFF ¶¶ 898-916, 950-51, 960-70, 1074-75).

2. Altria Discontinued All Research and Development Relating to E-Cigarettes, Including Collaborations with Third Parties

1006. On December 10, 2018, Altria's General Counsel Garnick sent an internal email stating that with the JLI deal, there will be no e-vapor research, product integrity work, or competitive analysis relating to e-cigarettes. (PX1265 (Altria) at 001).

Response to Proposed Finding No. 1006:

The Proposed Finding is incomplete and misleading without context. Garnick's email was requesting a draft regulatory "restructuring plan," to help the finance department determine where Altria could make budget cuts. (PX1265 (Altria) at 001). The email requests that the plan describe what would happen "[a]ssuming we do Tree," meaning assuming Altria did a transaction with JLI.

(PX1265 (Altria) at 001). Whether that would happen was still unclear. (PX7000 Garnick (Altria) IHT at 148). As Garnick testified:

> Either that money would be used to fund the growth teams or that money would be used to pay the interest on the loan to pay for the JUUL transaction. And we had -- the upper management did not want to announce JUUL, if the transaction happened, without at the same time announcing productivity cuts to pay for the interest for JUUL in order to reassure investors that we had a way to pay for the interest for JUUL, which means that before JUUL was completed, we had to be prepared for, generally speaking, what productivity cuts we were prepared to make in case the transaction with JUUL closed[.]

(PX7000 Garnick (Altria) IHT at 148; *see also* RFF ¶¶ 1074-76).

1007. Altria's Richard Jupe testified that the terms of the JLI transaction required Altria to immediately stop doing work in e-cigarettes. (PX7016 (Jupe (Altria), Dep. at 284)).

Response to Proposed Finding No. 1007:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Jupe also qualified that he "d[id]n't remember the exact words in the deal." (PX7016 Jupe (Altria) Dep. at 284). As Complaint Counsel notes elsewhere, the terms of the transaction did not require an "immediate" stop, but rather gave Altria 60 days to wind down its e-vapor work. (CCFF ¶ 1013; PX1276 (Altria) at 026).

1008. In a December 20, 2018 email, Jupe wrote that "[s]ubsequent to today's announcement [of the JLI transaction], it is important to convene a communications approach for internal and external recipients to ensure a rapid and comprehensive closure to product development work associated with e-vapor." (PX1022 (Altria)). "Internal" recipients referred to Altria team members, and "external" recipients referred to third-party partners. (PX7016 (Jupe (Altria), Dep. at 283-84)).

Response to Proposed Finding No. 1008:

Respondents have no specific response.

1009. [redacted] (PX4531 (Altria) at 002 (*in camera*)).

Response to Proposed Finding No. 1009:

Respondents have no specific response.

1010. Altria disbanded its e-cigarette growth teams upon closing the JLI transaction. (Garnick (Altria) Tr. 1,660; PX7026 (Gardner (Altria), Dep. at 176)). The e-cigarette growth teams were shut down because Altria ceased development work on e-cigarettes due to the JLI transaction. (PX7026 (Gardner (Altria), Dep. at 176)). If the JLI transaction had not occurred, Altria would have continued to fund the e-cigarette growth teams. (Garnick (Altria) Tr. 1,660).

Response to Proposed Finding No. 1010:

Respondents have no specific response except to note that Complaint Counsel did not demonstrate that the Growth Teams would be capable of developing a new product that could be commercialized in the near future. (*See* RFF ¶¶ 1604-11). By the time the Growth Teams were disbanded in December 2018, they "didn't even have a product concept in mind, let alone a leapfrog concept." (Garnick (Altria) Tr. 1661-62; *see also* PX7000 Garnick (Altria) IHT at 132 ("It was a bunch of people in a room saying, okay, think of something.")).

The undisputed evidence shows that it would have taken at least five years before any product developed by the Growth Teams could have received FDA approval and been placed on the market, as the Growth Teams "needed to develop new products, a prototype, to design a product, and then do the necessary studies for a PMTA . . . ." (Garnick (Altria) Tr. 1661-62).

Jupe, who was tasked with overseeing the Growth Teams, also outlined what lay ahead: The Growth Teams would need to finish the "consumer definition phase," then go to the "development phase," where they would engineer the product. (PX7016 Jupe (Altria) Dep. at 340-41). After that, they would go to the "commercial phase," where they would write all the manufacturing specifications, after which they would lock down the design. All of that "product development cycle" would take two years, "if you're lucky." (PX7016 Jupe (Altria) Dep. at 341). And only after design lock could the Growth Teams begin gathering scientific evidence for the

PMTA, which would take approximately two years. Then they would wait during FDA review, which could easily be 18 months. "So [Altria was] five to six years away from a potential product." (PX7016 Jupe (Altria) Dep. at 341; *see also* PX5000 Rothman Report ¶ 132 (stating that the "time horizon [for the Growth Teams was] four to five years")).

Indeed, the Growth Team's assignment was "a huge task for such a small team with everybody who really ha[d] no proven track record[] of innovation and bringing new product[s] into the marketplace." (PX7015 Gogova (Altria) Dep. at 317-19). There was substantial skepticism that the Growth Teams would have been able to design a viable product. As Jupe explained, you cannot "turn" a "knob" and "all of a sudden you're an innovative company." (PX7016 Jupe (Altria) Dep. at 212).

1011. Gifford testified that Altria disbanded the growth teams "as we moved into December" 2018, although he doesn't recall the exact date. (Gifford (Altria) Tr. 2,877).

Response to Proposed Finding No. 1011:

Respondents have no specific response except to note that other witnesses testified that the Growth Teams were not disbanded until December 20, 2018, following Altria's announcement of the JLI transaction. (PX7015 Gogova (Altria) Dep. at 307-08).

1012. [redacted] (PX3210 (PMI) at 002 [redacted]) (*in camera*)); *see also* CCFF ¶¶ 515-22, above).

Response to Proposed Finding No. 1012:

The Proposed Finding is inaccurate. As to PMI, although the noncompete limited Altria's ability to undertake development work and commercialize e-vapor products, (Jupe (Altria) Tr. 2196), [redacted]. Shortly after the JLI transaction was announced, Jupe suggested that

the two sides meet to "(i) develop the schedule for completing identified on-going studies, (ii) identify information that has yet to be communicated that each party would like to have transferred to it[,] . . . and (iii) define the continuing activities of the IP working group." (PX1920 (Altria) at 002). [redacted]

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 515-22, Respondents incorporate their responses to those Proposed Findings herein.

1013. The non-compete between Altria and JLI included a provision stating that Altria could engage in the e-cigarette business "for a period of sixty (60) days commencing on the date of this Agreement, certain research and development activities pursuant to existing agreements with third parties that are in the process of being discontinued . . . ." (PX1276 (Altria) at 026 (Dec. 20, 2018 Relationship Agreement)).

Response to Proposed Finding No. 1013:

Respondents have no specific response.

1014. [redacted] (PX3210 (PMI) at 002 [redacted]) (*in camera*)).

Response to Proposed Finding No. 1014:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. While the noncompete generally prohibited Altria from commercializing new e-vapor products in the United States or engaging in research and development related to e-vapor, (Jupe (Altria) Tr. 2192-94), contrary to the assertion in the cited source, Altria did not state that it [redacted]

[redacted]

1015. Jupe could not think of any third-party development agreements relating to e-cigarettes that remained in place after the JLI transaction closed. (PX7016 (Jupe (Altria), Dep. at 285)).

Response to Proposed Finding No. 1015:

Respondents have no specific response.

O. OTHER MARKET PARTICIPANTS WERE SURPRISED AT ALTRIA'S EXIT

1016. Ordinary course documents and testimony from market participants, demonstrate that market participants were surprised by Altria's exit from the closed-system e-cigarette market. (*See* CCFF ¶¶ 1017-27, below).

Response to Proposed Finding No. 1016:

Respondents have no specific response except to dispute any implication that such surprise indicates that Altria's reasons for exiting the e-vapor market were pretextual. Other market participants lacked personal knowledge of the financial, commercial, or regulatory challenges facing Nu Mark's products. (*See, e.g.*, PX7012 Eldridge (ITG) Dep. at 158-60; PX7019 Crozier (Sheetz) Dep. at 88-89). In addition, many industry participants expressed low opinions of Nu Mark's products prior to their discontinuation. (RFF ¶¶ 478-85, 1020-25, 1099-100).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1017-27, Respondents incorporate their responses to those Proposed Findings herein.

1017. Martin King of PMI testified that Altria's decision to exit the sale and development of e-cigarettes did not make sense to him because "investors and others were adamant that companies like PMI and Altria address the e-cigarette space and have some way to compete and make sure that they're not being disrupted, and it would have been, I think, unusual for a major tobacco company at the time not to have some initiative or way to deal with the growth of e-cigarettes." (King (PMI) Tr. 2379-80).

Response to Proposed Finding No. 1017:

The Proposed Finding is incomplete and misleading without additional context. Altria's choice to discontinue Nu Mark products is not inconsistent with having "some way to compete." (King (PMI) Tr. 2380). As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). These were the "two pathways" Altria was pursuing—the Growth Teams ("organic product development") or a JLI investment ("acquisitions")—when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018. (Gifford (Altria) Tr. 2842; RFF ¶ 1074). Indeed, immediately prior to the cited testimony, King explained that there "was a great deal of effort" by tobacco companies "to have products that could compete," including "some mergers and acquisition type activity of e-cigarette companies." (King (PMI) Tr. 2379).

1018. Huckabee of Reynolds testified that he was "very surprised" by Altria's announcement that it would withdraw its MarkTen products because "Altria had committed a great deal of resources to the marketing and distribution of MarkTen product, and the brand features very prominently in its activities certainly from a marketing standpoint, throughout the industry, and at retail. So the removal of the products comprised a substantial strategic shift." (Huckabee (Reynolds) Tr. 391).

Response to Proposed Finding No. 1018:

The Proposed Finding is incomplete and misleading without additional context. Huckabee agreed that [redacted]. And the evidence demonstrates that despite aggressive promotions, Elite had dismal sales, (RFF ¶¶ 431-59), while the market was continuing to shift away from the cig-a-like format that made up the rest of Nu Mark's products, (RFF ¶¶ 1324-29). Huckabee further testified that Elite and MarkTen cig-a-like were viewed both within Reynolds and by Huckabee himself as "inferior" products. (PX7037 Huckabee (Reynolds)

Dep. at 86-87, 93; Huckabee (Reynolds) Tr. 471-72). Indeed, when Altria discontinued Elite and nontraditional flavors in response to FDA's September 12, 2018 letter, Reynolds' CEO wrote to the British American Tobacco management board that Altria's decision was a "relatively easy call for Altria because they have never had that much success in vapour." (RX1723 (Reynolds) at 001; Huckabee (Reynolds) Tr. 470-72). Huckabee testified that he had no reason to doubt that his CEO was "being accurate in his views as he reported them to the BAT management board" in this contemporaneous email. (Huckabee (Reynolds) Tr. 472). Moreover, Huckabee admitted his lack of any personal knowledge of Altria's internal financial, commercial, and regulatory assessments of its Nu Mark products. (PX7037 Huckabee (Reynolds) Dep. at 147-49).

1019. Eldridge of ITG testified that he was "surprised" by Altria's announcement that it would withdraw its MarkTen products because he "heard it was a good product and felt that they had marketing power to drive the business in that space. And when I say 'space,' I meant the e-cigarette space." (PX7012 (Eldridge (ITG), Dep. at 180-81)).

Response to Proposed Finding No. 1019:

The Proposed Finding is incomplete and misleading without additional context. Eldridge agreed that "to be successful in e-vapor, it's not enough just to have the resources of a large tobacco company, you also have to have a product that's attractive to consumers and that can clear the regulatory hurdles." (PX7012 Eldridge (ITG) Dep. at 161). Moreover, Eldridge did not offer any testimony based on his own experience that Elite was a good product. (PX7012 Eldridge (ITG) Dep. at 178). Rather, his testimony was based on what he had "heard" and he admitted that he could not recall specifically who told him Elite was a good product or what specifically they had said. (PX7012 Eldridge (ITG) Dep. at 178-79). Further, he admitted that he had no access to internal scientific or regulatory information regarding Elite's chances of commercial success or FDA approval. (PX7012 Eldridge (ITG) Dep. at 158-60, 220-21).

1020. In an analyst report following Altria's December 7, 2018 announcement, Morgan Stanley expressed surprise that Altria would exit the e-cigarette market given the resources it had

> invested in the category and questioned whether its actions were made in anticipation of a JUUL deal, noting "JUUL has ~75% market share of e-cigs and a potential investment by MO [Altria] could raise anti-trust issues." (PX1293 (Altria) at 121-22 ("However, we are surprised to see the company forgo this business altogether, given the amount of investment it has already put into the category, shifting consumer preferences towards RRPs over the long-term, and a regulatory backdrop that aims to encourage a shift down 'the continuum of risk'. MO's decision to exit e-cigs suggests that it sees better growth prospects elsewhere and could reflect its intent to focus its efforts on IQOS (once it receives PMTA approval) and we question if it is related to a potential JUUL investment (note that JUUL has ~75% market share of e-cigs and a potential investment by MO could raise anti-trust issues).")).

Response to Proposed Finding No. 1020:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Morgan Stanley had any personal knowledge of Altria's internal financial, commercial, and regulatory assessments of its Nu Mark products. To the contrary, the cited document states that Morgan Stanley "ha[s] no knowledge of a potential deal and neither company has commented." (PX1293 (Altria) at 122).

Moreover, Altria's choice to discontinue Nu Mark products is not equivalent to "forgo[ing] this [e-vapor] business altogether," (PX1293 (Altria) at 121), as the report surmised. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). These were the "two pathways" Altria was pursuing—the Growth Teams ("organic product development") or a JLI investment ("acquisitions")—when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018. (Gifford (Altria) Tr. 2842; RFF ¶ 1074).

And regardless of the investment Altria had already put into the category, "nothing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis (Altria) Dep. at 63). As a result, notwithstanding Altria's significant investment, Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59

(Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive FDA approval. (RFF ¶¶ 1501-31).

1021. In an analyst report, Wells Fargo expressed surprise at the MarkTen and Green Smoke discontinuation announcement and immediately suspected that a JUUL deal was imminent. (PX1293 (Altria) at 141 ("In a surprise move, MO [Altria] also announced that it is discontinuing production & distribution of all *MarkTen* & *Green Smoke* e-vapor products as well as its newer *VERVE* oral nicotine product line. MO cites poor financial performance outlook & increased regulatory restrictions that will make it difficult to effect 'quick' improvements to the products. MO states that it will 'refocus' resources on 'more compelling' RRP tobacco opportunities, which we have to believe includes iQOS and, increasingly believe, JUUL. We wouldn't be surprised if an announcement to acquire JUUL is imminent and we continue to believe this would be very positive.") (italics in original)).

Response to Proposed Finding No. 1021:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Wells Fargo had any personal knowledge of Altria's internal financial, commercial, and regulatory assessments of its Nu Mark products. To the contrary, the cited document stated that "MO was not available for comment." (PX1293 (Altria) at 141).

Moreover, Wells Fargo analysts' subjective beliefs that the discontinuation of Nu Mark products suggested that Altria's acquisition of JLI was "imminent," (PX1293 (Altria) at 141), has no bearing on whether Altria's stated reasons for discontinuing its Nu Mark products were pretextual: Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive FDA approval. (RFF ¶¶ 1501-31).

1022. On December 7, 2018, Deutsche Bank wrote that 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** (also consistent with recent press coverage)." (PX1293 (Altria) at 098 (emphasis in original)).

Response to Proposed Finding No. 1022:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Deutsche Bank had any personal knowledge of Altria's internal financial, commercial, and regulatory assessments of its Nu Mark products. Deutsche Bank analysts' subjective beliefs that the discontinuation of Nu Mark's products "increas[es] the odds of a potential tie-up with JUUL," (PX1293 (Altria) at 098), has no bearing on whether Altria's stated reasons for discontinuing its Nu Mark products were pretextual: Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive FDA approval. (RFF ¶¶ 1501-31).

1023. On December 7, 2018 following Altria's "discontinuation of its MarkTen/Green Smoke vapor products," Bank of America / Merrill Lynch published a report that stated, "We see this move as clearing the decks for [Altria's] next possible investment in" JLI. (PX1293 (Altria) at 072).

Response to Proposed Finding No. 1023:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Bank of America/Merrill Lynch had any personal knowledge of Altria's internal financial, commercial, and regulatory assessments of its Nu Mark products. Bank of America/Merrill Lynch analysts' subjective beliefs that the discontinuation of Nu Mark's products was to "clear[] the decks" for an investment in JLI, (PX1293 (Altria) at 072), has no bearing on whether Altria's stated reasons for discontinuing its Nu Mark products were pretextual: Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive PMTA approval. (RFF ¶¶ 1501-31).

1024. Cenkos Securities described the discontinuation as a "clearing of the decks of the old attempts at e-vapour," which "seem[ed] to be a fairly clear pointer" towards Altria buying a stake in JLI. (PX1293 (Altria) at 080) ("Two announcements from Altria; one that it is chasing the dream in buying a stake in a Canadian cannabis company; the other that it is closing down its MarkTen, Green Smoke and VERVE businesses. There has been widespread speculation that the company has been pursuing a stake in Juul. The clearing of the decks of the old attempts at e-vapour seems to be a fairly clear pointer towards that announcement being the third to be made, presumably sometime soon.").

Response to Proposed Finding No. 1024:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Cenkos Securities had any personal knowledge of Altria's internal financial, commercial, and regulatory assessments of its Nu Mark products. Even so, the cited report also describes Altria's e-vapor venture as a "failing business[]," and observes that "there is no point in throwing more money at products which are not as good as competitors[']." (PX1293 (Altria) at 080).

Cenkos Securities analysts' subjective beliefs that the discontinuation of Nu Mark's products was a "clear pointer" towards an investment in JLI, (PX1293 (Altria) at 080), has no bearing on whether Altria's stated reasons for discontinuing its Nu Mark products were pretextual: Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive FDA approval. (RFF ¶¶ 1501-31).

1025. Barclays commented that the discontinuation of MarkTen "suggest[s] that Altria might be exploring strategic opportunities in its e-cig business . . . there has recently been heightened speculation around Altria potentially investing in JUUL." (PX1293 (Altria) at 004).

Response to Proposed Finding No. 1025:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Barclays had any personal knowledge of Altria's internal financial, commercial,

and regulatory assessments of its Nu Mark products. And "heightened speculation" by Barclays "around Altria potentially investing in JUUL," (PX1293 (Altria) at 004), has no bearing on whether Altria's stated reasons for discontinuing its Nu Mark products were pretextual: Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive FDA approval. (RFF ¶¶ 1501-31). Indeed, Barclays described the Nu Mark discontinuation in the context of Altria "fix[ing] its problems in e-cigs." (PX1293 (Altria) at 004).

1026. William Kloss, Category Manager for Tobacco and Alcohol products at Wawa, Inc., stated that he was surprised that Altria discontinued MarkTen because of the substantial investments in marketing and displaying MarkTen products that Altria had made. (PX8006 at 004-05 (¶ 18) (Kloss (Wawa), Decl.)).

Response to Proposed Finding No. 1026:

The Proposed Finding is incomplete and misleading without additional context. Regardless of the investment Altria had already put into the category, "nothing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis (Altria) Dep. at 63). As a result, notwithstanding Altria's significant investment, Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive PMTA approval. (RFF ¶¶ 1501-31).

Moreover, Kloss's surprise does not change the fact that, after the transaction, the e-vapor marked has continued to be fiercely competitive: According to Kloss, when Altria and JLI amended their Services Agreement, Altria asked Wawa to stop displaying JUUL products on its shelves and instead display On! pouches. (PX8006 Kloss (Wawa) Decl. at 005 ¶ 21). Instead of

acceding to Altria's request, "Wawa reached out to the leading tobacco companies to renegotiate the allocation of space" at Wawa, and decided to put Vuse products in the top display position. (PX8006 Kloss (Wawa) Decl. at 005 ¶ 22).

1027. When Paul Crozier of Sheetz first heard about Altria's exit from the e-cigarette category on December 7, 2018, he was "surprised they were exiting the category" because Altria had a leadership position in the other tobacco categories, such as combustible cigarettes, smokeless tobacco, and cigars, and Altria's e-cigarettes were also Sheetz's number two product in the category. (Crozier (Sheetz) Tr. 1501-02).

Response to Proposed Finding No. 1027:

The Proposed Finding is incomplete and misleading without additional context. *First*, Crozier admitted that he had no personal knowledge about internal assessments at Altria of the future financial, commercial, or regulatory prospects of Nu Mark products, or why Altria shut down Nu Mark. (Crozier (Sheetz) Tr. 1557-60); *see also* PX7019 Crozier (Sheetz) Dep. at 88-90, 101-02). He did testify, however, that Altria likely removed Elite because "it wasn't selling to their expectations." (PX7019 Crozier (Sheetz) Dep. at 101). And he agreed that "it's unlikely a business limited to cigalikes"—as Nu Mark was in December 2017—"would be a competitive threat." (Crozier (Sheetz) Tr. 1560).

Second, regardless of Altria's leadership position in other tobacco categories, "nothing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis (Altria) Dep. at 63). As a result, despite Altria's success in other categories, Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84). And none of its products were likely to receive PMTA approval. (RFF ¶¶ 1501-31).

Third, discontinuing Nu Mark products is not akin to an exit from the e-cigarette category. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways,"

including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). These were the "two pathways" Altria was pursuing—the Growth Teams ("organic product development") or a JLI investment ("acquisitions")—when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018. (Gifford (Altria) Tr. 2842; RFF ¶ 1074).

P. ALL OTHER MARKET PARTICIPANTS REMAINED COMMITTED TO E-CIGARETTES

1028. Altria's, JLI's, and Third parties' ordinary course documents and their executives' testimony confirm that other market participants remained committed to the closed-system e-cigarette market. (*See* CCFF ¶¶ 1029-33, below).

Response to Proposed Finding No. 1028:

The Proposed Finding is incomplete and misleading without additional context. *First*, other e-vapor companies also pulled products that were commercially unsuccessful, such as: NJOY with its King, PFT, and Loop products, (RFF ¶ 251); ITG with its "Salt of the Earth" line of liquids, which it pulled from the market after a "quick introduction," (RFF ¶ 259); and PMI, which only commercialized first-generation Apex in the UK for a short period of time, understanding that it would not be commercially successful in that form, (RFF ¶¶ 1522-23).

Second, a company may remain in an industry where it has a reasonable [redacted]. By contrast, Nu Mark lost money every year it was in business and was projected to continue to lose money going forward, (RFF ¶¶ 1077-84).

Finally, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1029-33, Respondents incorporate their responses to those Proposed Findings herein.

1029. According to a November 14, 2018 "Nu Mark Business Update," MarkTen, Vuse, Blu, and Logic all faced substantial share declines in e-cigarettes sold in the MOC channel from Q4 2017 to Q4 2018-to-date as JLI's share rose rapidly: while JLI's share rose from 23.2 percent to 70.9 percent, MarkTen's share fell from 12.4 percent to 5 percent, Vuse's share

fell from 30 percent to 11.5 percent, Blu's share fell from 9 percent to 4.9 percent, and Logic's share fell from 6.8 percent to 2.8 percent. (PX1109 (Altria) at 045-46, 048, 051, 058).

Response to Proposed Finding No. 1029:

The Proposed Finding is incomplete and misleading without additional context. These share declines largely reflected the stagnant nature of those companies' cig-a-like products, and the ability of pod-based products, which at that time was primarily JUUL, to grow the vapor category. (RFF ¶¶ 390 (discussing explosive growth of pods and concomitant decline of cig-a-likes), 1326 (citing RX1217 Murphy Report Fig. IV.2, which shows dramatic shift between cig-a-like and pod shares); *see also* Begley (Altria) Tr. 1070 (explaining that during the early period of growth in pods, it was "primarily JUUL"); PX7014 Baculis (Altria) Dep. at 126 (explaining that JUUL "created [the] category of pod-based products that delivered high nicotine satisfaction")).

Two of the three companies identified in the Proposed Finding—Blu and Vuse—responded by commercializing pod-based products with nicotine salts that had been on the market as of August 2016 and could compete against JUUL. (RFF ¶¶ 243(d), 258(a)). Those companies have had success with their pod-based products with nicotine salts; for example, by September 2020, Vuse Alto was the market leader in device share (with 60% of pod-based device sales) and had grown to 21% of cartridge sales. (RFF ¶¶ 1371-74). By contrast, Logic does not have a pod-based product with nicotine salts and it has struggled; by September 2020, it had less than 1% of device share. (RFF ¶ 1333). Similarly, Nu Mark did not have a pod-based product with nicotine salts, (RFF ¶¶ 628-37), and could not commercialize such a product in the future without first obtaining FDA approval, (RFF ¶¶ 65-67).

1030. Reynolds' Vuse, ITG's Blu, and JTI's Logic all remained in the e-cigarette market. (*See* CCFF ¶¶ 163-87, above); *see also* PX2175 (JLI) at 019 (Email from Tim Danaher, Apr. 17, 2018 attaching a Citi Research analyst note) (noting that "all the large tobacco companies say their e-vapor businesses are loss-making"); PX1733 (Altria) at 005 (E-vapor

Category Review, Mar. 2017) (noting that "[m]ajor manufacturers are still operating at sizable losses")).

Response to Proposed Finding No. 1030:

The Proposed Finding is incomplete and misleading without additional context. A company may remain in an industry where it has a reasonable [redacted]; indeed, the cited Citi Research note stated that it did not expect tobacco companies to turn a profit in e-vapor "immediately." (PX2175 (JLI) at 019). However, Nu Mark lost money each year it was in business and was projected to continue to lose money going forward. (RFF ¶¶ 1077-84).

1031. [redacted] (PX8008 at 011-12 (¶ 21) (Huckabee (Reynolds), Decl.) (*in camera*) ([redacted]).

Response to Proposed Finding No. 1031:

The Proposed Finding is incomplete and misleading without additional context. As Huckabee explained, a [redacted]. Notably, in contrast to Nu Mark, Reynolds has a pod-based product [redacted], and has been taking market share from JLI and in fact is the market leader in device share, (RFF ¶¶ 1371-74).

1032. [redacted] (PX8011 at 007-08 (¶ 35) (Eldridge (ITG), Decl.) (*in camera*) ([redacted]

[redacted] ; *see also* PX7012 (Eldridge (ITG), Dep. at 189)).

Response to Proposed Finding No. 1032:

The Proposed Finding is incomplete and misleading without additional context. In contrast to Nu Mark, ITG has a pod-based product with nicotine salts—the format overwhelmingly preferred by consumers. (RFF ¶¶ 258(a), 1324-37). As Eldridge himself agreed, "to be successful in e-vapor, it's not enough just to have the resources of a large tobacco company, you also have to have a product that's attractive to consumers and that can clear the regulatory hurdles." (PX7012 Eldridge (ITG) Dep. at 161).

Moreover, discontinuing Nu Mark products is not incompatible with Altria [redacted]. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). These were the "two pathways" Altria was pursuing—the Growth Teams ("organic product development") or a JLI investment ("acquisitions")—when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018. (Gifford (Altria) Tr. 2842; RFF ¶ 1074).

1033. [redacted] (Farrell (NJOY) Tr. 336-37).

Response to Proposed Finding No. 1033:

Respondents have no specific response except to note that NJOY discontinued three other products—the Loop, King, and PFT—for independent business reasons and did not file a PMTA for any of those discontinued products. (RFF ¶¶ 251-52).

IX. ALTRIA'S ASSERTED JUSTIFICATIONS FOR DISCONTINUING ITS E-CIGARETTE PRODUCTS ARE PRETEXTUAL AND INCONSISTENT WITH THE EVIDENCE

A. ALTRIA'S CLAIM THAT IT EXITED THE E-CIGARETTE BUSINESS BECAUSE OF FINANCIAL CHALLENGES IS UNSUPPORTED AND PRETEXTUAL

1034. On December 7, 2018, Altria issued a press release announcing the discontinuation of its MarkTen and Green Smoke e-cigarette products and explained that "[t]his decision is based upon the current and expected financial performance of these products . . . ." (PX9080 (Altria) at 001).

Response to Proposed Finding No. 1034:

Respondents have no specific response except to note that the quoted portion of the December 7, 2018 press release is an accurate description of just one of the bases for Altria's decision to discontinue MarkTen and Green Smoke, (RFF ¶¶ 1074-84, 1090-91); the other reason was "regulatory restrictions that burden[ed] Altria's ability to quickly improve these products," (PX9080 (Altria) at 001; *see also* RFF ¶¶ 1085-91).

1035. Ordinary course documents from Altria, JLI, and third-party market participants, along with testimony from executives, show that the claim that Altria left the closed-tank e-cigarette market due to the current and expected financial performance of its e-cigarette products is implausible. (*See* CCFF ¶¶ 1036-162, below).

Response to Proposed Finding No. 1035:

The Proposed Finding is inaccurate and is not supported by the cited proposed findings. The record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that, as stated in the December 7, 2018 press release, Altria discontinued its remaining cig-a-like products because of the current and expected financial performance of those products, as well as regulatory restrictions that meant that Nu Mark could not quickly improve those products. (RFF ¶¶ 1074-91). And, as explained in the responses to the proposed findings in this section, Complaint Counsel's attempt to show otherwise is based on a portrayal of the evidence that is inaccurate, incomplete, and misleading without additional context.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1036-162, Respondents incorporate their responses to those Proposed Findings herein.

1036. On August 14, 2018, Altria's Brian Quigley expressed concerns that Altria executives involved in the JLI transaction presented "only the bad news version of the" MarkTen story, and that "some of the points" in the Board presentation "are flat out incorrect (e.g. mark ten cig a like platform is declining) [MarkTen] is growing volume [and] is the second fastest growing brand in terms of volume behind juul." (PX1008 (Altria) at 001).

Response to Proposed Finding No. 1036:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As Respondents explain in their proposed findings of fact, (RFF ¶ 875), Quigley acknowledges that "ultimately . . . the facts in the deck were accurate," (PX7041 Quigley (Altria) Dep. at 155-56). Quigley's chief complaint in his email was that the deck stated that "mark ten cig a like platform is declining," which he called "incorrect." (Quigley (Altria) Tr. 2061; PX1008 (Altria) at 001). As Quigley has clarified, however, "[r]elative to the overall category, [MarkTen cig-a-like] was underperforming significantly," and—with respect to the objection in his email—a subsequent draft of the deck made clear that the cig-a-like platform was "growing in absolute terms," even if only marginally. (PX7041 Quigley (Altria) Dep. at 157; *see also* Quigley (Altria) Tr. 2061-62 (similar)). Quigley did not raise any concerns regarding the deck's ultimate conclusion that the product could not get FDA approval. (PX1008 (Altria) at 001). And, although he would have preferred to present the information himself, he too would have told the Board the bad news about the Nu Mark business, just as he shared that information with the Altria leadership in June 2018. (Quigley (Altria) Tr. 2066-67; RFF ¶¶ 701-05, 711-16).

1037. [redacted] (Gifford (Altria) Tr. 2889 (*in camera*) (discussing PX4237 (Altria) at 032) (*in camera*)).

Response to Proposed Finding No. 1037:

The Proposed Finding is incomplete and misleading without additional context. [redacted], before Elite was commercialized, (Schwartz (Altria) Tr. 1871), and before cig-a-like's total share of the closed-system e-vapor products fell from 59 percent in January 2018 to 19 percent by December of that year, (RFF ¶ 1325). Nu Mark's financial prospects worsened substantially over the course of the year. The operating company lost $101 million in the first nine months the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003). In that same time frame, Nu Mark's share of the total dollars spent in e-vapor had tumbled from approximately 15 percent to 4.7 percent. (RX1447 (JLI) at 009).

1038. As of March 13, 2021, Altria wrote down its investment in JLI from $12.8 billion to $1.5 billion, a loss of $11.3 billion. (Gifford (Altria) Tr. 2849, 2879-80).

Response to Proposed Finding No. 1038:

Respondents have no specific response to the amount that Altria has written down its investment. To the extent, however, that Complaint Counsel intends to imply that the $11.3 billion write down is evidence that Altria's statement that it withdrew Nu Mark's e-vapor products because of poor financial performance is pretextual, that implication is belied by the evidence.

First, Altria stated that it was concerned not just with Nu Mark's products' current financial performance as of 2018 but also with their "*expected* financial performance." (PX9080 (Altria) at 001 (emphasis added)). Altria's financial projections from early 2018—before Elite was launched—had assumed that cig-a-like volumes would decline but that significant pod sales, driven by Elite, might provide a path to profitability. (PX4012 (Altria) at 009; Begley (Altria) Tr. 1131-32; RFF ¶¶ 392-94). But, by December 2018, with only cig-a-like products left in its

portfolio, Nu Mark "had no chance of achieving [its financial projections]" and would continue to incur losses for the foreseeable future. (Begley (Altria) Tr. 1087-88). Indeed, Altria projected that Nu Mark would suffer another quarter billion dollars in *losses* over the next three years. (PX4232 (Altria) at 013; *see also* [redacted]). By contrast, as of December 2018, Altria expected that JLI would generate $1.5 billion in gross *profits* in the United States in 2019. (PX4234 (Altria) at 018). And Altria's write-downs of its JLI investment, which began in late 2019, were based on unforeseen circumstances, including e-vapor bans in various local and international markets, increased litigation, and lower revenues. (RFF ¶¶ 1143-50).

Second, the comparison Complaint Counsel appears to be inviting is of apples and oranges. [redacted] By contrast, the write-down was based on something called "equity accounting," which calculated the total "value of the investment" over time. (PX7040 Gifford (Altria) Dep. at 14).

1039. Altria has not publicly announced any intention or desire to divest its interest in JLI. (Gifford (Altria) Tr. 2880-81).

Response to Proposed Finding No. 1039:

Respondents have no specific response except to note that, to the extent that Complaint Counsel intends to imply that the $11.3 billion write down is evidence that Altria's statement that it withdrew its e-vapor products because of poor financial performance is pretextual, that implication is belied by the evidence.

First, Altria stated that it was concerned not just with Nu Mark's products' current financial performance as of 2018 but also with their "*expected* financial performance." (PX9080 (Altria) at 001 (emphasis added)). Altria's financial projections from early 2018—before Elite was

launched—had assumed that cig-a-like volumes would decline but that significant pod sales, driven by Elite, might provide a path to profitability. (PX4012 (Altria) at 009; Begley (Altria) Tr. 1131-32; RFF ¶¶ 392-94). But, by December 2018, with only cig-a-like products left in its portfolio, Nu Mark "had no chance of achieving [its financial projections]" and would continue to incur losses for the foreseeable future. (Begley (Altria) Tr. 1087-88). Indeed, Altria projected that Nu Mark would suffer another quarter billion dollars in *losses* over the next three years. (PX4232 (Altria) at 013; *see also* [redacted]). By contrast, as of December 2018, [redacted] And Altria's write-downs of its JLI investment, which began in late 2019, were based on unforeseen circumstances, including e-vapor bans in various local and international markets, increased litigation, and lower revenues. (RFF ¶¶ 1143-50).

Second, the comparison Complaint Counsel appears to be inviting is of apples and oranges. [redacted]. By contrast, the write-down was based on something called "equity accounting," which calculated the total "value of the investment" over time. (PX7040 Gifford (Altria) Dep. at 14).

1040. Gifford testified that it is important for Altria to continue to participate in the e-vapor space. (Gifford (Altria) Tr. 2880-81).

Response to Proposed Finding No. 1040:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340). In fact, historically any success Altria has had with potential reduced-risk products has come through

acquisition, rather than internal development. (RFF ¶¶ 168-69). There is thus nothing inconsistent with Altria's December 7, 2018 decision to withdraw its unsuccessful cig-a-like products, which had no path to profitability, and invest in "two pathways" with better prospects for success in the e-vapor industry—developing a leap frog product through the Growth Teams or the potential investment in JLI. (RFF ¶ 1074 (quoting Gifford (Altria) Tr. 2842)).

1. Altria's Discontinuation of Its E-Vapor Business Was Against Its Economic Interest

1041. Firms have economic incentives to invest in segments that are growing rather than shrinking. (PX5000 at 044-45 (¶ 94) (Rothman Expert Report)). Traditional cigarette sales have been declining for years, whereas sales of less harmful nicotine products like e-cigarettes have been increasing. (PX5000 at 044-45 (¶ 94) (Rothman Expert Report)).

Table 3
Projected Compound Annual Growth Rates

	2014–2017	2017–2020
Traditional Cigarettes	-2.2%	-4.5% to -5.0%
E-Vapor	4.4%	26.7%

Note: Compound annual growth rates for 2017–2020 projected as of May 2018.

(PX5000 at 044-45 (¶ 94) (Rothman Expert Report)).

Response to Proposed Finding No. 1041:

Respondents have no specific response except to note that this Proposed Finding's statement that "firms have economic incentives to invest in segments that are growing rather than shrinking" illustrates exactly why, contrary to the section's heading, Altria's discontinuation of its e-vapor business was in its economic interest. The two e-vapor products that Altria discontinued on December 7, 2018, MarkTen and Green Smoke, were both cig-a-likes. That product segment was shrinking rapidly. In early 2016, "cig-a-likes represented more than 90 percent of total e-cigarette cartridge volume." (RX1217 Murphy Report ¶ 80). Two years later, in January 2018,

"this fraction had fallen to about 59 percent." (RX1217 Murphy Report ¶ 80). And shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen "to less than 19 percent." (RX1217 Murphy Report ¶ 80). Thereafter, it declined further still, to just five percent of all cartridge sales as of September 2020 (the end date of available data), with pods-based products capturing the other 95 percent. (RX1217 Murphy Report ¶¶ 41, 62 n.143, Fig. IV.3). By contrast, both of the "two pathways" that Altria was pursuing when it discontinued its cig-a-like products—Growth Teams and a potential JLI transaction—were attempting to capitalize on segments in the e-vapor space with higher growth potential. (RFF ¶¶ 559 (explaining that JLI was growing by 30 percent per month), 903 (explaining that the vision for the Growth Teams was to develop a leapfrog product that would become a "break-through leader" (quoting Willard (Altria) Tr. 1378))).

1042. Altria viewed market leadership in the e-cigarette market as critically important to its long-term success. (*See* CCFF ¶¶ 92-108, 409-544, above).

Response to Proposed Finding No. 1042:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074).

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 92-108 and 409-544, Respondents incorporate their responses to those proposed findings herein.

1043. Altria's Brian Quigley wrote that in mid-August, he "had a discussion with Howard [Willard] this weekend where he agreed it doesn't make sense to close up shop while we build for the future. Hence, the gasket and continuing with PMTA." (PX1008 (Altria) at 001).

Response to Proposed Finding No. 1043:

The Proposed Finding is incomplete and misleading without additional context. The cited email and conversation came on the heels of a discussion amongst Altria executives about whether Nu Mark should pull Elite from the market because was the product "losing money" and did not "have the nicotine [Nu Mark] need[ed]" to convert adult smokers. (PX7041 Quigley (Altria) Dep. at 33-34; *see also* RFF ¶¶ 839-57). Gifford, who posed the question, testified at trial that, at the time he was "really pushing, even on the cigalike, was it worth investing in a space that was greatly declining." (Gifford (Altria) Tr. 2781). In his view, "[f]rom a financial standpoint, you always want to put your resources, because they are limited, both people resources and financial resources, against those areas where you think you can have the biggest bang for those dollars and people resources. And what we were seeing here is that we had significant gaps. Certainly we should invest to get ready for the future, but from this standpoint, what we had in the marketplace wasn't appearing to work." (Gifford (Altria) Tr. 2781-82). Given the continued delays in the profitability projections and Nu Mark's capability gaps, Gifford thought Altria "really needed to assess whether [it] needed to free up those people and financial resources and invest them elsewhere." (Gifford (Altria) Tr. 2782).

And, although Willard initially decided that Altria should stay the course and continue investing in Nu Mark's e-vapor portfolio for the time being, circumstances change. Following receipt of a letter from FDA on September 12, 2018, which demanded that Altria take "prompt action" to address FDA's concerns related to youth vaping, Altria's senior leadership concluded "enough is enough." (Garnick (Altria) Tr. 1756-58). Elite and the non-traditional flavored MarkTen cig-a-like products already were not "converting smokers, they were losing money, and they wouldn't get a PMTA." (Garnick (Altria) Tr. 1756). As a result, Altria decided to remove

these products from the market "in response to FDA." (RX1176 (Altria) at 024; *see also* RFF ¶¶ 938-48). And, although Altria chose to retain its other cig-a-like products at that time, it was already mindful that if it was "going to keep investing," it needed to figure out "how to shrink [costs] to reduce some of the overhead drag on [its] e-vapor or Nu Mark business." (Gifford (Altria) Tr. 2806-07). Three months later, as part of its annual budget process that begins in the fall of each year, Altria decided to pull its remaining cig-a-like products and shut down Nu Mark to "free up resources" to fund the Growth Teams or a potential JLI investment. (PX7010 Gifford (Altria) IHT at 189; *see also* RFF ¶ 1074).

1044. Willard testified that it was Altria's "objective" to attain a leading position in the U.S. e-vapor market. (Willard (Altria) Tr. 1146-47).

Response to Proposed Finding No. 1044:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074).

1045. Altria also has a stated vision to "Responsibly lead the transition of adult smokers to a non-combustible future." (PX9121 (Altria) at 001-02). As part of that vision, Altria publicly committed to "Develop and expand our portfolio of FDA-authorized, non-combustible products and actively convert adult smokers to them." (PX9121 (Altria) at 001-02).

Response to Proposed Finding No. 1045:

The Proposed Finding is incomplete and misleading without additional context. As early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074).

And Nu Mark's e-vapor products did not fulfill the aims set forth in the cited document, namely to secure FDA authorization and "convert adult smokers." To the contrary, the evidence shows that Altria had concluded that Nu Mark's products could not get PMTA approval and were not converting adult smokers. (RFF ¶¶ 676-700, 737-47).

1046. Willard testified that one of the factors that made attaining a leading position in the e-cigarette market a strategic initiative for Altria was that traditional cigarettes were declining while the e-cigarette category was growing. (Willard (Altria) Tr. 1147).

Response to Proposed Finding No. 1046:

The Proposed Finding is incomplete and misleading without additional context. Willard also observed that the cig-a-like segment was "slowly slipping away" while the pod segment was "growing." (Willard (Altria) Tr. 1342). And, as Complaint Counsel's expert emphasized, firms like Altria have "economic incentives to invest in segments that are growing rather than shrinking," (PX5000 Rothman Report ¶ 94), illustrating exactly why, contrary to the section's heading, Altria's discontinuation of its e-vapor business was in its economic interest. The two e-vapor products that Altria discontinued on December 7, 2018, MarkTen and Green Smoke, were both cig-a-likes. That product segment was shrinking rapidly. In early 2016, "cig-a-likes represented more than 90 percent of total e-cigarette cartridge volume." (RX1217 Murphy Report ¶ 80). By January 2018, "this fraction had fallen to about 59 percent," and shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen "to less than 19 percent." (RX1217 Murphy Report ¶ 80). Thereafter, it declined further still, to just five percent of all cartridge sales as of September 2020 (the end date of available data), with pods capturing the other 95 percent. (RX1217 Murphy Report ¶¶ 41, 62 n.143, Fig. IV.3). And both of the "two pathways" that Altria was pursuing when it discontinued its cig-a-like products—Growth Teams and a potential JLI transaction—were attempting to capitalize on segments in the e-vapor space with higher growth potential. (RFF ¶¶ 559 (explaining that JLI was growing by 30 percent per month),

903 (explaining that the vision for the Growth Teams was to develop a leapfrog product that would become a "break-through leader" (quoting Willard (Altria) Tr. 1378))).

1047. Begley testified that Altria saw a long-term opportunity in the e-cigarette category because "there is a significant consumer base that are interested in these products." (PX7022 (Begley (Altria), Dep. at 92-94)).

Response to Proposed Finding No. 1047:

Respondents have no specific response except to note that nicotine satisfaction is the number one requirement for adult smokers, (RFF ¶ 704), and Altria recognized that "cig-a-like products were not going to be of sufficiently deep and broad appeal for smokers to be able to convert large numbers of them," (PX7007 Murillo (Altria/JLI) IHT at 117). As Begley explained, "a lot of smokers were interested in vapor and picked it up and tried it. They just didn't find the products satisfying, and ultimately didn't convert from smoking cigarettes to e-vapor products." (Begley (Altria) Tr. 1030-31).

1048. Pascal Fernandez testified: "If I look at the time periods that, let's say 2017, '16, '18, you know, I was convinced, and I think many of my colleagues were convinced that we needed to compete in the e-vapor category, which is why we, you know, created an innovation company, Nu Mark, which in part was taking care of the e-vapor portion and working really hard at it. And I don't think there was many trends in the market that would tell you that's not a good idea, because we had millions of adult consumers who were using e-vapor product." (PX7023 (Fernandez (Altria), Dep. at 181-82)).

Response to Proposed Finding No. 1048:

Respondents have no specific response except to note that, as early as 2017, Altria stated that it could participate in the e-cigarette space in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074).

1049. King testified that PMI has a similar mission as Altria to transition adult smokers to less harmful products, and that e-cigarettes are a "very important" part of that mission. (King (PMI) Tr. 2371-72.

Response to Proposed Finding No. 1049:

Respondents have no specific response.

1050. King of PMI testified that traditional cigarettes companies, including Altria and Reynolds, reacted to the rapid growth of e-cigarettes by putting in "a great deal of effort . . . to have products that could compete." (King (PMI) Tr. 2379; *see also* PX7048 (Rothman, Trial Dep. at 13)).

Response to Proposed Finding No. 1050:

The Proposed Finding is incomplete and misleading without additional context. As evidenced by the actions of traditional cigarette companies, Altria's two decisions to discontinue Nu Mark's e-vapor products were consistent with putting a "great deal of effort" into competing in e-cigarettes. PMI's conduct is illustrative. [redacted]. And, just as Altria was prepared to remain out of the e-vapor market for five to seven years while the Growth Teams worked on a leapfrog product, (Gifford (Altria) Tr. 2799), PMI lacked a sustained presence in the e-vapor market from 2014, when it acquired e-cigarette technology, until when it began a full-scale commercialization of VEEV, which ultimately began in late 2020, (PX1635 (PMI) at 032; King (PMI) Tr. 2355). And, just as Altria ultimately decided to participate in the e-vapor space through an investment in JLI, (RFF ¶¶ 1126-28), [redacted].

1051. [redacted] (Huckabee (Reynolds) Tr. 416-17 (*in camera*)).

Response to Proposed Finding No. 1051:

The Proposed Finding is incomplete and misleading without additional context. Participants in the e-cigarette industry have never ignored profitability. Numerous industry participants have quickly withdrawn products that did not merit further investment. [redacted] And ITG Brands pulled an e-vapor product called "Salt of the Earth" after a "quick introduction." (RFF ¶ 259 (quoting PX7012 Eldridge (ITG Brands) Dep. at 181)).

And, although companies will sustain short-term losses in the interest of future profitability, their loss tolerance has limits. For example, shortly after statement quoted above, [redacted].

Finally, in contrast to Nu Mark's products, Reynolds is currently on the market with a format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 243, 1324-37). Reynolds has also had market success, including overtaking JUUL as the leader in device share. (RFF ¶ 246).

1052. [redacted] (PX8011 at 007-08 (¶ 35) (Eldridge (ITG), Decl.) (*in camera*); *see also* PX7012 (Eldridge (ITG), Dep. at 189)).

Response to Proposed Finding No. 1052:

The Proposed Finding is incomplete and misleading without additional context. In contrast to Nu Mark's products, ITG Brands is currently on the market with a format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 258-61, 1324-37).

1053. As early as 2016, Altria believed that e-cigarettes represented a "significant longer-term opportunity." (PX7022 (Begley (Altria), Dep. at 92-94 (discussing PX4040 (Altria), at 018 ("Nu Mark 2016-2018 Strategic Plan") ("E-Vapor Category Represents a Significant Longer-Term Opportunity"))).

Response to Proposed Finding No. 1053:

Respondents have no specific response.

1054. In 2016, there were already more adult vapers than adult dippers or adult large mass cigar smokers. (PX7022 (Begley (Altria), Dep. at 92-94 (discussing PX4040 (Altria) at 018 ("Nu Mark 2016-2018 Strategic Plan")))).

Response to Proposed Finding No. 1054:

Respondents have no specific response except to note that the first wave of adult vapers were primarily dual users and many tried and rejected vapor products. (PX1135 (Altria) at 035). As Begley explained at trial, "a lot of smokers were interested in vapor and picked it up and tried it. They just didn't find the products satisfying, and ultimately didn't convert from smoking cigarettes to e-vapor products." (Begley (Altria) Tr. 1030-31). "[T]he whole category changed when JUUL introduced their product to one that was really pod-based and delivered high nicotine satisfaction, and [Altria] had nothing in that space." (PX7014 Baculis (Altria) Dep. at 125).

1055. In the first half of 2017, Altria assessed that the closed tank e-cigarette market was highly attractive because JUUL "was starting to demonstrate some strong growth." (PX7004 (Willard (Altria), IHT at 55-56)).

Response to Proposed Finding No. 1055:

Respondents have no specific response except to note that this Proposed Finding illustrates exactly why, contrary to the section's heading, Altria's discontinuation of its e-vapor business was

in its economic interest. The cited testimony is discussing a slide from a May 2017 presentation that maps out the various product segments in the e-vapor space and categorizes them based on "overall attractiveness." (PX1286 (Altria) at 009). The cig-a-like segment, which then represented over 85 percent of total e-cigarette cartridge volume, (RX1217 Murphy Report ¶ 41, Fig. IV.3), was rated as "Medium" attractiveness, (PX1286 (Altria) at 009). By contrast, the segment labeled "[c]losed tank for adult smoker," which referred to pod-based products like JUUL, was rated as "High" attractiveness. (PX1286 (Altria) at 009; PX7004 Willard (Altria) IHT at 55-56). As Willard explained, Altria analyzed the e-vapor space based on "the attractiveness of [the] various product categories." (PX7004 Willard (Altria) IHT at 54). And features such as the category's "growth rate" and "future profitability," would inform the category's attractiveness. (PX7004 Willard (Altria) IHT at 54-55). Pods were seen as highly attractive because they were "the faster growing" product segment. (PX7004 Willard (Altria) IHT at 56).

And because the pod segment was not "[a]ddressed in [Nu Mark's] portfolio" the slide assessed that "[a]quir[ing]" a product was a strategic priority. (PX1286 (Altria) at 009). In 2017, after Altria was unable to quickly acquire its first and second choice products—JUUL and the device that later became ITG's *my*blu—Altria acquired Elite, which it viewed as "the best of what was available at the time." (Begley (Altria) Tr. 1075; *see also* RFF ¶¶ 305-14, 327). But Elite's sales performance was dismal, (RFF ¶¶ 431-59), and it did not appeal to adult smokers, (RFF ¶¶ 737-54), so Altria ultimately withdrew it in response to FDA's concern about youth issues, (RFF ¶¶ 938-51).

1056. Altria executives testified that they had an obligation to give truthful and accurate information to Altria's investors and board and that they did so. (Willard (Altria) Tr. 1142-43; Gifford (Altria) Tr. 2886 (*in camera*); PX7031 (Willard (Altria), Dep. at 18); PX7035 (Gifford (Altria), Dep. at 41-42, 66); PX7000 (Garnick (Altria), IHT at 14)).

Response to Proposed Finding No. 1056:

Respondents have no specific response except to note that the Gifford deposition is exhibit PX7040, not PX7035.

1057. In November 2017, Altria's former Chairman and CEO, Marty Barrington, told investors "[s]o we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products." (PX9000 (Altria) at 005).

Response to Proposed Finding No. 1057:

Respondents have no specific response except to note that, as Willard explained in the context of discussing the November 2017 Investor Day presentation referenced in the Proposed Finding, while Altria aspired to become the leader in e-vapor, it had not achieved that goal as of November 2017; it was "a distant player." (Willard (Altria) Tr. 1341; *see also* PX7013 Brace (Altria) Dep. at 174-75 (agreeing that "[m]any" of Nu Mark's "aspirations" failed to come true)). Respondents further note that the Investor Day presentation explained that Altria could pursue leadership in e-vapor in "multiple ways," including "through organic product development" and through "acquisitions," (RX0176 (Altria) at 156; RFF ¶ 340), the "two pathways" it was pursuing when it announced the discontinuation of Nu Mark's remaining e-vapor products on December 7, 2018, (RFF ¶ 1074).

1058. In January 2018, Altria's CEO Howard Willard wrote that the upcoming launch of MarkTen Elite "is a big step forward for our plan to compete vigorously for closed tank volume." (PX1647 (Altria) at 003).

Response to Proposed Finding No. 1058:

Respondents have no specific response except to note that, as the proposed finding alludes to, Willard made this statement before Altria launched Elite and, as detailed in Respondents' proposed findings, despite aggressive promotions and wide distribution, Elite's sales were dismal, (RFF ¶¶ 431-459), and Elite's competitors recognized that, without salts, it was a "non-starter,"

(PX2269 (JLI) at 001), and an "inferior" product, (PX8008 Huckabee (Reynolds) Decl. at 025 ¶ 48; *see also* RFF ¶¶ 478-85).

1059. In 2018, the closed-system e-cigarette segment was "growing rapidly" while the decline in the traditional cigarette segment was "noticeably increasing." (Willard (Altria) Tr. 1146; PX7023 (Fernandez (Altria), Dep. at 59 ("In 2018, the evapor category was growing rapidly, to very rapidly."); PX7021 (Pritzker (JLI), Dep. at 49 ("[T]he decline in cigarette revenues in the United States was increasing, noticeably increasing.")).

Response to Proposed Finding No. 1059:

Respondents have no specific response except to note that Pritzker explained that the decline in cigarettes was increasing because "Juul was actually having a serious impact in the marketplace on the cigarette business" which is "what Juul was intended to be doing." (PX7021 Pritzker (JLI) Dep. at 48-49). Unlike Altria's products, JUUL contained the salts necessary for nicotine satisfaction and was "very successful in converting adult smokers." (Gifford (Altria) Tr. 2825-28; *see also* RFF ¶¶ 226-35).

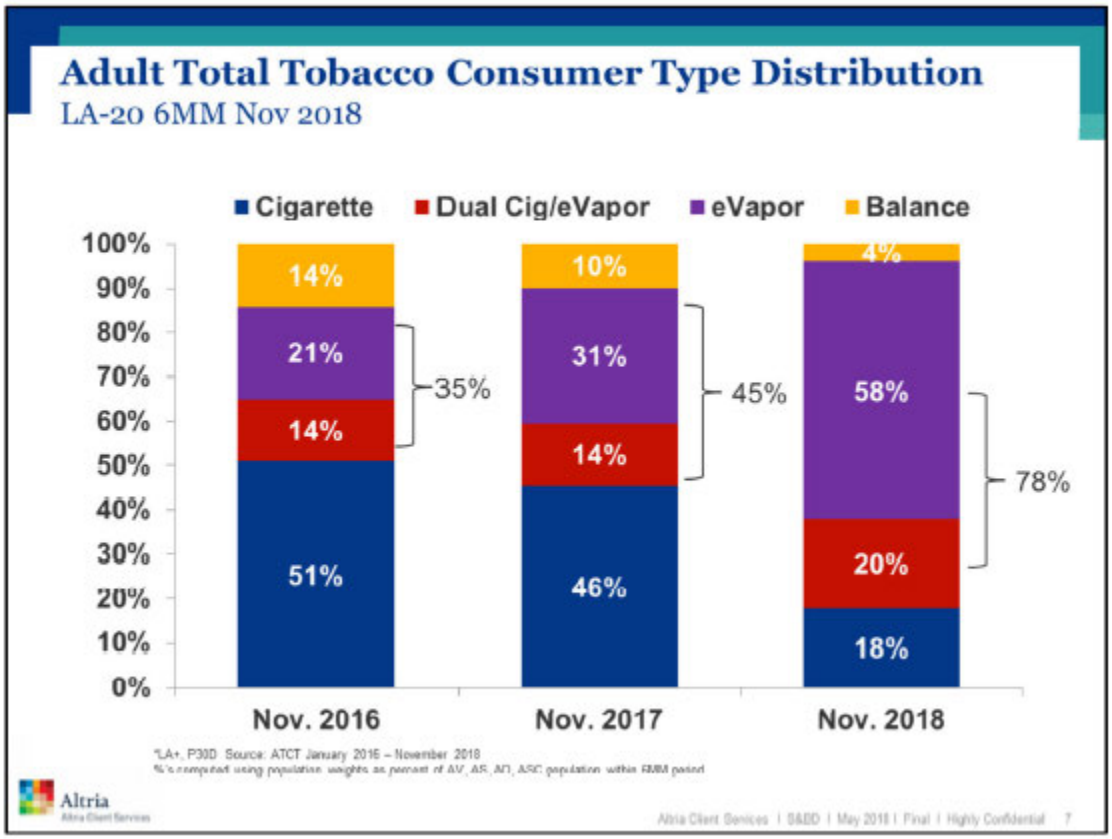
1060. [redacted] (PX1124 (Altria), at 019 (*in camera*); *see also* PX1979 (Altria) at 008-11 [redacted]) (*in camera*)).

Response to Proposed Finding No. 1060:

Respondents have no specific response except to note that [redacted]

1061. A January 2019 presentation prepared by Altria's Consumer & Marketplace Insights Group ("CMI") showed that tobacco users aged between the then-legal minimum to 20 years old were rapidly shifting from traditional cigarettes to e-cigarettes, with 51 percent of tobacco users in that age group using only traditional cigarettes in November 2016 and only 18

percent using only traditional cigarettes in November 2018. (PX4023 (Altria) at 019 (Altria presentation entitled "E-Vapor Business Review," Jan. 8, 2019)).



(PX4023 (Altria) at 019).

Response to Proposed Finding No. 1061:

Respondents have no specific response except to note that Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 57), or in any deposition, and should not be entitled to rely on it to establish anything beyond the words on the page.

1062. In a 2019 interview with the *Wall Street Journal*, Willard stated: "At a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don't invest in the new areas you potentially put your ability to deliver that financial result at risk." (PX1172 (Altria) at 007).

Response to Proposed Finding No. 1062:

Respondents have no specific response except to note that the cited source also observes that "Altria's MarkTen e-cigarettes, launched nationally in 2014, had a look, shape and feel that

mimicked a traditional cigarette, based on Altria's belief that smokers were looking to switch to something that felt familiar. Ultimately sales didn't support that idea." (PX1172 (Altria) at 009). By contrast, sales for JUUL, which "looked nothing like cigarettes," "surged." (PX1172 (Altria) at 009).

1063. [redacted] (PX1443 (Altria) at 009 (*in camera*)).

Response to Proposed Finding No. 1063:

Respondents have no specific response except to note that the [redacted].

2. Altria Was Willing to Sacrifice Short-Term Profits to Succeed in the Closed-System E-Cigarette Market

1064. [redacted] (Willard (Altria) Tr. 1300) (*in camera*)).

Response to Proposed Finding No. 1064:

The Proposed Finding is incomplete and misleading without additional context. Willard's answer continued: [redacted].

Nu Mark's sales and financial data confirm Willard's observation. Explaining data from an August 2018 presentation, Gifford, then-CFO, explained that, based on the sales data through July 2018, it became clear to Altria that aggressive promotions on Elite had not led to the expected

uptick in volume and "there didn't seem to be a pathway of profitability." (Gifford (Altria) Tr. 2786; *see also* PX1011 (Altria) at 009; RFF ¶¶ 431-59). And "things were not going as . . . predicted" with Nu Mark's broader financial projections because volume growth, which "drives profitability" kept "being pushed out" because the products "weren't gaining a consumer following." (Gifford (Altria) Tr. 2727; RX0746 (Altria) at 007). By the fall of 2018, Altria's market analysis showed that "they didn't see any way to improve the business from a unit volume standpoint." (Gifford (Altria) Tr. 2840; PX4232 (Altria) at 013). "And so with that volume and that OCI, [the projections] would show you that there really wasn't a pathway to profitability, and they weren't even forecasting it based on the trends." (Gifford (Altria) Tr. 2840; *see also* RFF ¶¶ 1077-84).

1065. Willard testified that Altria "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341).

Response to Proposed Finding No. 1065:

Respondents have no specific response except to note that this money was invested during a time period when Altria believed that Nu Mark might be able to achieve long-term profitability. But over time that hope faded: Nu Mark lost money every single year, the timeframe for profitability was repeatedly delayed as Nu Mark missed its volume targets and, by 2018, with the e-vapor market frozen by the Deeming Rule, cig-a-likes declining, and Elite failing to generate the anticipated volume growth, it became clear that Nu Mark's losses would continue for the foreseeable future. (RFF ¶¶ 431-59, 1077-84; Gifford (Altria) Tr. 2840).

1066. Craig Schwartz explained that when manufacturers first introduce e-cigarette products they typically "want to incent trial" with "a heavy up in your sales incentives" and Altria's management was aware that "when you are in the heavy up period, you are going to have depressed profits. The objective is that the investment will pay off." (PX7002 (Schwartz (Altria), IHT at 90-91)).

Response to Proposed Finding No. 1066:

Respondents have no specific response except to note that, during the six years Nu Mark was in operation, Altria's substantial investment in e-vapor more generally and aggressive sales incentives specifically showed no signs of paying off. Nu Mark lost money every single year, the timeframe for profitability was repeatedly delayed as Nu Mark missed its volume targets and, by 2018, with the e-vapor market frozen by the Deeming Rule, cig-a-likes declining, and Elite failing to generate the anticipated volume growth, it became clear that Nu Mark's losses would continue for the foreseeable future. (RFF ¶¶ 431-59, 1077-84; Gifford (Altria) Tr. 2840).

1067. [redacted] (Begley (Altria) Tr. 1019-20) (*in camera*)).

Response to Proposed Finding No. 1067:

Respondents have no specific response except to note that by the end of 2018, it was clear that there was no reasonable path to long-term profitability for Nu Mark. Nu Mark lost money every single year, the timeframe for profitability was repeatedly delayed as Nu Mark missed its volume targets and, by 2018, with the e-vapor market frozen by the Deeming Rule, cig-a-likes declining, and Elite failing to generate the anticipated volume growth, it became clear that Nu Mark's losses would continue for the foreseeable future. (RFF ¶¶ 431-59, 1077-84; Gifford (Altria) Tr. 2840).

1068. [redacted] (PX7022 (Begley (Altria), Dep. at 104-05) (*in camera*))).

Response to Proposed Finding No. 1068:

Respondents have no specific response except to note that, as of 2015, Altria had projected Nu Mark to become profitable by 2017, (RFF ¶ 1080(a)), and it ultimately missed that target, (RFF

¶ 1078(d)). In fact, as of fall 2018, Nu Mark was projected to incur losses through at least 2021. (RFF ¶ 1083; PX4232 (Altria) at 013).

1069. In its 2016 three-year strategic plan, Nu Mark estimated that its operating company income for 2016 would be negative $115 million. (PX4040 (Altria) at 012).

Response to Proposed Finding No. 1069:

Respondents have no specific response except to note that this was an increase over the 2015 three-year plan projections, which had anticipated that Nu Mark would lose $72 million in 2016 before turning a profit in 2017. (RX1733 (Altria) at 092). The 2016 three-year plan also predicted substantial losses in 2017 but projected that Nu Mark would break even in 2018. (PX4040 (Altria) at 012). In fact, Nu Mark did not break even in 2018; instead it lost $101 million in the first nine months of the year and it was projected to incur losses through at least 2021. (RFF ¶¶ 1081, 1083; PX4232 (Altria) at 013).

1070. [redacted] (Begley (Altria) Tr. 1019) (*in camera*)).

Response to Proposed Finding No. 1070:

Respondents have no specific response except to note that [redacted]

1071. [redacted] (Begley (Altria) Tr. 1015-19 (*in camera*) (discussing PX4073 (Altria) at 002) (*in camera*)).

Response to Proposed Finding No. 1071:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

1072. [redacted] (Begley (Altria) Tr. 1025 (*in camera*)).

Response to Proposed Finding No. 1072:

Respondents have no specific response except to note that, as of 2015, Altria had expected Nu Mark to become profitable by 2017, (RFF ¶ 1080(a)), and it ultimately missed that target, (RFF ¶ 1078(d)). In fact, as of fall 2018, was on track to incur losses through at least 2021. (RFF ¶ 1083; PX4232 (Altria) at 013).

1073. [redacted] (Gifford (Altria) Tr. 2883-86 (*in camera*)).

Response to Proposed Finding No. 1073:

The Proposed Finding is incomplete and misleading without additional context. Gifford explained that he was willing to make an investment in Nu Mark and lose money over the short term if there was an expectation of long-term profitability. (Gifford (Altria) Tr. 2720). But by mid-2018 Gifford was seeing "significant gaps" in Nu Mark's e-vapor portfolio. (Gifford (Altria) Tr. 2782). And "[c]ertainly [Altria] should invest to get ready for the future, but from this standpoint, what we had in the marketplace wasn't appearing to work." (Gifford (Altria) Tr. 2782). As a result, he started "really pushing, even on the cigalike, was it worth investing in a space that was greatly declining, and we saw the consumer really interested in another space." (Gifford (Altria) Tr. 2781). And ultimately Gifford concluded that Altria should "not lose additional

money" on Nu Mark but instead "look at how we could continue the growth teams and look for ways to participate well into the future in the e-vapor space." (Gifford (Altria) Tr. 2841).

1074. [redacted] (Gifford (Altria) Tr. 2886-87 (discussing PX4236 (Altria) at 022) (*in camera*) [redacted]).

Response to Proposed Finding No. 1074:

Respondents have no specific response except to note that these losses were worse than the 2015 three-year plan projections, which had anticipated that Nu Mark would lose $72 million in 2016 before turning a profit in 2017. (RX1733 (Altria) at 092). [redacted]

1075. [redacted] (Gifford (Altria) Tr. 2888-89 (discussing PX4237 (Altria) at 057) (*in camera*) [redacted]).

Response to Proposed Finding No. 1075:

Respondents have no specific response except to note that, as of 2015, Altria had expected Nu Mark to become profitable by 2017, (RFF ¶ 1080(a)), and it ultimately missed that target, (RFF ¶ 1078(d)). In fact, as of fall 2018, Nu Mark was on track to incur losses through at least 2021. (RFF ¶ 1083; PX4232 (Altria) at 013). In addition, Nu Mark lost $101 million in the first nine months of the year, which was approximately $30 million more than it lost in the prior twelve months. (RFF ¶ 1081).

1076. [redacted] (Gifford (Altria) Tr. 2889 (*in camera*) (discussing PX4237 (Altria) at 032) (*in camera*))).

Response to Proposed Finding No. 1076:

The Proposed Finding is incomplete and misleading without additional context. [redacted], before Elite was commercialized, (Schwartz (Altria) Tr. 1871), and before cig-a-like's total share of the closed-system e-vapor products fell from 59 percent in January 2018 to 19 percent by December of that year, (RFF ¶ 1325). Nu Mark's financial prospects worsened substantially over the course of the year. The operating company lost $101 million, in the first nine months the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003). In that same time frame, Nu Mark's share of the total dollars spent in e-vapor had tumbled from approximately 15 percent to 4.7 percent. (RX1447 (JLI) at 009).

1077. [redacted] (Gifford (Altria) Tr. 2883 (*in camera*)).

Response to Proposed Finding No. 1077:

The Proposed Finding is incomplete and misleading without additional context. Nu Mark did not just lose money from 2015 to 2017; it lost money every single year following its creation in 2012, including $101 million in the first nine months of 2018. (RFF ¶¶ 1078, 1081). [redacted]. The timeframe for profitability was repeatedly delayed as Nu Mark missed its volume targets and, by 2018, with the e-vapor market frozen by the Deeming Rule, cig-a-likes declining, and Elite failing to generate the anticipated volume growth, it became clear that Nu Mark's losses would continue for the foreseeable future. (RFF ¶¶ 431-59, 1077-84; Gifford

(Altria) Tr. 2840). In fact, as of late 2018, Altria expected to lose nearly a quarter billion dollars over the next three years. (RFF ¶ 1083).

1078. [redacted] (Gifford (Altria) Tr. 2890 (*in camera*)).

Response to Proposed Finding No. 1078:

The Proposed Finding is incomplete and misleading without additional context. [redacted] *First*, the timelines are different. Nu Mark was founded in 2012 and sustained substantial losses for six straight years before being shut down at the end of 2018, at which point it was predicting at least three more years of losses. (PX4232 (Altria) at 013). IQOS was first launched in the United States in 2019, (PX3110 (PMI) at 024), meaning that the losses incurred in 2018 were all startup costs.

Second, the regulatory risks are very different. As Gifford testified at trial, [redacted].

Finally, the investment prospects are different. Goldman Sachs's market analysis predicts that global heated tobacco will grow at a faster pace than e-vapor and reports that IQOS heat-not-burn has "exceptionally high conversions rates." (PX3110 (PMI) at 010, 014).

1079. [redacted] (PX7040 (Gifford (Altria), Dep. at 73-74) (*in camera*)).

Response to Proposed Finding No. 1079:

The Proposed Finding is incomplete and misleading without additional context. [redacted] *First*, the timelines are different. Nu Mark was founded in 2012 and sustained substantial losses for six straight years before being shut down at the end of 2018, at which point it was predicting at least three more years of losses. (PX4232 (Altria) at 013). IQOS was first launched in the United States in 2019, (PX3110 (PMI) at 024), meaning that the losses incurred in 2018 were all startup costs.

Second, the regulatory risks are very different. [redacted].

Finally, the investment prospects are different. Goldman Sachs's market analysis predicts that global heated tobacco will grow at a faster pace than e-vapor and reports that IQOS has "exceptionally high conversions rates." (PX3110 (PMI) at 010, 014).

1080. [redacted] (PX7040 (Gifford (Altria), Dep. at 74 (*in camera*)).

Response to Proposed Finding No. 1080:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted].

Moreover, [redacted] *First*, the timelines are different. Nu Mark was founded in 2012 and sustained substantial losses for six straight years before being shut down at the end of 2018, at which point it was predicting at least three more years of losses. (PX4232 (Altria) at 013). IQOS was first launched in the United States in 2019, (PX3110 (PMI) at 024), meaning that the losses incurred in 2018 were all startup costs.

Second, the regulatory risks are very different. [redacted].

Finally, the investment prospects are different. Goldman Sachs's market analysis predicts that global heated tobacco will grow at a faster pace than e-vapor and reports that IQOS has "exceptionally high conversions rates." (PX3110 (PMI) at 010, 014).

1081. [redacted] (PX4238 (Altria), at 013, 022 (*in camera*) [redacted]; *see also* Gifford (Altria) Tr. 2891 (*in camera*) [redacted]).

Response to Proposed Finding No. 1081:

The Proposed Finding is incomplete and misleading without additional context. [redacted] *First*, the timelines are different. Nu Mark was founded in 2012 and sustained substantial losses for six straight years before being shut down at the end of 2018, at which point it was predicting at least

three more years of losses. (PX4232 (Altria) at 013). IQOS was first launched in the United States in 2019, (PX3110 (PMI) at 024), meaning that the losses incurred in 2018 were all startup costs.

Second, the regulatory risks are very different. [redacted].

Finally, the investment prospects are different. Goldman Sachs's market analysis predicts that global heated tobacco will grow at a faster pace than e-vapor and reports that IQOS has "exceptionally high conversions rates." (PX3110 (PMI) at 010, 014).

1082. Altria continues to sell, distribute, and market IQOS in the United States. (Gifford (Altria) Tr. 2709-10, 2717).

Response to Proposed Finding No. 1082:

To the extent Complaint Counsel intends to imply that the continued sale of IQOS is inconsistent with the decision to shut down Nu Mark, the Proposed Finding is incomplete and misleading without additional context. [redacted] *First*, the timelines are different. Nu Mark was founded in 2012 and sustained substantial losses for six straight years before being shut down at the end of 2018, at which point it was predicting at least three more years of losses. (PX4232 (Altria) at 013). IQOS was first launched in the United States in 2019, (PX3110 (PMI) at 024), meaning that the losses incurred in 2018 were all startup costs.

Second, the regulatory risks are very different. [redacted]

[redacted].

Finally, the investment prospects are different. Goldman Sachs's market analysis predicts that global heated tobacco will grow at a faster pace than e-vapor and reports that IQOS has "exceptionally high conversions rates." (PX3110 (PMI) at 010, 014).

3. Altria Expected That Its Closed-System E-Cigarette Products Would Become Profitable

1083. A November 2, 2017, Nu Mark Investor Day presentation prepared for delivery by Jody Begley, included notes prompting Begley to say that he "fully expect[s] Nu Mark to achieve our long-term goal, which is to lead the U.S. e-vapor category through a portfolio of superior reduced risk products . . . that generate cigarette-like margins at scale." (PX1129 (Altria) at 007).

Response to Proposed Finding No. 1083:

The Proposed Finding is incomplete and misleading without additional context. Begley was talking about a "long-term goal" and neither offered a timeline for that goal nor implied that Altria would achieve those margins with its existing products. In addition, as of the time of the cited statement that Altria expected to achieve its long-term goals, Nu Mark had not even launched its pod-based product, Elite, (Schwartz (Altria) Tr. 1871), and thus did not yet know how that product would perform on the market. Knowing whether Elite could be successful is a critical piece of information in assessing Nu Mark's portfolio, as pod-based products came to dominate the market by 2018 and were necessary for any company seeking to compete. (RFF ¶¶ 563-65, 1325). Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-77). The evidence shows that, by the end of

this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of the market and unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). The Growth Teams were a long-term effort; Altria hoped that, if the teams were able to develop a new product, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (RFF ¶¶ 898-916, 1604-11).

1084. On April 18, 2018, Altria's then-CEO Marty Barrington sent an email to Altria's board of directors informing them that Altria was investing in e-cigarettes because "e-vapor and/or other innovative products may increasingly attract cigarette smokers over time" and advised them that "[m]argin in them will build with time, and managing the transition from a core business to an evolving one is what successful companies like ours do." (PX1114 (Altria) at 001-02).

Response to Proposed Finding No. 1084:

The Proposed Finding is incomplete and misleading without additional context. Barrington was discussing developments over "long-term" and neither offered a timeline for that goal nor implied that Altria would achieve those margins with its existing products. Indeed, his comment was not even limited to e-vapor products, he was referring to innovative products more broadly. (PX1114 (Altria) at 001-02).

1085. [redacted]

[redacted]

Response to Proposed Finding No. 1085:

The Proposed Finding is incomplete and misleading without additional context. The cited exhibit assesses income differently than many of the other documents cited by Complaint Counsel. For example, the Nu Mark Three Year Plan from February 2018 refers to Nu Mark's "Adjusted OCI," which includes expenses, and projects negative $70 million in 2018, negative $24 million in 2019, and positive $20 million in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2821-22).

[redacted] Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 10), or in any deposition, so there is no witness testimony explaining what types of income and expenses the cited exhibit is including.

Notably, Nu Mark repeatedly missed financial projections and did worse than originally anticipated. (RFF ¶¶ 392, 1078-80). And by the time that Altria made the decision to shut down Nu Mark, it was anticipating that Nu Mark would lose an addition $235 million over the next three years. (RFF ¶ 1083).

1086. A February 28, 2018, Altria board presentation titled "Nu Mark 2018 Three Year Strategic Plan" projected that Nu Mark's marginal contribution would rise from positive $20 million in 2017 to positive $117 million in 2020 and that Nu Mark's adjusted OCI [Operating Company Income] would rise from negative $71 million in 2017 to positive $20 million in 2020. (PX1113 (Altria) at 010).

Response to Proposed Finding No. 1086:

The Proposed Finding is incomplete and misleading without additional context. *First*, marginal contribution is not an indication of profitability. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to

support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785).

Second, the OCI numbers indicate that Nu Mark was not hitting its projections. (RFF ¶ 392). In the strategic plan prepared in February 2017, Nu Mark had predicted that it would likely lose $33 million in 2018 and then break even in 2019. (RX0746 (Altria) at 007; Gifford (Altria) Tr. 2728). The following year, in February of 2018, Nu Mark was estimating that it would lose $70 million in 2018, followed by a $24 million loss in 2019, before hopefully turning a profit in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2737).

Third, the February 2018 projections were made just as Nu Mark's pod-based product Elite was launched and before Altria knew how Elite would perform on the market. The projections were thus based on assumptions that were disproven over the course of the year. The projections for 2018-2020 assumed that Altria would sell 11 million units of pod products in 2018 and that, by 2019, pod products would account for the majority of its volume, while cig-a-like volume rapidly declined. (PX1113 (Altria) at 009). The plan further assumed that, driven by strong pod sales, Nu Mark's overall sales volume would grow by between 20 to 30 percent year over year. (PX4012 (Altria) at 009; *see also* Gifford (Altria) Tr. 2739 (explaining that the 2018 projections included Nu Mark's hopes that the launch of Elite would bolster the company's financial viability)). But Elite's sales were dismal, (RFF ¶¶ 431-77), and as of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target, (PX1113 (Altria) at 009). In addition, Nu Mark ultimately lost $101 million in the first nine months of the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1087. A February 28, 2018, Altria board presentation titled "Nu Mark 2018 Three Year Strategic Plan" estimated that MarkTen Elite's marginal contribution would be around 48 percent in 2019, compared to actual 2017 Marlboro traditional cigarette margins of 62 percent and actual 2017 Nu Mark[MarkTen] cigalike margins of 30 percent. (PX1113 (Altria) at 031).

Response to Proposed Finding No. 1087:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The February 2018 projections were made just as Nu Mark's pod-based product Elite was launched and before Altria knew how Elite would perform on the market. The projections were thus based on assumptions about market conditions that were disproven over the course of the year. For example, the estimated margin for Elite assumed a "Wholesale List Price of $5.62 for Pod pack and $13.69 for device. 2019 sales incentives 30%." (PX1113 (Altria) at 031). But once Elite was launched, Nu Mark was forced to offer steep discounts to try to incent trial, offering a $30-value for just $8.99, (RFF ¶¶ 424-25), which was a 70 percent markdown, not to mention the $10 off coupons that brought the purchase price down to $0, (RFF ¶ 427), meaning 100 percent off. In addition, had Altria kept its products in the market, aggressive competition from competitors such as NJOY and Reynolds—[redacted]—would have forced Altria to maintain these steep discounts.

4. Nu Mark's Financial Performance Was Improving

1088. [redacted] (Begley (Altria) Tr. 1017 (discussing PX4073 (Altria), at 002 [redacted])) (*in camera*)).

Response to Proposed Finding No. 1088:

The Proposed Finding is incomplete and misleading without additional context. Whatever the change from the previous year, Nu Mark still lost $118 million in 2016. (RFF ¶ 284; RX0746 (Altria) at 007). And this represents a *greater* loss than Nu Mark had anticipated the prior year, in

February 2015, when it projected that Nu Mark would lose $72 million in 2016. (RX1733 (Altria) at 092).

1089. [redacted] (Begley (Altria) Tr. 1018 (discussing PX4073 (Altria) at 002 [redacted])) (*in camera*)).

Response to Proposed Finding No. 1089:

The Proposed Finding is incomplete and misleading without additional context. The e-vapor market was fundamentally different in 2016 than it was in 2018 when Altria made its investment in JLI, and thus Nu Mark's share in 2016 says nothing about Nu Mark's ability to be competitive in the relevant time period. In 2016 the e-vapor industry was composed primarily of cig-a-likes, (RFF ¶ 281), making share in that year a poor indicator of how Nu Mark would perform in an industry that quickly began shifting towards pods, (RFF ¶ 565). Moreover, the e-vapor category in 2016 was shrinking: E-vapor industry volume declined by nine percent in 2016, (RX0746 (Altria) at 008), and the number of adult vapers declined by 21 percent, (RX0746 (Altria) at 010). By contrast, the market grew by nearly 12 percent in 2017, driven by a 660 percent increase in sales of pods, which surpassed cig-a-likes in market share by the end of the year, (PX4012 (Altria) at 014; RFF ¶ 565), and have since grown to 95 percent of e-cigarette cartridge volume, (RFF ¶ 1325).

Notably, although Nu Mark was growing in absolute terms in 2016, it was not "getting the volume [growth] that was predicted," (Gifford (Altria) Tr. 2728), and thus was not hitting its financial projections. Despite its market share, Nu Mark lost $118 million in 2016, (RFF ¶ 284; RX0746 (Altria) at 007), nearly $50 million more than the annual loss Nu Mark had projected when it prepared its 2015 strategic plan, (RX1733 (Altria) at 092).

1090. [redacted] (Begley (Altria) Tr. 1018 (discussing PX4073 (Altria) at 002 ([redacted])) (*in camera*)).

Response to Proposed Finding No. 1090:

The Proposed Finding is incomplete and misleading without additional context. The e-vapor market was fundamentally different in 2016 than it was in 2018 when Altria made its investment in JLI, and thus Nu Mark's share in 2016 says nothing about Nu Mark's ability to be competitive in the relevant time period. In 2016 the e-vapor industry was composed primarily of cig-a-likes, (RFF ¶ 281), making share in that year a poor indicator of how Nu Mark would perform in an industry that quickly began shifting towards pods, (RFF ¶ 565). Moreover, the e-vapor category in 2016 was shrinking: E-vapor industry volume declined by nine percent in 2016, (RX0746 (Altria) at 008), and the number of adult vapers declined by 21 percent, (RX0746 (Altria) at 010). By contrast, the market grew by nearly 12 percent in 2017, driven by a 660 percent increase in sales of pods, which surpassed cig-a-likes in market share by the end of the year, (PX4012 (Altria) at 014; RFF ¶ 565), and have since grown to 95 percent of e-cigarette cartridge volume, (RFF ¶ 1325).

Notably, although Nu Mark was growing in absolute terms in 2016, it was not "getting the volume [growth] that was predicted," (Gifford (Altria) Tr. 2728), and thus was not hitting its financial projections. Despite its market share, Nu Mark lost $118 million in 2016, (RFF ¶ 284; RX0746 (Altria) at 007), nearly $50 million more than the annual loss Nu Mark had projected when it prepared its 2015 strategic plan, (RX1733 (Altria) at 092).

1091. [redacted] (Begley (Altria) Tr. 1021-22 (discussing PX4042 (Altria), at 006 ([redacted]) (*in camera*)).

Response to Proposed Finding No. 1091:

The Proposed Finding is incomplete and misleading without additional context. *First*, the Proposed Finding disregards that Nu Mark was losing momentum. Indeed, [redacted].

Second, although e-vapor sales increased in absolute terms during 2017, that growth was driven by the shift to pod-based products; cig-a-like volume declined by 3 percent, a contraction of some 5.8 million units. (PX4012 (Altria) at 014; RFF ¶ 390). At the time, Nu Mark only had cig-a-like products. (RFF ¶ 277).

Third, Nu Mark was continuing to incur substantial financial losses—$71 million in 2017—all while failing to achieve the projected volume growth. (RFF ¶¶ 391-92).

1092. [redacted] (Begley (Altria) Tr. 1023 (discussing PX4042 (Altria) at 018) (*in camera*)).

Response to Proposed Finding No. 1092:

The Proposed Finding is incomplete and misleading without additional context. *First*, the Proposed Finding disregards that Nu Mark was losing momentum, whereas JUUL was growing quite rapidly over 2017. (RFF ¶ 342). Indeed, at the time, Nu Mark only had cig-a-like products, (RFF ¶ 277), and cig-a-like volume declined by 3 percent over 2017, a contraction of some 5.8 million units, while sales of pod-based devices increased by over 650 percent, a growth of over 30 million units. (PX4012 (Altria) at 014; RFF ¶ 390). In the midst of this, JUUL, the catalyst for

much of pods' growth, exploded from less than ten percent of the e-vapor category to approximately 30 percent. (PX4012 (Altria) at 015).

Second, Nu Mark was missing its projections. [redacted]. And Nu Mark was continuing to incur substantial financial losses—$71 million in 2017—all while failing to achieve the projected volume growth. (RFF ¶¶ 391-92).

1093. [redacted] (Begley (Altria) Tr. 1024-25 (discussing PX4042 (Altria) at 018 ([redacted])) (*in camera*)).

Response to Proposed Finding No. 1093:

The Proposed Finding is incomplete and misleading without additional context. *First*, whatever the change from the previous year, [redacted]. *Second*, Nu Mark was continuing to miss the financial targets set in its annual three-year plans. In the strategic plan prepared at the start of 2017, Nu Mark had predicted that it would likely lose $33 million in 2018 and then break even in 2019. (RX0746 at 007; Gifford (Altria) Tr. 2728). Based on Nu Mark's performance in 2017, by February of 2018, Nu Mark was estimating that it would lose $70 million again in 2018, followed by a $24 million loss in 2019, before hopefully turning a profit in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2737). But even those projections of a profit in 2020 assumed "substantial volume growth in the cigalike form"; "without [that] growth," Altria was "going to continue to lose $70 million a year on the cigalike platform." (PX7022 Begley (Altria) Dep. at 225). And that assumption proved wrong; cig-a-like volume actually declined. (RX1217 Murphy Report ¶ 115, Fig. VI.3).

1094. [redacted] (Begley (Altria) Tr. 1025 (discussing PX4042 (Altria) at 018 ([redacted])) (*in camera*)).

Response to Proposed Finding No. 1094:

The Proposed Finding is incomplete and misleading without additional context. *First,* although Nu Mark met some of its goals, it missed others. For example, the cited memo notes that [redacted].

Second, Nu Mark still was not meeting its long-term targets. In the strategic plan prepared at the start of 2017, Nu Mark had predicted that it would likely lose $33 million in 2018 and then break even in 2019. (RX0746 at 007; Gifford (Altria) Tr. 2728). Based on Nu Mark's performance in 2017, by February of 2018, Nu Mark was estimating that it would lose $70 million again in 2018, followed by a $24 million loss in 2019, before hopefully turning a profit in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2737). But even those projections of a profit in 2020 assumed "substantial volume growth in the cigalike form"; "without [that] growth," Altria was "going to continue to lose $70 million a year on the cigalike platform." (PX7022 Begley (Altria) Dep. at 225). And that assumption proved wrong; cig-a-like volume actually declined. (RX1217 Murphy Report ¶ 115, Fig. VI.3). As a result, by the end of 2017, the sustained losses and continued delays in projected profitability had become "troubl[ing]" to senior management, including Gifford, then the CFO. (Gifford (Altria) Tr. 2738).

1095. [redacted] (PX7022 (Begley (Altria), Dep. at 51, 56, 149-50) (*in camera*)).

Response to Proposed Finding No. 1095:

Respondents have no specific response.

1096. On February 21, 2018, Willard stated at an Altria investor conference that in 2017, MarkTen cigalikes grew volume by "approximately 60%, far outpacing competitive cig-a-like brands." (PX9045 (Altria) at 006).

Response to Proposed Finding No. 1096:

The Proposed Finding is incomplete and misleading without additional context. *First*, on its face, this statement was limited to an assessment of Nu Mark's performance in the cig-a-like category. Cig-a-likes were a declining category: They declined from 90 percent of total e-cigarette cartridge volume in early 2016 to 59 percent in January 2018 and then to only 19 percent in December 2018. (RX1217 Murphy Report ¶ 80; *see also* RFF ¶ 1325). At the time of this statement, Nu Mark had not yet launched its pod-based product, Elite, (Schwartz (Altria) Tr. 1871), and did not know how that product would perform on the market.

Second, any growth in MarkTen cig-a-likes' volume was driven primarily by expanded distribution rather than by growing its sales in existing stores. [redacted], to 65,000 by the early 2018, (PX9045 (Altria) at 006). During this period, Nu Mark also expanded distribution for MarkTen Bold, which grew from 5,000 retail stores in late 2016, (RX0746 (Altria) at 018), to 25,000 stores by early 2018, (PX9045 (Altria) at 006). But there are costs associated with "expand[ing] from location to location," (PX7040 Gifford (Altria) Dep. at 74), and you need volume to "cover the fixed cost to drive profitability," (Gifford (Altria) Tr. 2727).

Third, Nu Mark still was losing money and not meeting its long-term targets. Nu Mark lost $71 million in 2017—all while failing to achieve the projected volume growth. (RFF ¶¶ 391-92).

1097. Altria's e-cigarette unit sales and revenue were growing prior to its exit, [redacted] (PX5000 at 068 (¶ 120) (Rothman Expert Report) (analyzing Nielsen and STARS data); *see also* PX7003 (Quigley (Altria), IHT at 152 ("[T]he cig-a-like platform was growing. Not declining. And that was the point that I thought I had convinced Howard of why we should keep the cig-a-like business, that we were actually growing 3-1/2 million units, and there was an opportunity to compete with Vuse in that space."); PX7040 (Gifford (Altria), Dep. at 62 ("Q. Meaning that [Nu Mark's] 2018 year to date actual volume was over 8.8 million units higher than the 2017 year to date actual volume? A. That is correct. . . . Q. For Nu Mark volume, the percent change between 2018 actual year to date and 2017 actual year to date was 20.7 percent; is that right? A. That's correct.")).

Response to Proposed Finding No. 1097:

The Proposed Finding is incomplete and misleading without additional context. *First*, Altria's financial results from November 2018, which Gifford was explaining in the cited testimony, show that although Nu Mark had grown volume compared to the previous year, its actual unit sales were 3.8 million units below the projected sales set in its original budget, (PX4231 (Altria) at 003), meaning that it was not hitting its volume projections. And the aggressive discounts necessary to achieve this volume growth impacted Altria's ability to grow revenue. For example, Dr. Rothman's charts show that while Altria had increased unit sales more than ITG Brands during this time period, ITG showed higher revenue growth. (PX5000 Rothman Report ¶ 120 Tbls. 7 & 8).

Second, although Quigley was emphasizing Altria's growth in cig-a-likes, that segment had been declining in overall volume, meaning that Nu Mark was simply increasing its slice of a shrinking pie. (RX0746 (Altria) at 008 (showing that e-vapor industry volume, then composed primarily of cig-a-likes, declined by nine percent in 2016); PX4012 (Altria) at 014 (showing that in 2017 cig-a-like volume declined by 3 percent, a contraction of some 5.8 million units); RFF ¶ 390). Quigley acknowledged as much at trial, explaining that by the summer of 2018, the cig-a-like segment was "very small and getting smaller relative to the growth in pods. So it was . . . not

meaningful in terms of what was driving change in the tobacco landscape." (Quigley (Altria) Tr. 2032).

1098. From 2014 to 2017, Nu Mark reduced its variable production costs for MarkTen cigalike products from $1.17 to $0.70 for cartridges and from $5.02 to $2.95 for devices. (PX7002 (Schwartz (Altria), IHT at 078-79) (discussing PX1093 (Altria) at 008 (Nu Mark Operations Financial Results for September 2018 vs 2018 Operating Budget)).

Response to Proposed Finding No. 1098:

Respondents have no specific response except to note that the Proposed Finding shows why Nu Mark was not going to become profitable. Despite cutting costs, Altria incurred significant losses every year from 2014 to 2017 and it went on to incur $101 million in losses in the first nine months of 2018. (RFF ¶¶ 1078, 1081). As Gifford explained, "it's either grow volume or reduce expenses to become profitable." (Gifford (Altria) Tr. 2807). And, having already tried to minimize its annual losses by aggressively cutting cost, Nu Mark's only option was to grow volume. But Nu Mark was not "getting the volume [growth] that was predicted," (Gifford (Altria) Tr. 2728), and thus was not hitting its financial projections.

1099. Schwartz estimated that, from 2015 to 2018, Nu Mark sales grew from $200 million to $500 million, with "maybe a third" of that growth attributable to MarkTen's cigalike products and MarkTen Elite. (Schwartz (Altria) Tr. 1864-65).

Response to Proposed Finding No. 1099:

The Proposed Finding is inaccurate and mischaracterizes Schwartz's testimony. In the cited testimony, Schwartz was not testifying about Nu Mark's sales; he was testifying about the "size" of *Smoore*, the company from which Nu Mark licensed Elite. (Schwartz (Altria) Tr. 1864).

1100. A November 2, 2017, Nu Mark Investor Day presentation, prepared for delivery by Begley, contains notes prompting Begley to say: "*MarkTen* also has promising re-purchase rates, with cartridges comprising nearly 90% of *MarkTen* sales." (PX1129 (Altria) at 015).

Response to Proposed Finding No. 1100:

The Proposed Finding is incomplete and misleading without additional context. At the time of this statement, Nu Mark only had cig-a-like products, (RFF ¶ 277), and thus Begley was addressing only the re-purchase rates for cig-a-likes. And overall cig-a-like volume sales were declining, meaning that, contrary to this section's heading, this was not a product segment that would help improve Nu Mark's financial performance over the long term. During 2017, cig-a-like volume declined by 3 percent, a contraction of some 5.8 million units. (PX4012 (Altria) at 014; RFF ¶ 390). It was also declining as a share of the overall market. (RFF ¶¶ 1324-29). In early 2016, "cig-a-likes represented more than 90 percent of total e-cigarette cartridge volume." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). Two years later, in January 2018, "this fraction had fallen to about 59 percent." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). And shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen "to less than 19 percent." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). Thereafter, it declined further still, to just five percent of all cartridge sales as of September 2020 (the end date of available data), with pod-based products capturing the other 95 percent. (RX1217 Murphy Report ¶¶ 41, 62 n.143, Fig. IV.3; RFF ¶ 1325).

1101. A November 2, 2017, Nu Mark Investor Day presentation, prepared for delivery by Begley, contains notes prompting Begley to say: "Nu Mark has made substantial progress in the cig-a-like segment, and we believe it has a solid runway for the future. While we continue to invest in growing brand awareness and equity, we've also made considerable progress reducing costs and have positive gross margins." (PX1129 (Altria) at 020).

Response to Proposed Finding No. 1101:

The Proposed Finding is incomplete and misleading without additional context. Overall cig-a-like volume sales were declining, meaning that, contrary to this section's heading, this was not a product segment that would help improve Nu Mark's financial performance over the long term. During 2017, cig-a-like volume declined by 3 percent, a contraction of some 5.8 million

units. (PX4012 (Altria) at 014; RFF ¶ 390). It was also declining as a share of the overall market. (RFF ¶¶ 1324-29). In early 2016, "cig-a-likes represented more than 90 percent of total e-cigarette cartridge volume." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). Two years later, in January 2018, "this fraction had fallen to about 59 percent." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). And shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen "to less than 19 percent." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). Thereafter, it declined further still, to just five percent of all cartridge sales as of September 2020 (the end date of available data), with pod-based products capturing the other 95 percent. (RX1217 Murphy Report ¶¶ 41, 62 n.143, Fig. IV.3; RFF ¶ 1325).

In addition, marginal contribution is not an indication of profitability. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785). The evidence overwhelmingly shows that Nu Mark was never profitable and there was no expectation that it would become profitable in the foreseeable future. Nu Mark lost money every year from 2012 through 2018. (RFF ¶¶ 1078, 1081). Nu Mark lost $101 million in the first nine months of 2018 alone, (RFF ¶ 1081); and, as of November 2018, its projections indicated that it would lose money for the next three years, losses that would total nearly a quarter billion dollars, (RFF ¶ 1083).

1102. In November 2017, Altria told investors that MarkTen Bold had promising early results and those results led Nu Mark to plan to expand MarkTen Bold to an additional 15,000 stores by the end of 2017. (PX7022 (Begley (Altria), Dep. at 126-27 (discussing PX9000 (Altria) at 017))).

Response to Proposed Finding No. 1102:

The Proposed Finding is incomplete and misleading without additional context. *First*, when asked about this statement from a November 2017 investor presentation, Begley explained, "I believe we had had MarkTen Bold in some lead market stores, and had seen some incrementality for MarkTen Bold that was layering on top of the rest of the MarkTen XL platform or brand. And, you know, we were encouraged enough by the results to expand it to an additional 15,000 stores by the end of the year." (PX7022 Begley (Altria) Dep. at 126-27). But the evidence shows that the incrementality was quite modest. According to another 2017 presentation, Bold was showing only a minor impact on MarkTen's bottom line, largely stealing share from the original MarkTen cig-a-like and boosting the MarkTen brand's total share by less than two percent in stores where it was sold. (RX0746 (Altria) at 019).

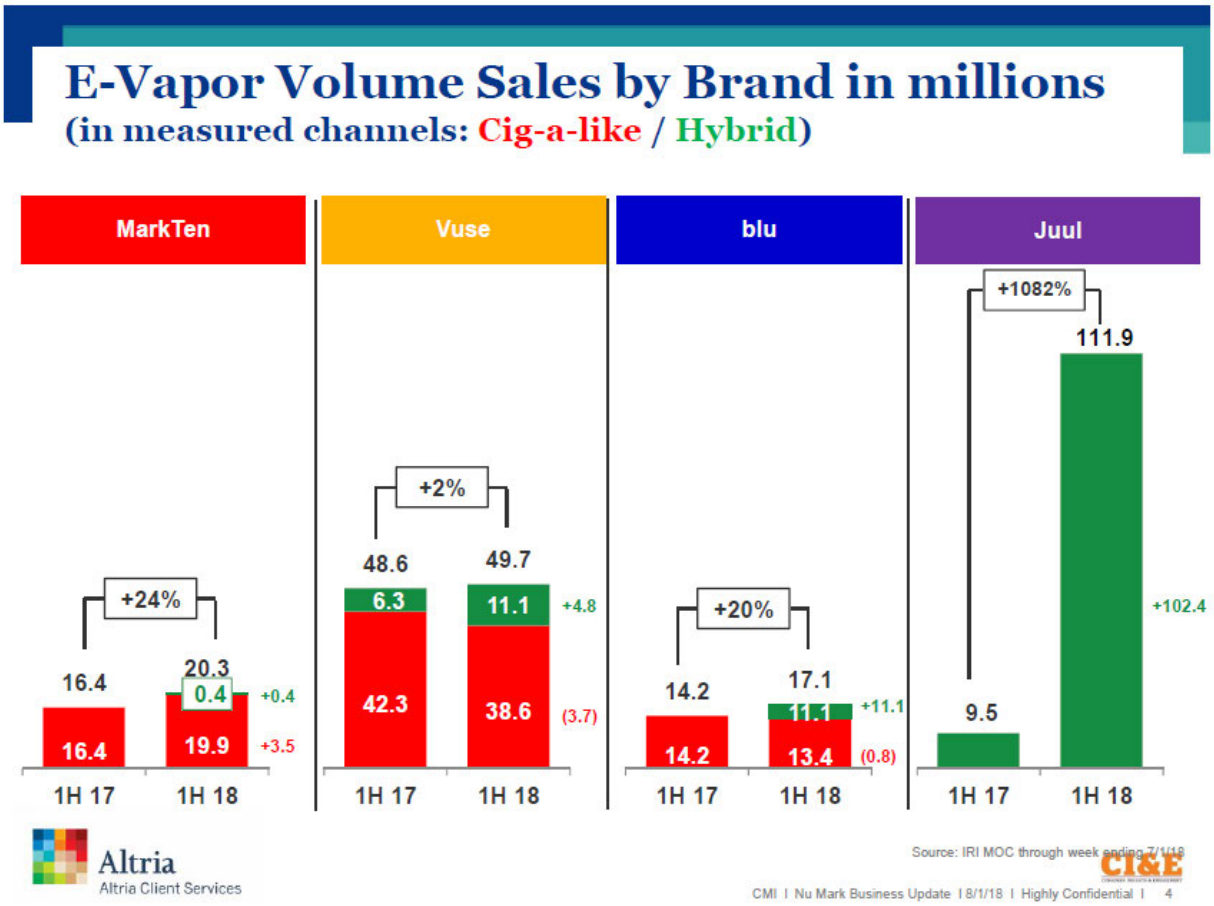
Second, overall cig-a-like volume sales were declining, meaning that, contrary to this section's heading, this was not a product segment that would help improve Nu Mark's financial performance over the long term. During 2017, cig-a-like volume declined by 3 percent, a contraction of some 5.8 million units. (PX4012 (Altria) at 014; RFF ¶ 390). It was also declining as a share of the overall market. (RFF ¶¶ 1324-29). In early 2016, "cig-a-likes represented more than 90 percent of total e-cigarette cartridge volume." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). Two years later, in January 2018, "this fraction had fallen to about 59 percent." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). And shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen "to less than 19 percent." (RX1217 Murphy Report ¶ 80; RFF ¶ 1325). Thereafter, it declined further still, to just five percent of all cartridge sales as of September 2020 (the end date of available data), with pod-based products capturing the other 95 percent. (RX1217 Murphy Report ¶¶ 41, 62 n.143, Fig. IV.3; RFF ¶ 1325).

1103. From the first half of 2017 to the first half of 2018, MarkTen's sales volume growth in the closed-tank e-cigarette segment was 24 percent, second highest after JUUL. (PX7013 (Brace (Altria), Dep. at 126-27 (discussing PX1059 (Altria) at 006 ("Nu Mark Update" Sept. 2018)))).

Response to Proposed Finding No. 1103:

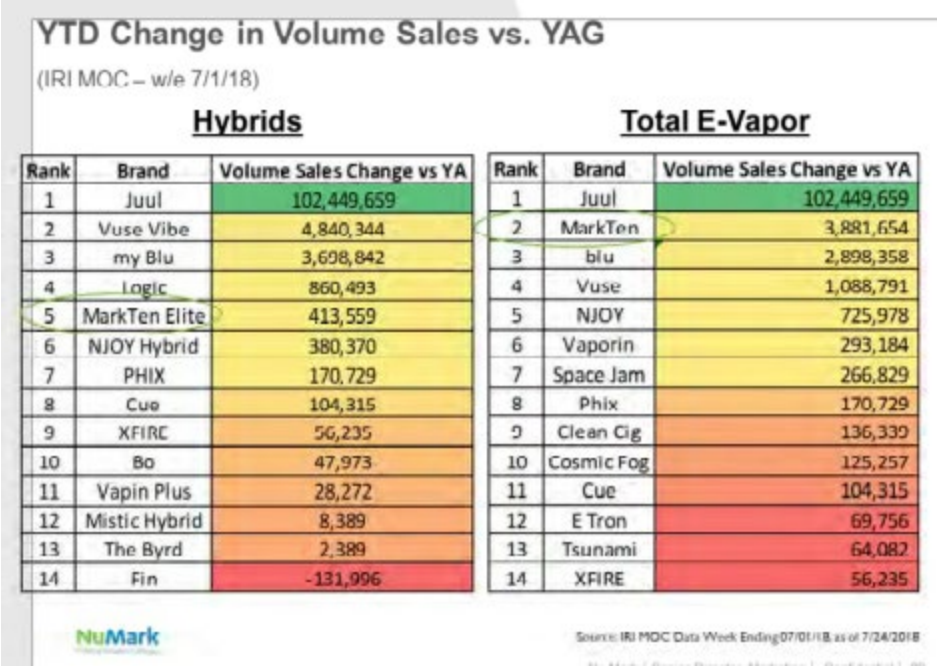
The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As a threshold matter, the cited slide is not measuring performance from the first half of 2017 to 2018; instead it is comparing two periods of time: the first half of 2017 against the first half of 2018. (PX1059 (Altria) at 006).

In addition, the slide (reproduced below) illustrates exactly why Nu Mark was not going to become profitable—almost all of its sales were in the declining cig-a-like category. (RFF ¶ 843). Thus Altria's 24 percent increase in sales from the first half of 2018 compared to the first half of 2017 was almost entirely cig-a-likes. (PX1059 (Altria) at 006). It added just *0.4 million* sales in pod-based (referred to as "hybrid" in the slide) products. (PX1059 (Altria) at 006). By contrast, Vuse, which then sold Vibe, a product sometimes classified as a hybrid/pod, (PX1056 (Altria) at 031), was both starting from a much larger base of sales and sold *6.3 million* pod-based units in the first half of 2017 and *11.1 million* units in the first half of 2018. (PX1059 (Altria) at 006). And ITG, which had overall sales volume and growth rates comparable to Altria, went from selling zero pod-based units in the first half of 2017 to selling *11.1 million* pod-based units in the first half of 2018. (PX1059 (Altria) at 006). Meanwhile, JUUL, which was all pod-based, demonstrated explosive growth, selling an additional 102 million units in the first half of 2018, a 1082 percent increase. (PX1059 (Altria) at 006).



(PX1059 (Altria) at 006).

1104. From July 1, 2017, to July 1, 2018, IRI data showed that the MarkTen brand's sales volume growth in the closed-tank e-cigarette segment was second place behind JUUL. (PX1056 (Altria), at 031 (Nu Mark Business Update, Aug. 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley, Aug. 14, 2018) ("[M]arkTen] volume is the second fastest growing brand in terms of volume behind [JUUL]."); *see also* Quigley (Altria) Tr. 1973-74 (discussing PX1008 (Altria), at 001)).



YTD Change in Volume Sales vs. YAG

(IRI MOC – w/e 7/1/18)

Hybrids

Rank	Brand	Volume Sales Change vs YA
1	Juul	102,449,659
2	Vuse Vibe	4,840,344
3	my Blu	3,698,842
4	Logic	860,493
5	MarkTen Elite	413,559
6	NJOY Hybrid	380,370
7	PHIX	170,729
8	Cue	104,315
9	XFIRE	56,235
10	Bo	47,973
11	Vapin Plus	28,272
12	Mistic Hybrid	8,389
13	The Byrd	2,389
14	Fin	-131,996

Total E-Vapor

Rank	Brand	Volume Sales Change vs YA
1	Juul	102,449,659
2	MarkTen	3,881,654
3	blu	2,898,358
4	Vuse	1,088,791
5	NJOY	725,978
6	Vaporin	293,184
7	Space Jam	266,829
8	Phix	170,729
9	Clean Cig	136,339
10	Cosmic Fog	125,257
11	Cue	104,315
12	E Tron	69,756
13	Tsunami	64,082
14	XFIRE	56,235

NuMark

Source: IRI MOC Data Week Ending 07/01/18, as of 7/24/2018

(PX1056 (Altria) at 031).

Response to Proposed Finding No. 1104:

The Proposed Finding is incomplete and misleading without additional context. As the slide makes clear, virtually all of Nu Mark's volume growth was in cig-a-likes, (PX1056 (Altria) at 031), which was a declining category being overtaken by pod-based products, (RFF ¶¶ 276-300, 390, 1324-29). Nu Mark's growth in this dying category does not speak to whether the company had a pathway to long term profitability or would be a long-term competitive threat.

Critically, in the pod-based category (labeled as "hybrids" in the slide), which now account for 95% of the market, (RFF ¶ 1325), Nu Mark had only added 413,559 in sales, as compared to 102 million for JUUL, 4.84 million for Vuse Vibe, and 3.698 million for *my*blu, (PX1056 (Altria) at 031). [redacted].

1105. From July 1, 2017, to July 1, 2018, MarkTen's "e-commerce volume" grew 105 percent. (PX1056 (Altria) at 028 (Nu Mark Business Update, Aug. 2018)).

Response to Proposed Finding No. 1105:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 3), or in any deposition, and thus there is no witness testimony contextualizing this information. In addition, the percentage increase of e-commerce volume is a meaningless indicator without knowing the size of the base from which it was growing, and Complaint Counsel has offered no evidence on this point. Willard testified that the "vast majority of [e-vapor products] are sold in physical stores." (PX7004 Willard (Altria) IHT at 94).

1106. As of September 2018, Nu Mark's year-to-date marginal contribution was positive $26 million, excluding spending on "trade programs." (PX7002 (Schwartz (Altria), IHT at 085-87) (discussing PX1127 (Altria) at 003) (Nu Mark Finance Update – September YTD, Oct. 15, 2018))).

Response to Proposed Finding No. 1106:

The Proposed Finding is incomplete and misleading without additional context. *First,* contrary to Complaint Counsel's insinuation, marginal contribution is not an indication of profitability. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785).

The evidence overwhelmingly shows that Nu Mark was never profitable and there was no expectation that it would become profitable in the foreseeable future. Nu Mark lost money every year from 2012 through 2018. (RFF ¶¶ 1078, 1081). Nu Mark lost $101 million in the first nine months of 2018 alone, (RFF ¶ 1081); and, as of November 2018, its projections indicated that it would lose money for the next three years, losses that would total nearly a quarter billion dollars, (RFF ¶ 1083).

Second, the cited marginal contribution calculation was skewed because it also excluded distribution costs, such as the ITP shelf-space program. (PX1127 (Altria) at 003). According to data circulated in September 2018, when distribution costs were included, Nu Mark's total marginal contribution was $3 million below target and $15 million less than the previous year. (PX1127 (Altria) at 003). Meanwhile, Nu Mark's adjusted income, after accounting for all relevant expenses, was negative $101 million. (PX1127 (Altria) at 003).

1107. A September 7, 2018, Altria presentation circulated by Craig Schwartz showed that both MarkTen Elite and Altria's cigalike franchise had a positive marginal contribution, 21 percent and 42 percent respectively, and Schwartz stated that the information in the presentation "could support a decision to further invest in MarkTen Elite 1.0 – if that's what we decide to do . . . ." (PX4313 (Altria) at 001, 006) (MarkTen Elite Potential Investment Justification Information)).

Response to Proposed Finding No. 1107:

The Proposed Finding is incomplete and misleading without additional context. Contrary to Complaint Counsel's insinuation, marginal contribution is not an indication of profitability. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785).

The evidence overwhelmingly shows that Nu Mark was never profitable and there was no expectation that it would become profitable in the foreseeable future. Nu Mark lost money every year from 2012 through 2018. (RFF ¶¶ 1078, 1081). Nu Mark lost $101 million in the first nine months of 2018 alone, (RFF ¶ 1081); and, as of November 2018, its projections indicated that it would lose money for the next three years, losses that would total nearly a quarter billion dollars, (RFF ¶ 1083).

1108. Altria's November 2018 year-to-date financial results showed that Nu Mark's sales volume from January to November 2018 improved by 20.7% as compared to the same period in

2017. (PX7040 (Gifford (Altria), Dep. at 61-62) (discussing PX4231 (Altria) at 003 (Altria Group, Inc. Operating Companies 2018 November YTD Financial Results))).

Response to Proposed Finding No. 1108:

The Proposed Finding is incomplete and misleading without additional context. The cited financial results show that although Nu Mark had modest volume growth compared to the previous year, its actual unit sales were 3.8 million units below the projected sales set in its original budget, (PX4231 (Altria) at 003), meaning that Nu Mark would not meet its volume or earnings projections. In fact, Nu Mark had lost $101 million in the first nine months of 2018, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003). And, at this time, Altria's latest projections indicated that Nu Mark would lose money for the next three years, losses that would total nearly a quarter billion dollars. (RFF ¶ 1083).

1109. [redacted] (PX4366 (Altria) at 055 (*in camera*) [redacted]).

Response to Proposed Finding No. 1109:

The Proposed Finding is incomplete and misleading without additional context. *First*, the [redacted].

Second, Nu Mark's modest volume growth was insufficient to put it on a path to profitability. Instead, Nu Mark's actual unit sales were 3.8 million units below the projected sales

set in its original budget, (PX4231 (Altria) at 003), meaning that Nu Mark would not meet its volume or earning projections. In fact, at this time Nu Mark had lost $101 million in the first nine months of the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003). And Altria's latest projections indicated that Nu Mark would lose money for the next three years, losses that would total nearly a quarter billion dollars. (RFF ¶ 1083).

1110. Paul Crozier testified that, in October 2018, Altria's e-cigarette products had around "8 to 10 percent of the share of [e-cigarette] sales" at Sheetz, which placed them in the "second position" behind JLI. (Crozier (Sheetz) Tr. 1499).

Response to Proposed Finding No. 1110:

The Proposed Finding is incomplete and misleading without additional context. *First*, Nu Mark's share in a single retail chain is not indicative of whether Nu Mark's overall financial position was improving, much less its profitability. [redacted]. But, despite Nu Mark's "very aggressive promotions," Elite did not make a dent in JUUL's share in 2018, nor did Elite's modest device sales result in an uptick in cartridge sales. (Crozier (Sheetz) Tr. 1553).

Second, there is no reason to believe that Nu Mark's performance would have improved over time. [redacted] He also acknowledged that, in today's environment, it is "unlikely" a business limited to cig-a-likes would be competitive. (Crozier (Sheetz) Tr. 1560).

1111. Michelle Baculis testified that there were no headcount reductions or other indications of financial distress prior to the shutdown of Nu Mark. (PX7014 (Baculis (Altria), Dep. at 61, 289-90 ("Q. You didn't notice any significant decreases in personnel at Nu Mark at any other time? A. No. . . Did you go to work expecting to be told that your group was going to be shut down? A. No. Q. It was a surprise to you? A. Yes. . . Q. Had you heard that Nu Mark was in a bad financial situation such that you could kind of guess that cuts were coming? A. No.")); *see also* PX7016 (Jupe (Altria), Dep. at 251 ("And were you aware of any conversations happening at this point in time that discussed a potential just simple exit from the entire e-vapor market entirely? A. Not an exit from the entire market, no.")).

Response to Proposed Finding No. 1111:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The cited passage of Baculis's testimony was not discussing the "shutdown of Nu Mark," (CCFF ¶ 1111), which occurred in December 2018, (RFF ¶¶ 1090-91, 1098). Instead, Baculis was discussing layoffs that occurred in October 2018, when the Growth Teams were created and the product development component within Nu Mark was discontinued. (PX7014 Baculis (Altria) Dep. at 61 ("Q. Other than when the growth teams were started in October 2018, NuMark continued to add employees[?]"); *see also* PX7014 Baculis (Altria) Dep. at 289-90 (describing personnel cuts that took place on "October 5")). The testimony from Jupe is on a separate topic and simply acknowledges that, as of December 2018, he was not aware of any discussions about Altria exiting the e-vapor market. (PX7016 Jupe (Altria) Dep. at 251).

5. MarkTen Elite Sales Were Growing

1112. Altria executives consistently testified that MarkTen Elite sales were growing in 2018. (Schwartz (Altria) Tr. 1945 ("So Elite was growing sales volume . . ."); PX7038 (Myers (Altria), Dep. at 108-09 ("Q. And during this time of the initial wave of MarkTen Elite, were pod sales growing as well? . . . A. Yes. To my understanding, yes, they were.")); PX7003 (Quigley (Altria), IHT at 056 ("Elite was growing."), 072-73 ("Q. Despite the fact that Elite products, that some of them were leaking, Elite was growing in sales volume during your time as president, correct? A. Correct.")).

Response to Proposed Finding No. 1112:

The Proposed Finding is incomplete and misleading without additional context. By definition, Elite's sales could only grow, since Nu Mark launched Elite in the end of February

2018. The mere fact that Elite grew from a sales base of zero does not speak to whether the product had a pathway to profitability or could be a competitive threat. To the contrary, the market evidence demonstrates that, notwithstanding aggressive promotions, (RFF ¶¶ 422-30), Elite was never able to achieve more than a one percent share of e-vapor cartridge unit shares, (RFF ¶ 442).

1113. On July 26, 2018, Willard stated to investors on an earnings call that "Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution" and that MarkTen Elite and MarkTen Bold were "[t]he drivers of the growth in second quarter and first half" and were "getting traction with consumers." (Willard (Altria) Tr. 1167-68 (discussing PX9047 (Altria) at 003, 009-10 (Altria's Q2 2018 Earnings Call))).

Response to Proposed Finding No. 1113:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel has not provided the full quote. In the earnings call Willard qualified, "Those products [meaning MarkTen Bold and Elite] are getting traction with consumers, *albeit in the shadow of a product that's growing much more quickly*." (PX9047 (Altria) at 10 (emphasis added)). As Willard testified at trial, when he said that the products were gaining traction, he meant that Nu Mark "at least this first phase of getting them distributed in stores and getting consumers to try them had been successful." (Willard (Altria) Tr. 1386). In other words, "[t]hey were getting initial traction with consumers largely because of expanded distribution and promotional offers." (Willard (Altria) Tr. 1386). As for the qualification, Willard explained, "I also felt like I should point out to the analysts what they all knew, which was these guys were growing 16 percent, and JUUL was growing, I don't know, year over year, 100 percent -- a big, huge number. And so, hey, listen, our products had some limited success in the short time frame, but it was substantially less than the leading product in the marketplace." (Willard (Altria) Tr. 1387).

Second, despite some initial trial, Elite's sales were dismal. (RFF ¶¶ 431-77). The market evidence demonstrates that, notwithstanding aggressive promotions, (RFF ¶¶ 422-30), Elite was never able to achieve more than a one percent share of e-vapor cartridge unit shares, (RFF ¶ 442). As of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target, (PX1113 (Altria) at 009). In addition, Nu Mark ultimately lost $101 million in the first nine months the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1114. MarkTen Elite's unit sales in the first 21 weeks following its launch were in a similar range as those of its competitors—6.8 pods per store per week on average compared to 4.6 pods per store per week for blu and 8.8 pods per store per week for JUUL. (PX1013 (Altria) at 009 (Email from Brian Quigley, Aug. 9, 2018) (showing average weekly volume per store selling by weeks after introduction date for MarkTen Elite, my blu, and Juul); PX7003 (Quigley (Altria), IHT at 136 ("Q. So at about a 21-week period post launch, this means that myblu was selling 4.6 -- A. Average pods per store per week. Q. And Elite was selling 6.8? A. And JUUL was selling 8.8. Q. Based on this slide, how would you characterize Elite's sale performance at about 21 weeks on the market compared to JUUL and myblu after the equivalent amount of time that they had been on the market? A. That we are doing okay."))).

Response to Proposed Finding No. 1114:

The Proposed Finding is incomplete and misleading without additional information. *First*, any comparison in sales in weeks after launch between Elite and JUUL is spurious given that the two products were launched in different circumstances: When Elite launched "there was an established pod segment in the marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; *see also* PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater"); PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")). Moreover, at JUUL's launch, JLI

was a start up with limited reach. (RFF ¶ 415 (noting that JUUL grew without "visibility" or national shelf space)). By contrast, at the launch of Elite, Nu Mark had the benefit of Altria's distribution capabilities and resources (RFF ¶¶ 407-30), yet still had dismal sales, (RFF ¶¶ 431-59).

Second, Altria executives understood that the cited numbers were not "really a fair comparison to what was actually happening at that time in the market." (Quigley (Altria) Tr. 2054). As Quigley explained, "This was a slide I believe Craig Schwartz had the market information people put together that was used oftentimes, but we looked at the bar charts of the growth, what was happening at this same time with the relative growth of JUUL and pod products relative to our products. So this doesn't reflect what was happening [in the market at the time]." (Quigley (Altria) Tr. 2054).

Crosthwaite, Altria's former Chief Growth Officer and JUUL's current CEO, shared a similar critique. "[I]t is taking three different time frames and articulating in three different points of time a certain articulation of per store sales. For example, it's showing in June of 2015 what was JUUL's average volume per store selling." (PX7024 Crosthwaite (Altria/JLI) Dep. at 148). Then on "November 18, 2017, it is showing myblu store average weekly volume per store selling. And then at a later time period in March of 2018, it is showing Elite's volume per store selling." (PX7024 Crosthwaite (Altria/JLI) Dep. at 148). But "I really don't think it's an apples-to-apples comparison to anything." (PX7024 Crosthwaite (Altria/JLI) Dep. at 150). "[I]n 2015, a time frame when consumers didn't even know about e-vapor, it was extraordinarily new . . . . And then comparing all the way out to 2018, a time frame when the e-vapor category has grown extraordinarily fast, has lots of awareness. So, I don't think the chart is comparing anything of the like." (PX7024 Crosthwaite (Altria/JLI) Dep. at 150; *see also* RX1217 Murphy Report ¶ 164

(explaining that JUUL's first 21 weeks occurred "when e-cigarette demand in general, and demand for pod-based systems specifically, were substantially smaller than when MarkTen Elite was launched")).

Third, if one looks at a longer time horizon and includes pod-based products that launched around the same time as Elite, it is clear that Elite was substantially outperformed by its competitors. "[W]hile MarkTen Elite started out on a similar sales growth path to those of myblu and NJOY, it was substantially outpaced by Vuse Alto, which in the first 25 weeks on the market achieved monthly sales of roughly 4.7 times MarkTen Elite[.]" (RX1217 Murphy Report ¶ 165). "[A]nd after the first 25 weeks Elite falls behind myblu and NJOY as well. By week 33 right before Elite was discontinued, its sales were only 41 percent of myblu's sales, only 21 percent of NJOY's sales, and only 12 percent of Alto's sales." (RX1217 Murphy Report ¶ 165).

1115. [redacted] (PX5000 at 066 (¶ 115) (Rothman Report) (citing PX2517 (JLI) (Excel worksheet "Metrics_Launch.")).

Response to Proposed Finding No. 1115:

The Proposed Finding is incomplete and misleading without additional information. *First*, like the slide discussed in Proposed Finding 1114, Dr. Rothman's calculation looks to sales in a fixed period (26 weeks) following the launch of the products, which means he too is comparing sales in very different time periods. (Quigley (Altria) Tr. 2054-55; PX7024 Crosthwaite (Altria/JLI) Dep. at 149-50; *see also* RX1217 Murphy Report ¶ 164). For example, according to the cited Excel worksheet, Elite launched on March 10, 2018, *my*blu launched on January 27, 2018, Logic Pro launched on March 7, 2015, and JUUL launched on June 20, 2015. (PX2517 (JLI) (Excel worksheet "Metrics_Launch")). As a result, the products were launched in different circumstances: For example, when Elite launched "there was an established pod segment in the

marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; *see also* PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater"); PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")).

Second, if one looks at a longer time horizon and includes pod-based products that launched around the same time as Elite, it is clear that Elite was substantially outperformed by its competitors. "[W]hile MarkTen Elite started out on a similar sales growth path to those of myblu and NJOY, it was substantially outpaced by Vuse Alto, which in the first 25 weeks on the market achieved monthly sales of roughly 4.7 times MarkTen Elite[.]" (RX1217 Murphy Report ¶ 165). "[A]nd after the first 25 weeks Elite falls behind myblu and NJOY as well. By week 33 right before Elite was discontinued, its sales were only 41 percent of myblu's sales, only 21 percent of NJOY's sales, and only 12 percent of Alto's sales." (RX1217 Murphy Report ¶ 165).

1116. [redacted] (PX5000 at 066 (¶ 115) (Rothman Report) (citing PX2517 (JLI) (Excel worksheet "AttachRates_Launch.")).

Response to Proposed Finding No. 1116:

The Proposed Finding is incomplete and misleading without additional information. *First*, like the slide discussed in Proposed Finding 1114, Dr. Rothman's calculation looks to sales in a fixed period (26 weeks) following the launch of the products, which means he too is comparing sales in very different time periods. (Quigley (Altria) Tr. 2054-55; PX7024 Crosthwaite (Altria/JLI) Dep. at 149-50; *see also* RX1217 Murphy Report ¶ 164). For example, according to the cited Excel worksheet, Elite launched on March 10, 2018, *my*blu launched on January 27, 2018,

Logic Pro launched on March 7, 2015, and JUUL launched on June 20, 2015. (PX2517 (JLI) (Excel worksheet "AttachRates_Launch")). As a result, the products were launched in different circumstances: For example, when Elite launched "there was an established pod segment in the marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; *see also* PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater"); PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")).

Second, if one looks at a longer time horizon and includes pod-based products that launched around the same time of Elite, it is clear that Elite was substantially outperformed by its competitors. "[W]hile MarkTen Elite started out on a similar sales growth path to those of myblu and NJOY, it was substantially outpaced by Vuse Alto, which in the first 25 weeks on the market achieved monthly sales of roughly 4.7 times MarkTen Elite[.]" (RX1217 Murphy Report ¶ 165). "[A]nd after the first 25 weeks Elite falls behind myblu and NJOY as well. By week 33 right before Elite was discontinued, its sales were only 41 percent of myblu's sales, only 21 percent of NJOY's sales, and only 12 percent of Alto's sales." (RX1217 Murphy Report ¶ 165).

1117. MarkTen Elite's average sales per store also grew from May to July in major retail chains including Walgreens, 7-Eleven, Wawa, Speedway, and Sheetz. (PX1013 (Altria) at 007 (Email from Brian Quigley, Aug. 9, 2018) (showing "MarkTen Elite Average Sales / Store / Chain" in May and "Latest Week" as of July 29, 2019, by retail chain)).

Response to Proposed Finding No. 1117:

The Proposed Finding is incomplete and misleading without additional context. Modest sales growth from a small base is not indicative of a product with a path to profitability. According to the cited slide, as of late July Elite's sales per week in Walgreens had increased from 0.2 units

to 0.5 units, which would work out to a total of two units per month. (PX1013 (Altria) at 007). In 7-Eleven, Elite's sales increased from 1.7 units per week to 4.4 units per week, meaning less than one sale per day. (PX1013 (Altria) at 007). And, in Wawa, sales increased from 2.4 units to 6.4 units, less than one sale per day. (PX1013 (Altria) at 007). And the latter set of sales figures, from July 2018, represent Elite's sales *after* Nu Mark started offering an Elite device for free in its promotion for "Battery Kit + Any Pod Pack for $8.99." (PX1013 (Altria) at 011).

1118. According to IRI data, from the week of May 20, 2018, to the week of June 24, 2018, MarkTen Elite's sales increased from $135K to $445K (or by 230 percent), and in one week alone in June 2018, MarkTen Elite's sales increased by 77.9 percent. (O'Hara (JLI) Tr. 558-60 (discussing PX2616 (JLI) at 009)).

Response to Proposed Finding No. 1118:

The Proposed Finding is incomplete and misleading without additional context. When shown this exhibit at trial and asked to confirm that it showed that "Elite's sales grew from 135K to 445K," O'Hara responded, "Yes. . . . [I]t was a disappointing performance, I'm sure, for Altria." (O'Hara (JLI) Tr. 560). O'Hara also observed that it was important to consider the weekly sales numbers alongside the weekly growth rate, both of which are depicted in charts on the same page. (O'Hara (JLI) Tr. 560). Over the six weeks from May 20, 2018 to June 24, 2018, Elite grew by 1.4 percent, 16.5 percent, 25 percent, 77.9 percent, 17.7 percent, and 8.2 percent, respectively. (PX2616 (JLI) at 009). This showed that "growth was inconsistent and decelerating, especially towards the end, and overall sales were quite low." (O'Hara (JLI) Tr. 560). And the occasional large jump is consistent with the fact that Altria tended to expand distribution in "wave[s]," meaning that, "[e]very couple months, [it] would add another six, 7,000, 10,000 stores." (PX7038 Myers (Altria) Dep. at 109-10).

1119. From the four weeks ending May 27, 2018, to the four weeks ending July 1, 2018, MarkTen Elite's sales volume grew 210 percent. (Schwartz (Altria) Tr. 1952-53 (discussing PX1194 (Altria) at 009)).

Response to Proposed Finding No. 1119:

The Proposed Finding is incomplete and misleading without additional context. As Schwartz explained when asked about this slide at trial, "this is showing, again, in the middle of a launch with expanding new stores that volume was growing, but this also was only half the picture because relative to the rest of what was going on in the vapor market, this was insignificant." (Schwartz (Altria) Tr. 1953).

1120. As of July 1, 2018, Nu Mark reported that MarkTen Elite was "continuing to show week-over-week growth" with a marginal contribution of $1.5 million through June 2018. (PX1056 (Altria) at 028 (Nu Mark Brand Update, Aug. 2018)).

Response to Proposed Finding No. 1120:

The Proposed Finding is incomplete and misleading without additional context. *First*, the presentation shows that Elite's growth was miniscule. The presentation indicates that from May to July, Elite had increased its share in stores selling the product from just 1.6 percent to 2.4 percent, a less than one percent increase. (PX1056 (Altria) at 032).

Second, marginal contribution is not an indication of profitability or growth. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785).

Third, despite some growth, Elite was not meeting its projections. The projections for 2018-2020 prepared in February 2018 assumed that Altria would sell 11 million units of pod products in 2018. (PX1113 (Altria) at 009). But, as of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target. And, despite Elite's marginal contribution, Nu Mark ultimately lost $101 million in the first nine months of the

year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1121. As of July 2018, MarkTen Elite had a 38 percent year-to-date positive marginal contribution, excluding one-time marketing costs. (PX1056 (Altria) at 008 (Nu Mark Brand Update, Aug. 2018)).

Response to Proposed Finding No. 1121:

The Proposed Finding is incomplete and misleading without additional context. *First*, marginal contribution is not an indication of profitability or growth. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785).

Second, the cited marginal contribution calculation was ever more skewed because it also excluded distribution costs, such as the ITP shelf-space program. (PX1127 (Altria) at 003). According to data circulated in September 2018, when distribution costs were included, Nu Mark's total marginal contribution was $3 million below target and $15 million less than the previous year. (PX1127 (Altria) at 003). Meanwhile, Nu Mark's adjusted income, after accounting for all relevant expenses, was negative $101 million. (PX1127 (Altria) at 003).

Third, despite some growth, Elite was not meeting its projections. The projections for 2018-2020 prepared in February 2018 assumed that Altria would sell 11 million units of pod products in 2018. (PX1113 (Altria) at 009). But, as of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target. And, despite Elite's marginal contribution, Nu Mark ultimately lost $101 million in the first nine months of the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1122. Between May 2018 and July 2018, MarkTen Elite's sales volume increased by 450 percent in the multioutlet convenience store channel, with average weekly volume in stores carrying Elite increasing by 56 percent over this period. (PX1056 (Altria) at 033 (Nu Mark Brand Update, Aug. 2018)).

Response to Proposed Finding No. 1122:

The Proposed Finding is incomplete and misleading without additional context. *First*, the increase in Elite's sales volume did not reflect that it was developing a consumer base that preferred Elite, but rather merely that Nu Mark was rapidly expanding distribution, growing from 6,000 stores in the first quarter to more than 23,000 stores by the end of the second quarter. (PX4566 (Altria) at 016). As Schwartz explained when presented with a similar sales volume figure at trial, "this is showing, again, in the middle of a launch with expanding new stores that volume was growing, but this also was only half the picture because relative to the rest of what was going on in the vapor market, this was insignificant." (Schwartz (Altria) Tr. 1953).

Second, Elite's average weekly sales volume per store was increasing off of a very small base. The increase of 56 percent represents an increase from 4.1 units per store per week to just 6.4 units per store per day, an average of less than one sale per day. (PX1056 (Altria) at 033). By contrast, JUUL was selling 83 units per store per week in 2018. (PX1109 (Altria) at 014)

1123. From July 2018 to September 2018, MarkTen Elite's same store sales grew 38 percent, with "[a]ccelerated development in stores with premium space/positioning." (Quigley (Altria) Tr. 1981 (discussing PX1072 (Altria) at 004) (Nu Mark "Brand Update," Oct. 2018)).

Response to Proposed Finding No. 1123:

The Proposed Finding is incomplete and misleading without additional context. *First*, Elite's average weekly sales volume per store was increasing off of a very small base. Although the cited presentation does not list the units of per-store sales, using the numbers from a July 2018 presentation, which indicated that Elite was selling an average of 6.4 units per store per day,

(PX1056 (Altria) at 033), an increase of 38 percent would work out to an additional 2.4 units per store per week, for a total of 8.8 units per store per week, barely one sale per day.

Second, Elite's per-store sales growth was decelerating. While it had increased by 56 percent from May to July, (PX1056 (Altria) at 033), it increased by just 38 percent from July through September, (PX1072 (Altria) at 004).

1124. Nu Mark was able to take Elite from zero retail stores to 25,000 retail stores between February and September of 2018. (PX4314 (Altria) at 006).

Response to Proposed Finding No. 1124:

The Proposed Finding is incomplete and misleading without additional context. Elite's rapid increase in distribution is a testament to Altria's distribution network, not the growth potential of the product. As Myers, the head of AGDC, explained, consumers face "two moments of truth": (1) when they see the product in the store and decide whether to make a purchase, and then (2) "when they take it out of the package and use the product." (Myers (Altria) Tr. 3329). Altria's sales force could "roll it out and get it everywhere in position," i.e., "create good conditions for the first moment, but [it did not] own the second." (Myers (Altria) Tr. 3329-30). Though the sales force did everything it could, Elite "didn't win in the second moment of truth, that part where the consumer took it home and used the product." (Myers (Altria) Tr. 3366-67).

The sales data bears this out. The projections for 2018-2020 prepared in February 2018 assumed that Altria would sell 11 million units of pod products in 2018. (PX1113 (Altria) at 009). But, as of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target. And Nu Mark ultimately lost $101 million in the first nine months of the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1125. Craig Schwartz stated in an August 4, 2018, email to Altria's former Chairman that MarkTen Elite was "Starting to gain traction" and was "showing promise" with "the best

yet to come," including plans for marketing the product in casinos, on social media, and through affiliate programs later in the month. (PX1260 (Altria) at 002).

Response to Proposed Finding No. 1125:

The Proposed Finding is incomplete and misleading without additional context. Schwartz also noted Altria "had to revamp the bundle offer," meaning the $8.99 promotion for an Elite device and a pod pack, to even start gaining traction. (PX1260 (Altria) at 002). And Schwartz was also measured about Elite's prospects: "Tall task against Juul." (PX1260 (Altria) at 002). Moreover, in his next email in this chain, he clarified the limited nature of Elite's promise: "Fundamentally," he wrote, "Juul appeals to those seeking a cigarette experience, whereas Elite provides a full inhalation, vaping experience . . . the size of the prize currently favors the former." (PX1260 (Altria) at 001 (ellipses in original)).

1126. By August 11, 2018, MarkTen Elite had expanded to around 20,000 stores with a planned expansion to more than 20,000 "additional stores by December 2018." (PX1149 (Altria) at 011 (Nu Mark 2018 Strategic Plan Review Q3 Update, Aug. 11, 2018)).

Response to Proposed Finding No. 1126:

The Proposed Finding is incomplete and misleading without additional context. Elite's rapid increase in distribution is a testament to Altria's distribution network, not the growth potential of the product. As Myers, the head of AGDC, explained, consumers face "two moments of truth": (1) when they see the product in the store and decide whether to make a purchase, and then (2) "when they take it out of the package and use the product." (Myers (Altria) Tr. 3329). Altria's sales force could "roll it out and get it everywhere in position," i.e., "create good conditions for the first moment, but [it did not] own the second." (Myers (Altria) Tr. 3329-30). Though the sales force did everything it could, Elite "didn't win in the second moment of truth, that part where the consumer took it home and used the product." (Myers (Altria) Tr. 3366-67).

The sales data bears this out. The projections for 2018-2020 prepared in February 2018 assumed that Altria would sell 11 million units of pod products in 2018. (PX1113 (Altria) at 009). But, as of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target. And Nu Mark ultimately lost $101 million in the first nine months of the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1127. In an August 15, 2018, email to Altria's former Chairman, Craig Schwartz stated that by July 2018, MarkTen Elite had generated $5 million in positive marginal contribution on $20 million in sales, despite the fact that it "took us 4 years to be Margin positive with our MarkTen cig-a-like franchise." (PX1601 (Altria) at 001).

Response to Proposed Finding No. 1127:

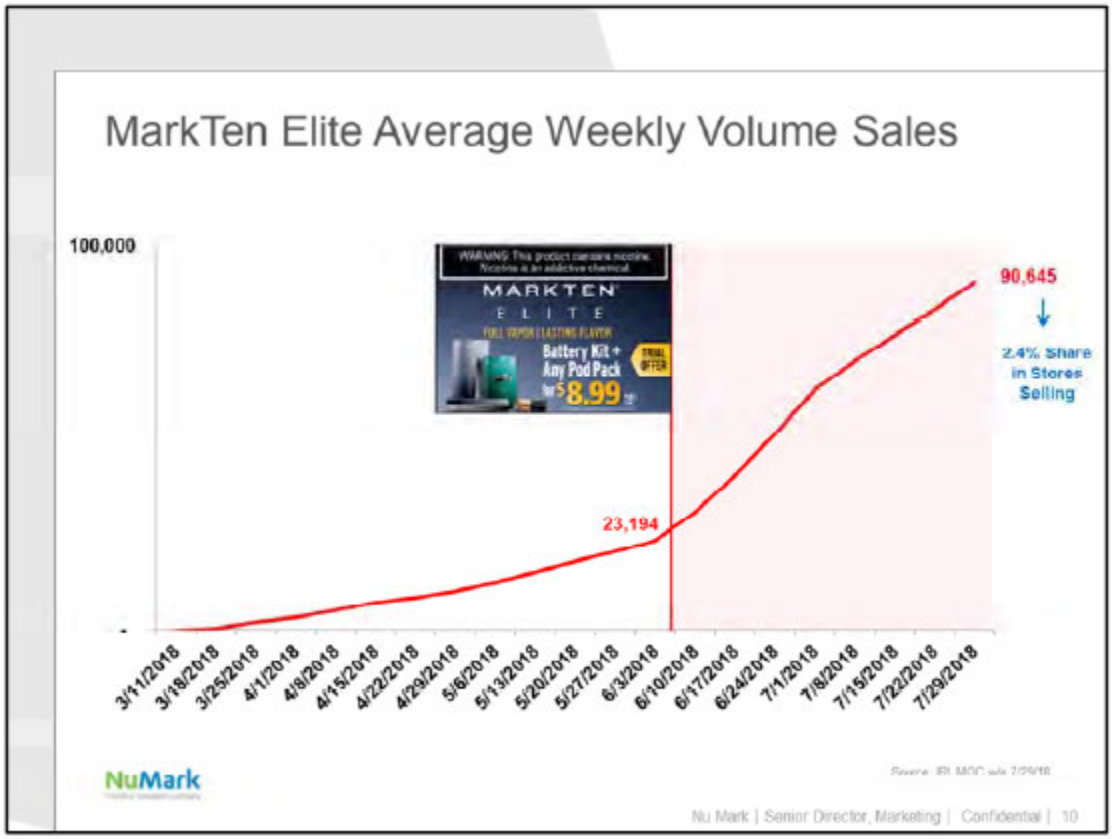
The Proposed Finding is incomplete and misleading without additional context. *First*, in this email Schwartz acknowledged that Elite was not a product suited to converting smokers. "Fundamentally," he wrote, "Juul appeals to those seeking a cigarette experience, whereas Elite provides a full inhalation, vaping experience . . . the size of the prize currently favors the former." (PX1260 (Altria) at 001 (ellipses in original)).

Second, marginal contribution is not an indication of profitability or growth. It excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (PX7040 Gifford (Altria) Dep. at 98). Marginal contribution thus "leav[es] out part of the story," namely the profits and losses that show "what the entire business is doing." (Gifford (Altria) Tr. 2785).

Third, despite some growth, Elite was not meeting its projections. The projections for 2018-2020 prepared in February 2018 assumed that Altria would sell 11 million units of pod products in 2018. (PX1113 (Altria) at 009). But, as of October 15, 2018, Altria had sold just 4.9 million units of pod products, (PX1127 (Altria) at 004), well off the 11 million target. And, despite

Elite's marginal contribution, Nu Mark ultimately lost $101 million in the first nine months of the year alone, $30 million more than it had anticipated losing over the course of 12 months. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003).

1128. An August 2018 "Nu Mark Brand Update" showed that MarkTen Elite average weekly volume sales increased steadily from the product's launch in March 2018 through July 2018. (PX1056 (Altria) at 012 (Nu Mark Brand Update, Aug. 2018)).

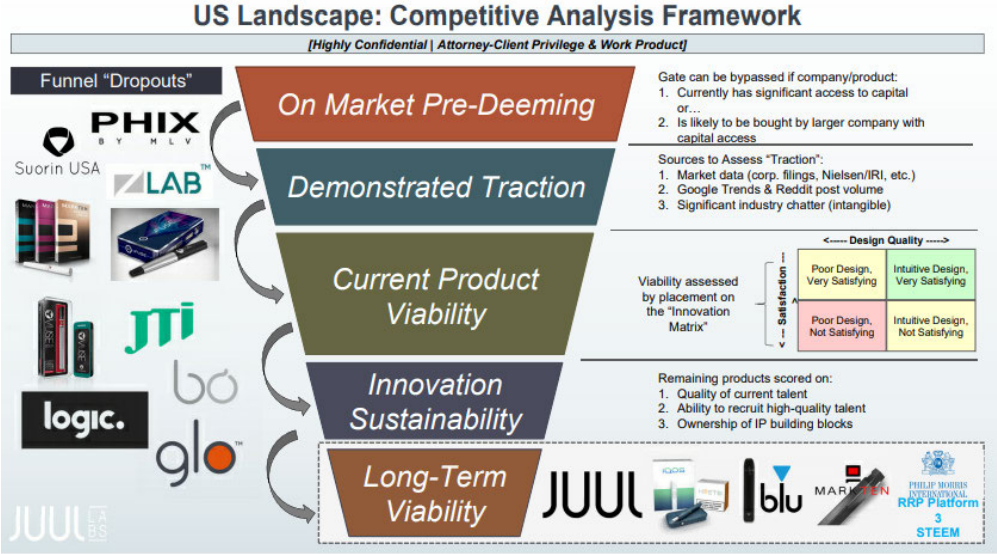


(PX1056 (Altria) at 012).

Response to Proposed Finding No. 1128:

The Proposed Finding is incomplete and misleading without additional context. Elite's growing volume sales merely reflect its growing distribution. From March to late July, Nu Mark expanded distribution to 24,000 stores. (PX1056 (Altria) at 015). But 90,645 weekly unit sales across 24,000 stores works out to less than four units sold per store per week. That is hardly the makings of a profitable business.

1129. Joseph O'Hara, JLI's competitive intelligence expert, concluded that MarkTen Elite had "long-term viability." (PX2289 at 021 ("US Landscape: Competitive Analysis Framework"); PX7033 (O'Hara (JLI), Dep. at 80 ("And what are the brands under the long-term viability category in this slide? A. […] MarkTen […] Q. Do you know whether the logo for MarkTen there, is that referring to MarkTen Elite or the MarkTen brand as a whole or something else? A. That was referring to MarkTen Elite.")).



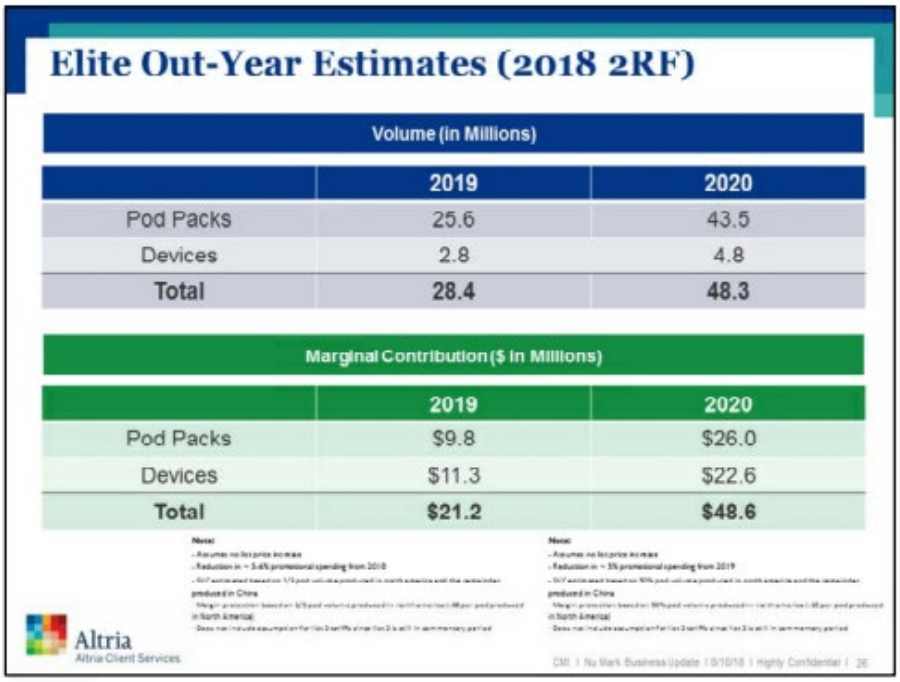
(PX2289 (JLI) at 021).

Response to Proposed Finding No. 1129:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that his framework was "a speculative analysis of who should continue to be watched in the future as well as who may currently be viable in the long term." (PX7033 O'Hara (JLI) Dep. at 80). "In this snapshot in time," O'Hara included Elite as a product to watch because, while it had only been on the market a few weeks when O'Hara created the framework sometime around March 2018 and "there was no traction to demonstrate one way or the other," it was a pod-based product, brought to market by Altria, which had significant access to capital. (O'Hara (JLI) Tr. 528, 530, 549-50). Despite the criteria listed on the right-side of the slide, O'Hara emphasized that the analysis was "case-by-case." (PX7033 O'Hara (JLI) Dep. at 71). For example, one of the products, PMI's Platform 3, had not even launched and O'Hara included it as a product to watch

based solely on what he had read in PMI's investor materials. (O'Hara (JLI) Tr. 528; PX7033 O'Hara (JLI) Dep. at 76). Meanwhile Elite "did not have nicotine salts and did not have a high nicotine strength, so would not have scored well on that metric [of satisfaction]." (PX7033 O'Hara (JLI) Dep. at 74-75). O'Hara testified that, "[b]y the end of 2018, [he] certainly would have included a product like Vuse Alto at the bottom," which was not yet on the market when the slide was created, "and [he] certainly would not have included a product like MarkTen." (O'Hara (JLI) Tr. 548).

1130. An Altria presentation attached to an August 27, 2018, email projected positive and growing margins and sales volume for MarkTen Elite for 2019 and 2020, as well as declining promotional spending. (PX1143 (Altria) at 28 ("Elite Business Case," Aug. 27, 2018) (estimating that MarkTen Elite would sell 25.6 million pods and 2.8 million devices in 2019 and 43.5 million pods and 4.8 million devices in 2020, with a marginal contribution of $21.2 million in 2019 and $48.6 million in 2020)).



Elite Out-Year Estimates (2018 2RF)

Volume (in Millions)		
	2019	2020
Pod Packs	25.6	43.5
Devices	2.8	4.8
Total	**28.4**	**48.3**

Marginal Contribution ($ in Millions)		
	2019	2020
Pod Packs	$9.8	$26.0
Devices	$11.3	$22.6
Total	**$21.2**	**$48.6**

Altria
Altria Client Services

(PX1143 (Altria) at 28).

Response to Proposed Finding No. 1130:

The Proposed Finding is incomplete and misleading without additional context. The presentation was a "work-in-progress" document to identify what the business prospects were for Elite. It made assumptions about the future of Elite, including "a scenario for growing." (PX7014 Baculis (Altria) Dep. at 259-61). Those assumptions vary at different points in the presentation, (PX1143 (Altria) at 014, 028), and the slide cited by Complaint Counsel has even more ambitious projections than what Baculis characterized as the "growing" scenario. (PX7014 Baculis (Altria) Dep. at 261 (discussing PX1143 (Altria) at 014); *see also* PX1143 (Altria) at 014, 028 (compare 014, which assumes Elite will sell 23.4 million pods in 2019, with 028, which assumes it will sell 25.6 pods)).

But the presentation, which was never finalized, (PX7014 Baculis (Altria) Dep. at 263), rests on a series of unfounded assumptions. As Complaint Counsel highlighted in the Proposed Finding, it assumed that Nu Mark would reduce promotional spending on Elite, which is incompatible with the aggressive discounting by leading competitors beginning in late 2018 and carrying on through today. (RFF ¶¶ 1290, 1304, 1315-23). And the presentation makes no attempt to explain how Elite, which sold just 4.9 million units as of October 2018, (PX1127 (Altria) at 004), would achieve a nearly six-fold increase in unit sales from 2018 to 2019, and then nearly double its sales the following year, (PX1143 (Altria) at 028 (listing "total" projected volume)). Nor does the presentation explain how, given that Nu Mark as a whole had a marginal contribution of just $1 million as of November 2018, (PX1127 (Altria) at 003), Elite would increase its marginal contribution to $21.2 million in 2019, a 2100 percent increase in one year, or $48.6 million in 2020, a 4800 percent increase over two years.

1131. Altria's own research showed that Elite performed well against JUUL on multiple dimensions and was "consistently preferred over…JUUL". (PX7034 (Mountjoy (Altria)

Dep. at 50-53) (discussing PX4248 (Altria) at 014 (E-Vapor Category and Nu Mark and Business Update, May 2017)).

Response to Proposed Finding No. 1131:

The Proposed Finding is incomplete and misleading without additional context. The cited quote is based on analysis from a May 10-11, 2017 consumer study conducted in Hackensack and Morristown, New Jersey. (*Compare* PX4248 (Altria) at 12, *with* RX1291 (Altria) at 003). According to the full analysis of the study, Nu Mark tested Elite alongside a number of other pod-based products, including JUUL. (RX1291 (Altria) at 004). The consumer study, which asked users to try a series of devices in quick succession, did not address nicotine satisfaction specifically and noted that a longer-term study would "better address overall satisfaction." (RX1291 (Altria) at 004, 006).

In addition, "the test at the end of the day is what people are buying at retail," not consumer research. (Jupe (Altria) Tr. 2247-48; *see also* Begley (Altria) Tr. 1098 (observing that the retail environment is where manufacturers "get the best learnings in terms of how appealing [a] product [is] to consumers")). And Elite failed on the market. Despite Altria's heavy promotional efforts, Elite never achieved more than a one percent share of e-vapor cartridge unit sales. (RX1217 Murphy Report ¶ 12; RFF ¶ 442). In July 2018, a senior manager at JLI put it bluntly: Elite's "US sales have been absolutely terrible, no traction whatsoever." (RX1165 (JLI) at 004).

6. Other Competitors in the Closed-System E-Cigarette Market Experienced Commercial Challenges, But Remained in the Market

1132. MarkTen, Vuse, Blu, and Logic all faced substantial market share declines in the closed-tank e-cigarette market from Q4 2017 to Q4 2018 as JLI's market share rose rapidly: while JLI's share rose from 23.2 percent to 70.9 percent, MarkTen's share fell from 12.4 percent to 5 percent, Vuse's share fell from 30 percent to 11.5 percent, Blu's share fell from 9 percent to 4.9 percent, Logic's share fell from 6.8 percent to 2.8 percent. (PX1109 (Altria) at 045, 046, 048, 051, 058 (Nov. 14, 2018, "Nu Mark Business Update")).

Response to Proposed Finding No. 1132:

The Proposed Finding is incomplete and misleading without additional context. These declines largely reflect the decline in these companies' cig-a-like products and do not speak to the competitive potential of products that were just being commercialized at the end of 2018. For example, Reynolds launched its Vuse Alto—[redacted]—in the fourth quarter of 2018, (PX1109 (Altria) at 048), at the end of the period measured in the Proposed Finding. In that fourth quarter of 2018, Alto had already jumped to 0.7 percent market share, (PX1109 (Altria) at 048), and its sales velocity was increasing quickly, (PX1109 (Altria) at 050). And that trend has continued; by September 2020, Vuse Alto was the leader in device share and had 21 percent of the cartridge share. (RFF ¶¶ 1371-74).

Similarly, in the fourth quarter of 2018, ITG launched *my*blu Intense, salt-based cartridges for its pod-based device, (RFF ¶ 258(a); PX1109 (Altria) at 051), and saw a strong uptick in cartridge sales following the end of its device promotion, (PX1109 (Altria) at 054).

Nu Mark, by contrast, did not have a pod-based product with nicotine salts that had been on the market by August 8, 2016, that it could launch. Elite did not have salts, (RFF ¶ 628), and never saw a strong uptick in cartridge sales following its device promotions, (RFF ¶ 435-37).

1133. [redacted] and have not exited the closed system e-vapor market. (*See* CCFF ¶¶ 109-17, above; ¶¶ 1134-43, below).

Response to Proposed Finding No. 1133:

The Proposed Finding is incomplete and misleading without additional context. [redacted], meaning that they were well positioned to compete with JUUL and had greater growth potential than Nu Mark's products, (RFF ¶¶ 1464-69).

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 109-17 and 1134-43, Respondents incorporate their responses to those Proposed Findings herein.

1134. [redacted] (PX8008 at 011-12 (¶ 21) (Huckabee (Reynolds), Decl.) (*in camera*)).

Response to Proposed Finding No. 1134:

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted], meaning that it was well positioned to compete with JUUL and had greater growth potential than Nu Mark's products, (RFF ¶¶ 1464-69). Reynolds has also had market success, including overtaking JUUL as the leader in device share. (RFF ¶ 246).

Second, contrary to the implication invited by the Proposed Finding, Reynolds is not willing to continue earning negative returns. At trial, Huckabee testified that [redacted]

1135. Nonetheless, Reynolds' Vuse, ITG's Blu, and JTI's Logic all remained in the e-cigarette market. (*See* CCFF ¶¶ 163-87, above).

Response to Proposed Finding No. 1135:

The Proposed Finding is incomplete and misleading without additional context. [redacted], meaning that they were well positioned to compete with JUUL and had greater growth potential than Nu Mark's products, (RFF ¶¶ 1464-69)).

As for JTI, a representative from that company never appeared for a deposition, and the Court therefore ordered that that representative would not be permitted to testify at trial and that JTI's declaration should be excluded from the exhibit list, (Order of May 5, 2018); ultimately no documents produced by JTI were included on the exhibit list (JX002; JX003). As a result, the Court lacks sufficient information to draw any conclusions about JTI's motivations or rationale for marketing its e-vapor products.

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 163-87, Respondents incorporate their responses to those Proposed Findings herein.

1136. Other major e-cigarette competitors also face product design and regulatory hurdles, yet have not exited, even though they are also subject to the same PMTA requirements and deadlines. (*See* CCFF ¶¶ 197-207, above); [redacted]

Response to Proposed Finding No. 1136:

The Proposed Finding is incomplete and misleading without additional context. Although all e-vapor competitors are subject to the same PMTA requirements, their products vary. [redacted], meaning that they were well positioned to compete with JUUL and had greater growth potential than Nu Mark's products, (RFF ¶¶ 1464-69). And unlike Nu Mark's e-vapor products, other e-vapor products from major competitors, other than V2 and Logic, had dry puff prevention, (RFF ¶¶ 361-62, 365), which is important for satisfying the risk reduction requirement for a PMTA, (RFF ¶ 363).

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 197-207, Respondents incorporate their responses to those Proposed Findings herein.

1137. Other major e-cigarette competitors also face similar tradeoffs between short- and long-term profitability, yet have not exited. (PX2175 (JLI) at 019 (Email from Tim Danaher, Apr. 17, 2018 attaching a Citi Research analyst note) (Citi Research notes "all the large tobacco companies say their e-vapor businesses are loss-making"); PX1733 (Altria) at 005 (E-vapor Category Review, Mar. 2017) ("Major manufacturers are still operating at sizable

losses"); Gifford (Altria) Tr. 2851-54 (discussing PX4040 (Altria) at 012 ("Nu Mark 2016-2018 Strategic Plan") (estimating Vuse's OCI in 2015 at between negative $160 and negative $180 million) and RX0746 (Altria) at 007 (estimating Vuse's OCI in 2016 at negative $120 million))). OCI stands for "operating company income." (PX7010 (Gifford (Altria), Dep. at 44)).

Response to Proposed Finding No. 1137:

The Proposed Finding is incomplete and misleading without additional context. That e-vapor competitors were operating at a loss in 2015, 2016, and 2018, is not reflective of their "*expected* financial performance," which was one of the key factors for Altria when it decided to discontinue its remaining e-vapor products in December 2018. (PX9080 (Altria) at 001 (emphasis added)). At that time, Altria projected that Nu Mark would suffer another quarter billion dollars in losses over the next three years, including $47 million in 2021. (PX4232 (Altria) at 013; *see also* [redacted]).

[redacted]

These different financial expectations reflect the difference in the competitive positions of Altria and the other leading competitors. [redacted], meaning that they were well positioned to compete with JUUL and had greater growth potential than Nu Mark's products, (RFF ¶¶ 1464-69).

Finally, the citation for the Gifford testimony is incorrect. It appears Complaint Counsel intends to cite page 44 of his deposition, which is PX7040, not page 44 of his investigational hearing transcript, which is PX7010.

1138. [redacted] (PX8008 at 011-12 (¶ 21) (Huckabee (Reynolds), Decl.) (*in camera*) [redacted] .

Response to Proposed Finding No. 1138:

The Proposed Finding is incomplete and misleading without additional context. *First*, unlike Altria, [redacted], meaning that it was well positioned to compete with JUUL and had greater growth potential than Nu Mark's products, (RFF ¶¶ 1464-69). Reynolds has also had market success, including overtaking JUUL as the leader in device share. (RFF ¶ 246).

[redacted]

1139. [redacted] (PX8011 at 007-08 (¶ 35) (Eldridge (ITG), Decl.) (*in camera*) ([redacted] ; *see also* PX7012 (Eldridge (ITG), Dep. at 189)).

Response to Proposed Finding No. 1139:

The Proposed Finding is incomplete and misleading without additional context. In contrast to Nu Mark's products, ITG Brands is currently on the market with a format that is overwhelmingly preferred by consumers: a pod-based product with nicotine salts. (RFF ¶¶ 258, 261, 1324-37).

1140. Dr. Rothman found that Altria's margins were within the range of its competitors from 2015 to 2018. (PX5000 at 073 (¶ 126) (Rothman Expert Report)).

Response to Proposed Finding No. 1140:

The Proposed Finding is incomplete and misleading without additional context. *First*, Dr. Rothman simply averaged the margin across of all Nu Mark's products without considering the importance of pod-based products to future success. (RX1217 Murphy Report ¶ 161). "Whereas Altria's average margin for MarkTen was 2 percent, the gross margin for MarkTen Elite in 2018 averaged -31 percent, reflecting a combination of low sales volume and the cost of Altria's heavy spending on marketing and promotions." (RX1217 Murphy Report ¶ 161).

Second, Dr. Rothman examined only Altria's "gross margin," which excludes operating costs. (RX1217 Murphy Report ¶ 162). He did not consider "operating margin," which is the more relevant figure because it includes operating costs, such as "production overhead, fixed costs associated with marketing or promotion, sales, general and administrative ('SG&A') costs and research and development ('R&D') costs." (RX1217 Murphy Report ¶ 162). Notably, "[w]hereas Elite's gross margin was -31 percent, its operating margin was substantially lower at -47 percent." (RX1217 Murphy Report ¶ 162).

1141. [redacted] (King (PMI) Tr. 2382) (*in camera*)).

Response to Proposed Finding No. 1141:

Respondents have no specific response.

1142. [redacted] (King (PMI) Tr. 2382) (*in camera*)).

Response to Proposed Finding No. 1142:

Respondents have no specific response.

1143. [redacted] (King (PMI) Tr. 2383) (*in camera*)).

Response to Proposed Finding No. 1143:

The Proposed Finding is incomplete and misleading without additional context. Just as Altria withdrew e-vapor products from the market that it determined lacked conversion potential and were not expected to become profitable, (RFF ¶¶ 900, 1002, 1091), PMI withdrew numerous e-vapor products following short stints in the market, including its version of Apex. (RFF ¶¶ 1615-18; [redacted]). And, just as Altria was prepared to remain out of the e-vapor market for at least five years while the Growth Teams worked on a leapfrog product, (Gifford (Altria) Tr. 2799), PMI lacked a sustained presence in the e-vapor market from 2014, when it acquired e-cigarette technology, until when it began a full-scale commercialization of VEEV, which ultimately began in late 2020, (PX1635 (PMI) at 032; King (PMI) Tr. 2355). And, just as Altria ultimately decided to participate in the e-vapor space through a minority investment in JLI, (RFF ¶¶ 1126-28), [redacted].

7. Altria Withdrew MarkTen Elite before It Had Time to Assess the Product's Long-Term Potential

1144. Altria launched MarkTen Elite on February 26, 2018. (O'Hara (JLI) Tr. 631-32 (discussing PX2086 (JLI) at 001); Willard (Altria) Tr. 1356-57).

Response to Proposed Finding No. 1144:

Respondents have no specific response.

1145. Altria announced that it would withdraw Elite from the U.S. market on October 25, 2018. (Willard (Altria) Tr. 1274).

Response to Proposed Finding No. 1145:

Respondents have no specific response except to note that, contrary to the heading of this section, the 34 weeks Elite was on the market provided sufficient time to reliably assess its commercial viability. (Willard (Altria) Tr. 1442 (explaining that, by September 2018, Altria "had really had enough time to evaluate MarkTen Elite," and had determined that "[i]t was not successful"); PX7003 Quigley (Altria) IHT at 56 (explaining you need "26 weeks plus" (*i.e.*, 6 months) with a new brand to "really understand what you have")); Myers (Altria) Tr. 3337 (explaining that by the summer of 2018, he had concluded that Elite "wasn't working"; it was not "winning in this space")).

1146. Altria planned a phased rollout of Elite, with 55 percent of volume coverage of accounts/stores not scheduled to occur until September 2018. (PX1298 (Altria) at 029) (Nu Mark 2018 Three Year Strategic Plan, Feb. 27, 2018)).

Response to Proposed Finding No. 1146:

Respondents have no specific response except to note that further expansion was not necessary to evaluate Elite's commercial viability because 34 weeks on the market was sufficient to reliably assess the product. (Willard (Altria) Tr. 1442 (explaining that, by September 2018, Altria "had really had enough time to evaluate MarkTen Elite," and had determined that "[i]t was not successful"); PX7003 Quigley (Altria) IHT at 56 (explaining you need "26 weeks plus" (*i.e.*, 6 months) with a new brand to "really understand what you have")).

1147. As of September 28, 2018, Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (PX7038 (Myers (Altria), Dep. at 255-56 (discussing PX1617 (Altria) at 005))).

Response to Proposed Finding No. 1147:

Respondents have no specific response except to note that further expansion was not necessary to evaluate Elite's commercial viability because 34 weeks on the market was sufficient to reliably assess the product. (Willard (Altria) Tr. 1442 (explaining that, by September 2018,

Altria "had really had enough time to evaluate MarkTen Elite," and had determined that "[i]t was not successful"); PX7003 Quigley (Altria) IHT at 56 (explaining you need "26 weeks plus" (*i.e.*, 6 months) with a new brand to "really understand what you have")).

1148. Quigley testified that Altria planned to expand MarkTen Elite to 37,000 stores by the end of 2018, and that Altria would have been able to do so if not for the discontinuation of the product. (Quigley (Altria) Tr. 1975 (discussing PX1320 (Altria), at 052)).

Response to Proposed Finding No. 1148:

Respondents have no specific response except to note that further expansion was not necessary to evaluate Elite's commercial viability because 34 weeks on the market was sufficient to reliably assess the product. (Willard (Altria) Tr. 1442 (explaining that, by September 2018, Altria "had really had enough time to evaluate MarkTen Elite," and had determined that "[i]t was not successful"); PX7003 Quigley (Altria) IHT at 56 (explaining you need "26 weeks plus" (*i.e.*, 6 months) with a new brand to "really understand what you have")).

1149. Shortly before withdrawing MarkTen Elite from the market, Altria made a product change to Elite to address a leaking issue, leaving it little time to assess the impact of the change on Elite's sales performance. (*See* CCFF ¶¶ 1206-18, below; PX1567 (Altria) at 001 (email dated Oct. 22, 2018) ("As of today, the entire PW network has been converted over to the C1A gasket. Inventory durations are in a healthy position with additional production in transit.")).

Response to Proposed Finding No. 1149:

The Proposed Finding is incomplete and misleading without additional context. Altria did not need time to evaluate the gasket change made to address the leaking issue for two reasons. *First*, [redacted]

Second, addressing the leaking could not solve the primary problems with Elite, "most importantly the fact that [it] didn't have nicotine [satisfaction]." (Quigley (Altria) Tr. 1948).

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 1206-18, Respondents incorporate their responses to those Proposed Findings herein.

1150. Willard testified that "typically monitoring market performance for a longer period of time is going to give you a more reliable measure of the performance of the product" and "typically a longer timeframe is better to measure the long-term success of a product." (PX7004 (Willard (Altria), IHT at 114-15)).

Response to Proposed Finding No. 1150:

The Proposed Finding is incomplete and misleading without additional context. *First*, although a longer period of time might be *more* reliable, a company can make a reliable decision in a shorter time frame. And Willard specifically testified that, by September 2018, after about seven months on the market, Altria "had really had enough time to evaluate MarkTen Elite," and had determined that "[i]t was not successful." (Willard (Altria) Tr. 1442). *Second*, other manufacturers made the decision to discontinue products on a similar time frame. [redacted] Similarly, ITG Brands previously marketed a vapor product called Salt of the Earth, which was pulled from the market after "a quick introduction." (PX7012 Eldridge (ITG Brands) Dep. at 181; RFF ¶ 259).

1151. When Quigley first learned that Altria executives were considering discontinuing MarkTen Elite, he was surprised and he considered it unusual that Altria launched product, saw it grow, and then withdrew it several months later. (PX7003 (Quigley (Altria), IHT at 133-34).

Response to Proposed Finding No. 1151:

The Proposed Finding is incomplete and misleading without additional context. Quigley testified that he was "caught . . . off guard" to be asked whether Altria should consider pulling Elite in August because he "had been very clear that [he] wanted to go through a three-month process culminating with [Nu Mark's] game plan where [he] could assess the building and bring forward [his] recommendations. And so when [the leadership] started having discussions about

pulling Elite off the market, [he] was not done with [his] work . . . ." (Quigley (Altria) Tr. 1958-59). But Quigley also understood why the question was being asked. He had "told people that nicotine [satisfaction] . . . was the most important thing [Nu Mark] needed in [its] products and [Nu Mark] didn't have it. So [he] knew that -- that [Nu Mark] had these fundamental business gaps" and he "knew the products we had were not going to be successful." (Quigley (Altria) Tr. 1959).

Moreover, when Quigley was asked in August 2018 about whether to pull Elite, Altria had not yet received FDA's September letter raising concerns about youth usage of e-vapor products. Quigley consistently testified that he agreed with the decision to withdraw Elite in light of the FDA letter. (Quigley (Altria) Tr. 1993; PX7003 Quigley (Altria) IHT at 179-80; *see also* RFF ¶ 946).

1152. Quigley testified that he was President of U.S. Smokeless Tobacco for more than six years, during which time he was able to turn around the business. (Quigley (Altria) Tr. 2000-01 ("[US Smokeless Tobacco] had a significant amount of challenges in my time there, structural challenges. The board was very unhappy with the financial performance of the business, the brand performance of the business, and in my time I grew the income of that business 50 percent, over my six-year tenure, well ahead of I believe what our plans were. I put a brand strategy in place to address some of the key business performance concerns, and also addressed some of our structural challenges and built new returns models, addressed out of stocks and built a new pricing model to help us be more efficient. So I felt like I had totally transformed that business.").

Response to Proposed Finding No. 1152:

The Proposed Finding is incomplete and misleading without additional context. The circumstances under which Quigley took over U.S. Smokeless Tobacco (USSTC) were very different from the situation at Nu Mark. When Altria acquired USSTC, it already had the "leading brands in that category, Copenhagen and Skoal." (Willard (Altria) Tr. 1329). But the business had "structural challenges" that led the board to be "unhappy with the [company's] financial performance." (Quigley (Altria) Tr. 2001). In other words, Quigley was tasked with revitalizing an established business that already had well-known, leading brands but was not as successful as

it could be. Nu Mark, by contrast, was a start-up operating company, (RFF ¶ 174), that had been losing money since its inception, (RFF ¶¶ 1077-81), had products that had never held the leading position, (Willard (Altria) Tr. 1340-41), and needed to secure FDA approval to keep its products on the market, (RFF ¶¶ 60, 64).

1153. Quigley testified that he was given significantly less time to turn around the Nu Mark business as CEO than he was given to turn around U.S. Smokeless Tobacco. (Quigley (Altria) Tr. 2087-88 (explaining he only had six to seven months as CEO of Nu Mark versus six years at U.S. Smokeless Tobacco)).

Response to Proposed Finding No. 1153:

The Proposed Finding is incomplete and misleading without additional context. USTTC was in a fundamentally different position: When Altria acquired it in 2009, it was a well-established company that already had the "leading brands in that category, Copenhagen and Skoal." (Willard (Altria) Tr. 1329, 1331). Nu Mark, by contrast, was a start-up operating company, (RFF ¶ 174), that had been losing money since its inception, (RFF ¶¶ 1077-81), had products that had never held the leading position, (Willard (Altria) Tr. 1340-41), and needed to secure FDA approval to keep its products on the market, (RFF ¶¶ 60, 64).

Moreover, there is no evidence that Quigley was given insufficient time at Nu Mark. Quigley led a 100-day review that concluded that Altria did not have products that could succeed in the marketplace or a workable business approach to innovative products. (Quigley (Altria) Tr. 2079-80). He proposed the innovation overhaul that, by September 2018, evolved into the growth teams. (RFF ¶ 904). He endorsed withdrawing Elite from the market in response to the concerns about youth e-vapor usage raised in FDA's letter of September 12, 2018. (RFF ¶ 946). He ultimately agreed that Altria should discontinue Nu Mark's cig-a-like products based on its financial performance. (RFF ¶ 1098). And, far from arguing that either of the product withdrawals were made too hastily, he testified that "it would not be uncommon to make a decision where we're

losing money and a product is not performing or doesn't have what it needs to be successful to be pulled from the market." (Quigley (Altria) Tr. 1961).

1154. In his remarks at the 2017 Investor Day, Barrington observed that Altria "had reversed the very significant downward decline in market share its leading premium brands were experiencing before [Altria] acquired them," and that "[c]learly USSTC's tremendous success in smokeless products is a testament to our ability to build profitable businesses other than combustible cigarettes and grow brands other than Marlboro." (PX9000 (Altria) at 006).

Response to Proposed Finding No. 1154:

The Proposed Finding is incomplete and misleading without additional context. USSTC is not an apt comparison for Nu Mark. When Altria acquired USSTC in 2009, it had the "leading brands in that category, Copenhagen and Skoal." (Willard (Altria) Tr. 1329, 1331; RFF ¶ 166). But the business had "structural challenges" that led the board to be "unhappy with the [company's] financial performance." (Quigley (Altria) Tr. 2001). In short, it had strong, well-established brands in need of better management. Nu Mark, by contrast, was a start-up operating company, (RFF ¶ 174), that had been losing money since its inception, (RFF ¶¶ 1077-81), had products that had never held the leading position, (Willard (Altria) Tr. 1340-41), and needed to secure FDA approval to keep its products on the market, (RFF ¶¶ 60, 64). In other words, Nu Mark was a company in search of a viable product.

The challenges at USSTC played to Altria's strengths; those at Nu Mark did not. As Schwartz testified, "where Altria has done a great job is buying companies, bolting them to [its] infrastructure, . . . and [it] tend[s] to make them better once . . . [it] acquire[s] them." (Schwartz (Altria) Tr. 1913). "But from an organic point of view," Altria does not "have a good track record" in developing innovative alternatives to cigarettes. (Schwartz (Altria) Tr. 1913).

1155. Quigley testified that he "did not feel it made sense to walk away from the pod business." (PX7003 (Quigley (Altria), IHT at 120)). Quigley's recommendation to Willard, Gifford, Garnick, and Crosthwaite was that Nu Mark pursue a PMTA for Elite 1.0 and keep it on

the market, while focusing on getting an improved Elite 2.0 product through the PMTA process:

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

(PX7003 (Quigley (Altria), IHT at 120); PX1174 (Altria) at 024 (Aug. 2, 2018 Nu Mark Current Situation and Near Term Strategic Options deck sent from Quigley to Willard, Gifford, Garnick, and Crosthwaite)).

Response to Proposed Finding No. 1155:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In the context of discussing a recommendation made in a presentation from August 2, 2018, Quigley explained that, at the time, he thought Nu Mark should continue investing in Elite. (PX7003 Quigley (Altria) IHT at 120). But circumstances change. And, following receipt of FDA's September 12, 2018 letter raising concerns about youth usage of e-vapor, Quigley "was fully supportive of pulling Elite off the market" in response to FDA's letter. (Quigley (Altria) Tr. 1993). He thought it was the right decision "[b]ecause [Altria's] legacy as a company was to lead and be the most responsible tobacco company, and [he] believed it was the most responsible thing to do, and it, frankly, would give the FDA the ability to think about . . . its strategy to deal with flavor pod products and youth usage." (Quigley (Altria) Tr. 2078-79; *see also* PX7003 Quigley (Altria) IHT at 179-80 ("Q. Did you agree that this was the right decision to pull Mark Ten Elite off the market? A. At that point in time, given the circumstances, yes.")).

1156. When asked about the performance of IQOS, Willard testified "I think it's probably too early. It's only been a few months, and I think it probably takes a year to get an assessment for how it's doing." (PX7004 (Willard (Altria), IHT at 113-14)).

Response to Proposed Finding No. 1156:

The Proposed Finding is incomplete and misleading without additional context. IQOS's product rollout was very different from Elite's. When Elite was launched, JUUL had already created a market for pod-based products; in other words, Altria was "not introducing the consumer to a new way to enjoy e-vapor." (Gifford (Altria) Tr. 2739). By contrast, "the heat-not-burn category had not really been established in the U.S. yet." (PX7004 Willard (Altria) IHT at 113). In addition, [redacted]

1157. Paul Crozier, Sheetz's Category Manager, Cigarettes and Tobacco, acknowledged that it was not common for a vendor to Sheetz to remove a new product about roughly eight months after its launch. (Crozier (Sheetz) Tr. 1498).

Response to Proposed Finding No. 1157:

The Proposed Finding is incomplete and misleading without additional context. Numerous other manufacturers decided to discontinue products on a similar time frame. [redacted] Similarly, ITG Brands previously marketed a vapor product called Salt of the Earth, which was pulled from the market after "a quick introduction." (PX7012 Eldridge (ITG Brands) Dep. at 181; RFF ¶ 259).

1158. Crozier testified that, in his view, Altria did not give MarkTen Elite "enough time . . . to prove itself out" before discontinuing the product in October 2018. (Crozier (Sheetz) Tr. 1498).

Response to Proposed Finding No. 1158:

The Proposed Finding is incomplete and misleading without additional context. *First*, numerous other manufacturers decided to discontinue products on a similar time frame. [redacted]

[redacted]

Similarly, ITG Brands previously marketed a vapor product called Salt of the Earth, which was pulled from the market after "a quick introduction." (PX7012 Eldridge (ITG Brands) Dep. at 181; RFF ¶ 259).

Second, Crozier acknowledged that he has no idea why Altria pulled its products. He has no knowledge of Altria's innovation efforts, no knowledge of its financial analysis of its e-vapor business, and no knowledge of Altria's assessment of whether the business could ever become profitable. (Crozier (Sheetz) Tr. 1557-59).

1159. Crozier testified that he was surprised that Altria would discontinue MarkTen Elite after only 8 months and could not recall any other e-cigarette product that had been discontinued in such a short time period. (PX7019 (Crozier (Sheetz), Dep. at 109) ("Q. Are you surprised that Altria would launch a product with MarkTen Elite and discontinue it eight months later? […] A. I was a little surprised that it hadn't even been on the market an entire year, especially since we kind of had it as an exclusive product launch in March but less than a year is a pretty short time. […] Q. Do you recall any other examples of e-cigarette suppliers discontinuing products in that short of a time period? A. I do not.")).

Response to Proposed Finding No. 1159:

The Proposed Finding is incomplete and misleading without additional context. *First*, numerous other manufacturers decided to discontinue products on a similar time frame. [redacted]

[redacted]

Similarly, ITG Brands previously marketed a vapor product called Salt of the Earth, which was pulled from the market after "a quick introduction." (PX7012 Eldridge (ITG Brands) Dep. at 181; RFF ¶ 259).

Second, Crozier acknowledged that he has no idea why Altria pulled its products. He has no knowledge of Altria's innovation efforts, no knowledge of its financial analysis of its e-vapor

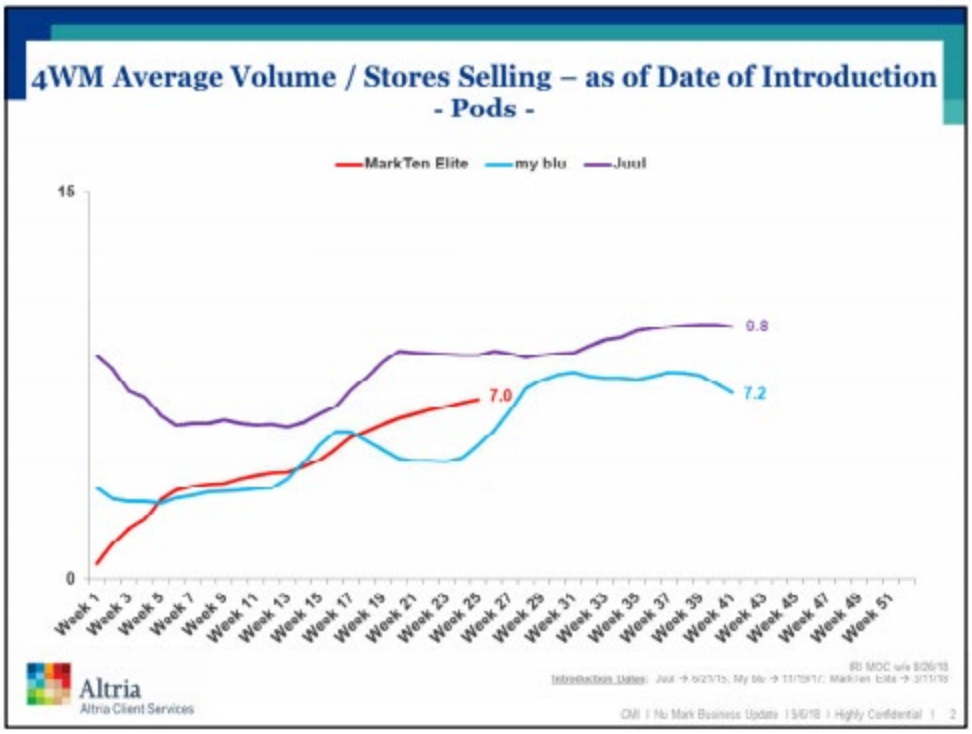
business, and no knowledge of Altria's assessment of whether the business could ever become profitable. (Crozier (Sheetz) Tr. 1557-59).

1160. Jeff Eldridge, ITG Brand's Vice President, Area Central, testified that he was "surprised" when Altria withdrew MarkTen Elite from the market and that he thought it was unusual for Altria to introduce a product and then announce they were pulling it off the market less than a year later. (PX7012 (Eldridge (ITG), Dep. at 180-81)).

Response to Proposed Finding No. 1160:

The Proposed Finding is incomplete and misleading without additional context. Numerous other manufacturers, including ITG Brands, decided to discontinue products on a similar time frame. ITG Brands previously marketed a vapor product called Salt of the Earth, which it pulled from the market after "a quick introduction." (PX7012 Eldridge (ITG Brands) Dep. at 181; RFF ¶ 259). [redacted]

1161. A September 7, 2018, Altria presentation circulated by Craig Schwartz included a chart showing that MarkTen Elite's average pod sales volume per store selling the product was comparable to JUUL's and *my*blu's at similar stages after their respective launches. (PX4313 (Altria) at 001, 005) (MarkTen Elite Potential Investment Justification Information)).



(PX4313 (Altria) at 005).

Response to Proposed Finding No. 1161:

The Proposed Finding is incomplete and misleading without additional information. *First*, any comparison in sales in weeks after launch between Elite and JUUL is spurious given that the two products were launched in different circumstances: When Elite launched "there was an established pod segment in the marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; *see also* PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater"); PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")). Moreover, at JUUL's launch, JLI was a start up with limited reach. (RFF ¶ 415 (noting that JUUL grew without "visibility" or

national shelf space)). By contrast, at the launch of Elite, Nu Mark had the benefit of Altria's distribution capabilities and resources (RFF ¶¶ 407-30), yet still had dismal sales, (RFF ¶¶ 431-59).

Second, Altria executives understood that the cited numbers were not "really a fair comparison to what was actually happening at that time in the market." (Quigley (Altria) Tr. 2054). As Quigley explained, "This was a slide I believe Craig Schwartz had the market information people put together that was used oftentimes, but we looked at the bar charts of the growth, what was happening at this same time with the relative growth of JUUL and pod products relative to our products. So this doesn't reflect what was happening [in the market at the time]." (Quigley (Altria) Tr. 2054).

Crosthwaite, Altria's former Chief Growth Officer and JUUL's current CEO, shared a similar critique. "[I]t is taking three different time frames and articulating in three different points of time a certain articulation of per store sales. For example, it's showing in June of 2015 what was JUUL's average volume per store selling." (PX7024 Crosthwaite (Altria/JLI) Dep. at 148). Then on "November 18, 2017, it is showing myblu store average weekly volume per store selling. And then at a later time period in March of 2018, it is showing Elite's volume per store selling." (PX7024 Crosthwaite (Altria/JLI) Dep. at 148). But "I really don't think it's an apples-to-apples comparison to anything." (PX7024 Crosthwaite (Altria/JLI) Dep. at 150). "[I]n 2015, a time frame when consumers didn't even know about e-vapor, it was extraordinarily new . . . . And then comparing all the way out to 2018, a time frame when the e-vapor category has grown extraordinarily fast, has lots of awareness. So, I don't think the chart is comparing anything of the like." (PX7024 Crosthwaite (Altria/JLI) Dep. at 150; *see also* RX1217 Murphy Report ¶ 164 (explaining that JUUL's first 21 weeks occurred "when e-cigarette demand in general, and demand

for pod-based systems specifically, were substantially smaller than when MarkTen Elite was launched.")).

Third, if one looks at a longer time horizon and includes pod-based products that launched around the same time of JUUL, it is clear that Elite was substantially outperformed by its competitors. "[W]hile MarkTen Elite started out on a similar sales growth path to those of myblu and NJOY, it was substantially outpaced by Vuse Alto, which in the first 25 weeks on the market achieved monthly sales of roughly 4.7 times MarkTen Elite[.]" (RX1217 Murphy Report ¶ 165). "[A]nd after the first 25 weeks Elite falls behind myblu and NJOY as well. By week 33 right before Elite was discontinued, its sales were only 41 percent of myblu's sales, only 21 percent of NJOY's sales, and only 12 percent of Alto's sales." (RX1217 Murphy Report ¶ 165).

1162. Marlboro cigarettes, an Altria brand, have been on the market for over 75 years. (Myers (Altria) Tr. 3391). In comparison, Altria's MarkTen Elite was only on the market for 8 months. (Myers (Altria) Tr. 3391).

Response to Proposed Finding No. 1162:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel cannot seriously be suggesting that it takes 75 years to assess a product's long-term potential. Marlboro is "by far the largest and most profitable brand in the cigarette category" and it has "been the leading brand in the category for over 40 years." (PX9000 (Altria) at 002). It has thus earned its place in Altria's portfolio quarter over quarter and year over year. It was also grandfathered in under the Tobacco Control Act and thus did not require a PMTA to stay on the market. (RFF ¶ 50). Elite, by contrast, showed no path to profitability, (RFF ¶¶ 431-59), and was unlikely to receive the FDA approval necessary to remain in the market, (RFF ¶¶ 512, 596-613).

B. ALTRIA'S CLAIM THAT ITS E-CIGARETTES HAD CHARACTERISTICS THAT MADE THEM COMMERCIALLY UNVIABLE IS UNSUPPORTED AND PRETEXTUAL

1163. Willard testified that Altria "didn't think cigalikes were ever going to be a winning product or represent an opportunity for profit." (Willard (Altria) Tr. 1458).

Response to Proposed Finding No. 1163:

Respondents have no specific response.

1164. Begley testified "there appeared to be one format that was winning in the marketplace, which was a pod-based product with nicotine salts." (Begley (Altria) Tr. 1055). Altria's MarkTen Elite product did not have nicotine salts. (Begley (Altria) Tr. 1084).

Response to Proposed Finding No. 1164:

Respondents have no specific response.

1165. Altria's, JLI's, and third parties' ordinary course documents and their executives' testimony show that the claim that the product characteristics of Altria's e-cigarette products made them commercially unviable is implausible. (*See* CCFF ¶¶ 1166-91, below).

Response to Proposed Finding No. 1165:

The Proposed Finding is inaccurate and is not supported by the cited proposed findings. The record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that the cig-a-like form factor lacked long-term viability and that nicotine salts are necessary to replicate the nicotine experience of smoking cigarettes, which is important for both commercial success and demonstrating the conversion potential necessary to receive PMTA approval. (RFF ¶¶ 7-17, 281-82, 289-90, 596-608, 612-13). And, as explained in the responses to the proposed findings in this section, Complaint Counsel's attempt to show otherwise is based on a portrayal of the evidence that is inaccurate, incomplete, and misleading without additional context.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1166-91, Respondents incorporate their responses to those Proposed Findings herein.

1. Other Manufacturers Continue to Market E-Cigarette Products without Nicotine Salts

1166. Eldridge testified that ITG still sells *my*blu freebase pods, which do not contain nicotine salts, and has submitted PMTAs for them. (PX7012 (Eldridge (ITG) Dep. at 207-08)). Eldridge testified that two of ITG's four *my*blu pod products currently on the market do not have nicotine sales, and none of Blu's cigalikes or disposable products have nicotine salts. (PX7012 (Eldridge (ITG), Dep. at 168)).

Response to Proposed Finding No. 1166:

The Proposed Finding is incomplete and misleading without additional context. *First*, ITG also sells a pod-based product with high nicotine content and salts, *my*blu Intense, (RFF ¶ 258(a)), that is capable of competing with JUUL, (RX1217 Murphy Report ¶ 72, Fig. V.7 (showing *my*blu achieve the same device share as JUUL in the summer of 2018); *see also* RX1217 Murphy Report ¶ 90 n.184 (explaining that *my*blu Intense was on the market as of the summer of 2018)). Indeed, *my*blu Intense is the focus of most of ITG's marketing. (RFF ¶ 261).

Second, Complaint Counsel has cited no evidence that ITG's cig-a-likes or pod-based products without nicotine salts have been competitive.

Third, the PMTA assessment for ITG's cig-a-like products was very different than Nu Mark's assessment for the MarkTen cig-a-like because ITG's products did not produce elevated levels of formaldehyde through the end of the cartridge, while MarkTen cig-a-like products did. (RFF ¶¶ 361-63). And Nu Mark recognized that this would be a significant problem for MarkTen's PMTA because FDA's risk reduction analysis would compare e-vapor products to both cigarettes and other e-vapor products. (RFF ¶ 363).

1167. [redacted] (PX7012 Eldridge (ITG), Dep. at 207-08) (discussing PX3005 (ITG) at 007) (*in camera*))).

Response to Proposed Finding No. 1167:

The Proposed Finding is incomplete and misleading without additional context. *First*, the fact that Altria and ITG were the only companies offering cartridges without nicotine salts for pod-

based devices in the traditional retail marketplace simply proves Respondents' point that the market was overwhelmingly shifting to salt-based e-liquids, particularly in the pod-based devices segment. (RFF ¶¶ 1330-37, 1464-68). [redacted]

Second, Complaint Counsel has cited no evidence that ITG's cig-a-likes or pod-based products without nicotine salts have been competitive.

[redacted]

1168. In May 2018, Joseph O'Hara, JLI's competitive intelligence expert, prepared a document entitled "US Landscape: Competitive Analysis Framework" which depicted MarkTen Elite and *my*blu as having "long-term viability" and neither of those products had nicotine salts. (O'Hara (JLI) Tr. 546-47 (discussing PX2289 (JLI) at 021)).

Response to Proposed Finding No. 1168:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that his framework was "a speculative analysis of who should continue to be watched in the future as well as who may currently be viable in the long term." (PX7033 O'Hara (JLI) Dep. at 80). "In this snapshot in time," O'Hara included Elite as a product to watch because, while it had only been on the market a few weeks when O'Hara created the framework sometime around March 2018 and "there was no traction to demonstrate one way or the other," it was a pod-based product, brought to market by Altria, which had significant access to capital. (O'Hara (JLI) Tr. 528, 530, 549-50; *see also* O'Hara (JLI) Tr. 546 (explaining that *my*blu also had not been on the

market long enough to demonstrate traction one way or the other)). Despite the criteria listed on the right-side of the slide, O'Hara emphasized that the analysis was case-by-case. (PX7033 O'Hara (JLI) Dep. at 71). For example, one of the products, PMI's Platform 3, had not even launched and O'Hara included it as a product to watch based solely on what he had read in PMI's investor materials. (O'Hara (JLI) Tr. 528; PX7033 O'Hara (JLI) Dep. at 76). Meanwhile, Elite "did not have nicotine salts and did not have a high nicotine strength, so would not have scored well on [the nicotine strength] metric." (PX7033 O'Hara (JLI) Dep. at 75). O'Hara testified that, "[b]y the end of 2018, [he] certainly would have included a product like Vuse Alto at the bottom [the 'Long-Term Viability' category]," which was not yet on the market when the slide was created, "and [he] certainly would not have included a product like MarkTen or myblu." (O'Hara (JLI) Tr. 548; PX7033 O'Hara (JLI) Dep. at 81; *see also* O'Hara (JLI) Tr. 633, 641-42 (noting that *my*blu became more viable when it released *my*blu Intense, which contained nicotine salts)).

1169. O'Hara testified that Vuse markets Vuse Ciro, Vuse Solo, and Vuse Vibe, which Vuse has inconsistently stated in marketing materials have nicotine salts, and he testified "from my personal experience using all of them and trying all of them, I -- it did not seem like there was nicotine salts in them." (O'Hara (JLI) Tr. 502-03).

Response to Proposed Finding No. 1169:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Huckabee, the Reynolds representative who testified at trial, explained that [redacted]. (Huckabee (Reynolds) Tr. 377, [redacted]). By contrast, O'Hara is a JLI employee who has no personal knowledge about the e-liquid formula used in Vuse products and was merely testifying, based on experience using the product, whether he could perceive the presence of salts. (O'Hara (JLI) Tr. 502-03).

Regardless of whether Vuse's cig-a-like products contain salts, the key point is that Reynolds sells a pod-based product with high nicotine content and salts, Vuse Alto, (RFF

¶ 243(d)). Vuse Alto has more than demonstrated that it can compete with JUUL; it is now the market leader in device share and by September 2020 had 21% cartridge share. (RFF ¶¶ 1371-74). [redacted]

In addition, Complaint Counsel has cited no evidence that Reynolds has been competitive, let alone profitable, with its cig-a-likes. [redacted]

Moreover, the PMTA assessment for Reynolds's cig-a-like products was very different than Nu Mark's assessment for the MarkTen cig-a-like because Reynolds's products had dry puff prevention and thus did not produce elevated levels of formaldehyde through the end of the cartridge, while MarkTen cig-a-like products lacked dry puff prevention and did produce elevated levels of formaldehyde. (RFF ¶ 361-63). And Nu Mark recognized that this would be a significant problem for MarkTen's PMTA because FDA's risk reduction analysis would compare e-vapor products to both cigarettes and other e-vapor products. (RFF ¶ 363).

1170. [redacted] (Farrell (NJOY) Tr. 289-90 (*in camera*)).

Response to Proposed Finding No. 1170:

The Proposed Finding is incomplete and misleading without additional context. Farrell also testified that [redacted]

[redacted]; *see also* PX3216 (NJOY) at 003 (touting Ace's "higher nicotine and better formulation (nicotine salt) than similar 'Big Tobacco' devices")).

In addition, retailers recognize that nicotine salts have been important to NJOY Ace's success. [redacted]

Finally, regardless of Farrell's opinion, the market evidence bears out that nicotine salts are critical to competitive success; the leading products all contain nicotine salts. (RFF ¶¶ 1330-33).

1171. [redacted] (Huckabee (Reynolds) Tr. 449-50 (*in camera*)).

Response to Proposed Finding No. 1171:

The Proposed Finding is incomplete and misleading without additional context. Huckabee also testified that "nicotine delivery is a -- is a very significant consideration for smokers," (PX7037 Huckabee (Reynolds) Dep. at 43), and [redacted].

In addition, retailers recognize that nicotine salts have been important to Vuse Alto's success. [redacted]

1172. O'Hara testified that "there are multiple different kinds of nicotine salts" and that "[n]icotine salts can be made with a variety of different organic acids, and some of them satisfy smokers materially better than others." (O'Hara (JLI) Tr. 503-04).

Response to Proposed Finding No. 1172:

Respondents have no specific response except to note that this testimony merely proves Respondents' point that it is not enough for a product to contain some nicotine salts, as MarkTen Bold did. (RFF ¶¶ 643-44). Instead, to be competitive, a product needs to have the right formula, meaning the right ratio, right ingredients, and right taste. (Jupe (Altria) Tr. 2140-42, 2228-29; PX4504 (Altria) at 009, 024; RFF ¶ 687).

2. Other Manufacturers Continue to Market Cigalike Products

1173. NJOY continues to market the NJOY Daily, which is a cigalike product. (Farrell (NJOY) Tr. 364-67; [redacted]; O'Hara (JLI) Tr. 505).

Response to Proposed Finding No. 1173:

The Proposed Finding is incomplete and misleading without additional context. The key point is that NJOY sells a pod-based product with [redacted] And NJOY Ace has shown that it is capable competing with JUUL. (RX1217 Murphy Report ¶ 72, Fig. V.7 (showing that NJOY Ace attained a comparable device share to JUUL in the fall of 2019)).

In addition, NJOY has discontinued two other cig-a-like products, NJOY Loop and NJOY King, both times because it decided that, from a business perspective, it no longer made sense to continue to manufacture and sell the products. (RFF ¶ 251(a)-(b)).

Moreover, despite that NJOY "continues to market" a cig-a-like product, (CCFF ¶ 1173), Complaint Counsel has presented no evidence that NJOY is proving competitive, much less profitable, with its cig-a-like products. [redacted]

[redacted]

1174. Vuse continues to market cigalike products called Vuse Ciro, Vuse Solo, and Vuse Vibe. (Huckabee (Reynolds) Tr. 377-78). [redacted] (Huckabee (Reynolds) Tr. 441-42 (*in camera*)).

Response to Proposed Finding No. 1174:

The Proposed Finding is incomplete and misleading without additional context. Regardless of whether Reynolds has chosen to keep cig-a-like products on the market, the key point is that Reynolds sells a pod-based product [redacted], Vuse Alto, [redacted]. Reynolds does not focus on cig-a-like products in its marketing and promotions. (RFF ¶ 244). And Reynolds' pod-based product, Vuse Alto, has more than demonstrated that it can compete with JUUL; it is now the market leader in device share and by September 2020 had 21% cartridge share. (RFF ¶¶ 1371-74). [redacted]

In addition, Complaint Counsel has cited no evidence that Reynolds has been competitive, let alone profitable, with its cig-a-likes. [redacted]

Moreover, the PMTA assessment for Reynolds's cig-a-like products was very different than Nu Mark's assessment for the MarkTen cig-a-like because Reynolds's products had dry puff prevention and thus did not produce elevated levels of formaldehyde through the end of the cartridge, while MarkTen cig-a-like products lacked dry puff prevention and did produce elevated

levels of formaldehyde. (RFF ¶ 361-63). And Nu Mark recognized that this would be a significant problem for MarkTen's PMTA because FDA's risk reduction analysis would compare e-vapor products to both cigarettes and other e-vapor products. (RFF ¶ 363).

1175. ITG's Blu "sells a lot of disposables in varying flavors. . . The blu disposables are cigalike products." (Farrell (NJOY) Tr. 360-61).

Response to Proposed Finding No. 1175:

The Proposed Finding is incomplete and misleading without additional context. *First*, the key point is that ITG sells a pod-based product with high nicotine content and salts, (RFF ¶ 258(a)), that is capable competing with JUUL, (RX1217 Murphy Report ¶ 72, Fig. V.7 (showing *my*blu achieve the same device share as JUUL in the summer of 2018); *see also* RX1217 Murphy Report ¶ 90 n.184 (explaining that *my*blu Intense was on the market as of the summer of 2018)).

Second, unlike MarkTen cig-a-like, blu Disposables have other attributes that could lead ITG to decide to keep the products on the market. As its name suggests, they are disposable products that are exempt from the flavor ban and thus come in many different flavors. (RFF ¶ 248(c); *see also* Crozier (Sheetz) Tr. 1495-1496, [redacted]).

Third, Complaint Counsel has cited no evidence that ITG has been competitive, let alone profitable, with its cig-a-likes or its pod-cartridges without nicotine salts.

1176. ITG submitted PMTAs for its cigalike products (blu PLUS) in various nicotine strengths and flavors, and none of them contain nicotine salts, with ITG explaining in its PMTA that, "[t]he variety of available nicotine concentrations, including zero nicotine, and flavors provides optionality to current adult smokers, aiding their transition from combustible cigarettes to blu PLUS+ ENDS." (PX3025 (ITG) at 009).

Response to Proposed Finding No. 1176:

The Proposed Finding is incomplete and misleading without additional context. *First*, the key point is that ITG sells a pod-based product with high nicotine content and salts, (RFF ¶ 258(a)), that is capable competing with JUUL, (RX1217 Murphy Report ¶ 72, Fig. V.7 (showing *my*blu

achieve the same device share as JUUL in the summer of 2018); *see also* RX1217 Murphy Report ¶ 90 n.184 (explaining that *my*blu Intense was on the market as of the summer of 2018)).

Second, Complaint Counsel has cited no evidence that ITG has been competitive, let alone profitable, with its cig-a-likes or its pod-cartridges without nicotine salts.

Third, the PMTA assessment for ITG Brands' blu Plus was very different than Nu Mark's assessment for the MarkTen cig-a-like because blu Plus did not produce elevated levels of formaldehyde through the end of the cartridge, while MarkTen cig-a-like products did. (RFF ¶ 361-63). And Nu Mark recognized that this would be a significant problem for MarkTen's PMTA because FDA's risk reduction analysis would compare e-vapor products to both cigarettes and other e-vapor products. (RFF ¶ 363).

3. Other Manufacturers Continue to Market E-Cigarette Products with Low-Nicotine Strength

1177. Gardner testified that some consumers prefer e-vapor products with lower nicotine strength. (Gardner (Altria) Tr. 2673-74).

Response to Proposed Finding No. 1177:

The Proposed Finding is inaccurate and misleading without additional context. Altria's scientists ultimately determined that offering cigarette smokers "the best satisfaction, closest to a cigarette" required a combination of approximately four percent nicotine by weight and three percent acid. (PX7016 Jupe (Altria) Dep. at 138). And even though some portion of consumers might prefer a lower nicotine concentration, (Gardner (Altria) Tr. 2673-74), Altria's scientists understood that, regardless of nicotine concentration, "salts were necessary for e-vapor products to convert adult smokers," (PX7026 Gardner (Altria) Dep. at 242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of nicotine satisfaction."); PX4504 (Altria) at 024). That is because with Elite and products like it, which had both low nicotine strength and no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the

way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Altria's scientists thus recommended that "all newly developed e-vapor products, regardless of nicotine content," should utilize nicotine salt technology. (PX4504 (Altria) at 024). That recommendation is borne out by the market; the current market leaders all utilize nicotine salts. (RFF ¶¶ 1330-37).

1178. MarkTen Elite had a nicotine strength of 1.8 percent nicotine by weight ("NBW"). (PX4115 (Altria) at 010 (JUUL "Book of Knowledge" prepared by Altria in June 2018)).

Response to Proposed Finding No. 1178:

Respondents have no specific response.

1179. Altria's MarkTen cigalike products came in nicotine strengths (NBW) of 4.0 percent (MarkTen Bold Classic and Menthol), 3.5 percent (MarkTen Classic, Menthol, and Winter Mint), 2.5 percent (MarkTen Smooth Classic, Caribbean Oasis, Summer Fusion, Mardi Gras, Vineyard Blend, Harvest Blend, and Bourbon Blend), and 2.4 percent (MarkTen Smooth Cream and Smooth Menthol). (PX4357 (Altria) at 001 (MarkTen Actual Use Study, Final Report Date: Oct. 3, 2018); PX1298 (Altria) at 045 (Nu Mark 2018 Three Year Strategic Plan, Feb. 27, 2018, draft of Feb. 12, 2018)).

Response to Proposed Finding No. 1179:

Respondents have no specific response.

1180. Joseph O'Hara, JLI's competitive intelligence expert, testified that nicotine by weight measurements for e-cigarettes can be influenced by "other ingredients in the formula" and are not always directly comparable across products. (O'Hara (JLI) Tr. 521-23).

Response to Proposed Finding No. 1180:

Respondents have no specific response except to note that O'Hara's statement is consistent with testimony from Altria scientists that salts are key to nicotine satisfaction and that two products with the same nicotine levels and different acid concentrations can offer very different levels of satisfaction. (Jupe (Altria) Tr. 2273-74 (discussing RX0796 (Altria) at 050 (depicting the rate of nicotine absorption for four different e-liquid concentrations with 4.5 percent nicotine and varied amounts of acid)).

1181. In 2018, JLI "had three strengths that were offered in the US . . . 5 percent, 3 percent and 1 and a half percent." (PX7025 (Burns (JLI), Dep. at 40)).

Response to Proposed Finding No. 1181:

The Proposed Finding is incomplete and misleading without additional information. Burns did not state that JLI had three nicotine strengths for sale in the United States as of 2018. (PX7025 Burns (JLI) Dep. at 40). He testified that he recalled JUUL offered 5 percent, 3 percent, and 1.5 percent nicotine strengths but he did not recall when the 1.5 percent strength version was introduced, beyond that it was after he joined the company in December 2017. (PX7025 Burns (JLI) Dep. at 42, 45; PX7032 Valani (JLI) Dep. at 13; *see also* PX7025 Burns (JLI) Dep. at 42-43 (noting that 3 percent and 1.5 percent nicotine strength pods had been in the marketplace for the purposes of FDA's Deeming Rule, but had not been launched as a regular offering)). According to JLI's internal documents, while JLI did plan to launch a 1.5 percent strength pod in Canada, (PX2098 (JLI) at 006), [redacted] Those nicotine strengths, which are comparable to products from the current market leaders, (RFF ¶¶ 243(d), 249(a)), are higher than the nicotine strength of Elite, which was 1.8 percent, (PX4109 (Altria) at 006). Critically, unlike Elite, (RFF ¶ 628), all of JUUL's pods contained nicotine salts, (PX2061 (JLI) at 019 (explaining that JUUL pods use nicotine salts)).

1182. Kevin Burns, JLI's former CEO, testified that "The intent of the company [in offering a variety of nicotine strengths], which we could not certainly talk about because of the FDA limitations, was to allow people the ability to taper down their nicotine consumption by going to a lower strength and/or allowing people to enter into the product category that might have thought that a 5 percent, for example, was too strong, but they would have an alternative that was a lower nicotine strength." (PX7025 (Burns (JLI), Dep. at 40)).

Response to Proposed Finding No. 1182:

The Proposed Finding is incomplete and misleading without additional context. All strengths sold by JLI contained nicotine salts, (PX2061 (JLI) at 019 (explaining that JUUL pods,

which come in several nicotine strengths, use nicotine salts)), which MarkTen cig-a-like and Elite lacked, and which MarkTen Bold cig-a-like did not have in the correct ratio, (RFF ¶¶ 627-51).

"[S]alts [are] necessary for e-vapor products to convert adult smokers." (PX7026 Gardner (Altria) Dep. at 242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of nicotine satisfaction."); PX4504 (Altria) at 024). That is because in products with no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Altria's scientists thus recommended that "all newly developed e-vapor products, regardless of nicotine content," should utilize nicotine salt technology. (PX4504 (Altria) at 024). That recommendation is borne out by the market; the current market leaders all utilize nicotine salts. (RFF ¶¶ 1330-37).

1183. Burns testified that, with respect to its five percent nicotine strength product, "some of the feedback would be that the product could come across, for example, too harsh in terms of the flavor or the sensation that a consumer might perceive." (PX7025 (Burns (JLI), Dep. at 41)).

Response to Proposed Finding No. 1183:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel has offered no evidence as to what percentage of consumers preferred a lower nicotine concentration. [redacted] And the evidence shows that current market leaders all sell products containing similar concentrations of nicotine and salts (RFF ¶¶ 243(d), 249(a), 258(a), 1330-33), showing that there was a high demand for e-liquids with effective levels of nicotine and salts. This is consistent with research performed by Altria's scientists, which indicated offering cigarette smokers "the best satisfaction, closest to a cigarette" required a combination of approximately four percent nicotine by weight and three percent acid. (PX7016 Jupe (Altria) Dep. at 138).

1184. Burns testified that, with respect to JLI's three percent and 1.5 nicotine strength products, "based on sales information, there was some volume that was being sold, which told us that, again, some set of consumers were preferring that product over either no alternative or the 5 percent alternative." (PX7025 (Burns (JLI), Dep. at 44)).

Response to Proposed Finding No. 1184:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel has offered no evidence as to what percentage of consumers preferred a lower nicotine concentration. [redacted] And the evidence shows that current market leaders all sell products containing similar concentrations of nicotine and salts (RFF ¶¶ 243(d), 249(a), 258(a), 1330-33), showing that there was a high demand for e-liquids with effective levels of nicotine and salts. This is consistent with research performed by Altria's scientists, which indicated offering cigarette smokers "the best satisfaction, closest to a cigarette" required a combination of approximately four percent nicotine by weight and three percent acid. (PX7016 Jupe (Altria) Dep. at 138).

1185. During 2019, JLI was developing five PMTAs for versions of its JUUL product with 1.7 percent nicotine by weight. (Gardner (Altria) Tr. 2674-75).

Response to Proposed Finding No. 1185:

The Proposed Finding is inaccurate, incomplete and misleading without additional context. As Gardner testified, although JLI considered in early planning stages the possibility of submitting PMTAs for a 1.7 percent nicotine by weight product, in the end Altria only conducted analyses of the four JUUL products that were ultimately submitted in JLI's PMTA, which did not include any products with 1.7 percent nicotine by weight. (Gardner (Altria) Tr. 2674-75, 3081; RX1950 (JLI) at 001). Furthermore, all strengths sold by JLI contained nicotine salts, (PX2061 (JLI) at 019 (explaining that JUUL pods, which come in several nicotine strengths, use nicotine salts)), which are "necessary for e-vapor products to convert adult smokers," (PX7026 Gardner (Altria) Dep. at

242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of nicotine satisfaction.")). That is because with Elite and products like it, which had both low nicotine strength and no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Altria's scientists thus recommended that "all newly developed e-vapor products, regardless of nicotine content," should utilize nicotine salt technology. (PX4504 (Altria) at 024). That recommendation is borne out by the market; the current market leaders all utilize nicotine salts. (RFF ¶¶ 1330-37).

1186. Reynolds continues to market its Vuse Alto in "three different nicotine strengths," 1.8, 2.4, and 5 percent, because consumers have "a range of desired product attributes." (Huckabee (Reynolds) Tr. 395).

Response to Proposed Finding No. 1186:

The Proposed Finding is incomplete and misleading without additional information. [redacted], which are "necessary for e-vapor products to convert adult smokers," (PX7026 Gardner (Altria) Dep. at 242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of nicotine satisfaction.")). That is because with Elite and products like it, which had both low nicotine strength and no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Altria's scientists thus recommended that "all newly developed e-vapor products, regardless of nicotine content," should utilize nicotine salt technology. (PX4504 (Altria) at 024). That recommendation is borne out by the market; the current market leaders all utilize nicotine salts. (RFF ¶¶ 1330-37).

1187. [redacted]
(Farrell (NJOY) Tr. 341-42) (*in camera*)).

Response to Proposed Finding No. 1187:

The Proposed Finding is incomplete and misleading without additional information. Both of the nicotine strengths for NJOY Ace [redacted], which are "necessary for e-vapor products to convert adult smokers," (PX7026 Gardner (Altria) Dep. at 242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of nicotine satisfaction.")). That is because with Elite and products like it, which had both low nicotine strength and no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Altria's scientists thus recommended that "all newly developed e-vapor products, regardless of nicotine content," should utilize nicotine salt technology. (PX4504 (Altria) at 024). That recommendation is borne out by the market; the current market leaders all utilize nicotine salts. (RFF ¶¶ 1330-37).

1188. [redacted] (PX3026 (ITG) at 024-25 (*in camera*) [redacted].

Response to Proposed Finding No. 1188:

The Proposed Finding is incomplete and misleading without additional context. [redacted] Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 51), or in any deposition. The study is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question ITG's employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

Second, [redacted] offered lower nicotine strength cartridges with salts. (RFF ¶ 258(a)). And,

regardless of nicotine concentration, "salts [are] necessary for e-vapor products to convert adult smokers." (PX7026 Gardner (Altria) Dep. at 242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of nicotine satisfaction."); PX4504 (Altria) at 024). That is because with Elite and products like it, which had both low nicotine strength and no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Altria's scientists thus recommended that "all newly developed e-vapor products, regardless of nicotine content," should utilize nicotine salt technology. (PX4504 (Altria) at 024). That recommendation is borne out by the market; the current market leaders all utilize nicotine salts. (RFF ¶¶ 1330-37).

Third, if the Court choses to consider the study, [redacted]

4. Some MarkTen Products Had High Nicotine Strength

1189. Dr. Gardner testified that "MarkTen Elite delivered more aerosol than JUUL. MarkTen Elite had lower nicotine percentage compared to JUUL but lower -- Elite had more aerosol mass, so it delivered more nicotine per puff under machine puffing conditions than JUUL." (Gardner (Altria) Tr. 2669-70).

Response to Proposed Finding No. 1189:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gardner noted, the results he was describing were based on "machine puffing conditions." (Gardner (Altria) Tr. 2670). Under machine puffing, a "smoking machine" is used to "provide[] reproducible and repeatable puffing of devices. So it takes the exact same puff at the exact same interval repeatedly until you stop the experiment, and it allows you to do direct comparisons between products under a fixed condition." (Gardner (Altria) Tr. 3085-86). But that is not an accurate representation of how those products will compare in terms of actual nicotine delivery to a smoker because (1) the machine "doesn't tell you how the adult smoker will actually use the product," and (2) it "doesn't tell you . . . the form the nicotine is in when it's delivered in aerosol." (Gardner (Altria) Tr. 3086). In terms of delivery, because JUUL has salts, it has "a lower pH" so "the nicotine in JUUL would go deeper into the lungs and better provide the smoking experience the . . . adult smoker was looking for." (Gardner (Altria) Tr. 3086-87). By contrast, Elite had "no nicotine salts and a higher pH," which "would not be as sufficient" to deliver nicotine "deep into the lungs" and so "would not deliver the experience the smoker was looking for." (Gardner (Altria) Tr. 3086-87).

Second, to the extent Complaint Counsel is implying that Elite delivered a similar nicotine satisfaction to JUUL because it delivered more nicotine per puff, Complaint Counsel is incorrect. Dr. Gardner was asked, "[i]f the product has no nicotine salts, even if you ended up delivering more nicotine per puff on a smoking machine, does that mean that the product is able to convert adult smokers?" (Gardner (Altria) Tr. 3087). He replied, "No. It's still challenged with the inefficient delivery of nicotine deep into the lung," meaning it would not be absorbed deep in the lung. "So it would be unlikely to convert adult smokers without nicotine salts even if you increased

the amount of nicotine." (Gardner (Altria) Tr. 3087; *see also* Gardner (Altria) Tr. 2669; PX7015 Gogova (Altria) Dep. at 42 (explaining that "nicotine satisfaction and replacement of conventional cigarettes" require providing a "similar nicotine release profile as a conventional cigarette, and this cannot be achieved truly without the acids to create nicotine salts")). In fact, studies showed that, with Elite, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274).

1190. An Altria board presentation, dated February 28, 2018, and titled "Nu Mark 2018 Three Year Strategic Plan," identified MarkTen Elite as having higher nicotine per puff than JUUL, "~0.17 mg/puff" compared to "~0.16 mg/puff", even though Elite had lower nicotine by volume compared to JUUL, "1.8% NBV" compared to "5% NBV." (PX1113 (Altria) at 001, 003, 022).

Response to Proposed Finding No. 1190:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gardner noted, the results he was describing were based on "machine puffing conditions." (Gardner (Altria) Tr. 2670). Under machine puffing, a "smoking machine" is used to "provide[] reproducible and repeatable puffing of devices. So it takes the exact same puff at the exact same interval repeatedly until you stop the experiment, and it allows you to do direct comparisons between products under a fixed condition." (Gardner (Altria) Tr. 3085-86). But that is not an accurate representation of how those products will compare in terms of actual nicotine delivery to a smoker because (1) the machine "doesn't tell you how the adult smoker will actually use the product," and (2) it "doesn't tell you . . . the form the nicotine is in when it's delivered in aerosol." (Gardner (Altria) Tr. 3086). In terms of delivery, because JUUL salts, it has "a lower pH" so "the nicotine in JUUL would go deeper into the lungs and better provide the smoking experience the . . . adult smoker was looking for." (Gardner (Altria) Tr. 3086-87). By contrast, Elite had "no nicotine salts and a higher pH," which "would not be as sufficient" to deliver nicotine "deep into

the lungs" and so "would not deliver the experience the smoker was looking for." (Gardner (Altria) Tr. 3086-87).

Second, to the extent Complaint Counsel is implying that Elite delivered a similar nicotine satisfaction to JUUL because it delivered more nicotine per puff, Complaint Counsel is incorrect. Dr. Gardner was asked, "[i]f the product has no nicotine salts, even if you ended up delivering more nicotine per puff on a smoking machine, does that mean that the product is able to convert adult smokers?" (Gardner (Altria) Tr. 3087). He replied, "No. It's still challenged with the inefficient delivery of nicotine deep into the lung," meaning it would not be absorbed deep in the lung. "So it would be unlikely to convert adult smokers without nicotine salts even if you increased the amount of nicotine." (Gardner (Altria) Tr. 3087; *see also* Gardner (Altria) Tr. 2669; PX7015 Gogova (Altria) Dep. at 42 (explaining that "nicotine satisfaction and replacement of conventional cigarettes" require providing a "similar nicotine release profile as a conventional cigarette, and this cannot be achieved truly without the acids to create nicotine salts")). In fact, studies showed that, with Elite, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274).

1191. A JUUL "Book of Knowledge" prepared by Altria in June 2018 for competitive intelligence purposes also identified MarkTen Elite as having higher nicotine per puff than JUUL. (Gardner (Altria) Tr. 2670-72 (discussing PX4115 (Altria) at 010)). Dr. Gardner testified that this presentation was prepared before Altria implemented the c1A gasket, which doubled MarkTen Elite's aerosol delivery in "machine puffing conditions." (Gardner (Altria) Tr. 2671-72).

Response to Proposed Finding No. 1191:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gardner noted, the results he was describing were based on "machine puffing conditions." (Gardner (Altria) Tr. 2670). Under machine puffing, a "smoking machine" is used to "provide[] reproducible and repeatable puffing of devices. So it takes the exact same puff at the exact same

interval repeatedly until you stop the experiment, and it allows you to do direct comparisons between products under a fixed condition." (Gardner (Altria) Tr. 3085-86). But that is not an accurate representation of how those products will compare in terms of actual nicotine delivery to a smoker because (1) the machine "doesn't tell you how the adult smoker will actually use the product," and (2) it "doesn't tell you . . . the form the nicotine is in when it's delivered in aerosol." (Gardner (Altria) Tr. 3086). In terms of delivery, because JUUL has salts, it has "a lower pH" so "the nicotine in JUUL would go deeper into the lungs and better provide the smoking experience the . . . adult smoker was looking for." (Gardner (Altria) Tr. 3086-87). By contrast, Elite had "no nicotine salts and a higher pH," which "would not be as sufficient" to deliver nicotine "deep into the lungs" and so "would not deliver the experience the smoker was looking for." (Gardner (Altria) Tr. 3086-87).

Second, to the extent Complaint Counsel is implying that Elite delivered a similar nicotine satisfaction to JUUL because it delivered more nicotine per puff, Complaint Counsel is incorrect. Dr. Gardner was asked, "[i]f the product has no nicotine salts, even if you ended up delivering more nicotine per puff on a smoking machine, does that mean that the product is able to convert adult smokers?" (Gardner (Altria) Tr. 3087). He replied, "No. It's still challenged with the inefficient delivery of nicotine deep into the lung," meaning it would not be absorbed deep in the lung. "So it would be unlikely to convert adult smokers without nicotine salts even if you increased the amount of nicotine." (Gardner (Altria) Tr. 3087; *see also* Gardner (Altria) Tr. 2669; PX7015 Gogova (Altria) Dep. at 42 (explaining that "nicotine satisfaction and replacement of conventional cigarettes" require providing a "similar nicotine release profile as a conventional cigarette, and this cannot be achieved truly without the acids to create nicotine salts")). In fact, studies showed that, with Elite, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it

would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). For this reason, it makes no difference if the C1a gasket would have doubled the aerosol delivery; zero times two is still zero, and Elite would have been just as inefficient at delivering nicotine. (Jupe (Altria) Tr. 2273-74 (explaining that in a liquid with 4.5 percent nicotine and no acid, essentially zero percent of the nicotine is delivered to the lung as it would be delivered by a cigarette)).

C. ALTRIA'S CLAIM THAT IT COULD NOT IMPROVE ITS PRODUCTS OR INTRODUCE NEW ONES AFTER THE DEEMING DATE IS UNSUPPORTED AND PRETEXTUAL

1192. The FDA's deeming rule limits the ability of e-cigarette manufacturers to market e-cigarette products that were introduced to the U.S. market after September 16, 2016, (the "Deeming Date") or to modify products manufactured before the Deeming Date. (*See* CCFF ¶¶ 197-207, above).

Response to Proposed Finding No. 1192:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 197-207, Respondents incorporate their responses to those Proposed Findings herein.

1193. On December 7, 2018, Altria issued a press release announcing the discontinuation of its MarkTen and Green Smoke e-cigarette products and explained that "[t]his decision is based upon . . . regulatory restrictions that burden Altria's ability to quickly improve these products." (PX9080 (Altria) at 001).

Response to Proposed Finding No. 1193:

Respondents have no specific response except to note that the reason quoted by Complaint Counsel from the December 7, 2018 press release is an accurate description of one of the bases for Altria's decision to discontinue MarkTen and Green Smoke, (RFF ¶¶ 1085-92); the other reason was "the current and expected financial performance of these products," (PX9080 (Altria) at 001; *see also* RFF ¶¶ 1074-84, 1090-92).

1194. Altria's and JLI's ordinary course documents and their executives' testimony show that the claim that Altria left the closed-tank e-cigarette market due to regulatory restrictions that burdened Altria's ability to quickly improve its products is implausible. (*See* CCFF ¶¶ 1195-236, below).

Response to Proposed Finding No. 1194:

The Proposed Finding is inaccurate and is not supported by the cited proposed findings. The record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that the Deeming Rule limited Altria's ability to fix the fundamental problems with its products, including lack of nicotine satisfaction (and thus conversion potential) and lack of dry puff prevention (and thus risk reduction compared to other e-vapor products). (RFF ¶¶ 351-67, 486-509, 596-700, 725-47, 1085-89). And, as explained in the responses to the proposed findings in this section, Complaint Counsel's attempt to show otherwise is based on a portrayal of the evidence that is inaccurate, incomplete, and misleading without additional context.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1195-236, Respondents incorporate their responses to those Proposed Findings herein.

1. Despite the Deeming Rule, Altria Commercialized a Product with Nicotine Salts and High Nicotine Strength as well as a Pod-Based Product

1195. On February 26, 2018, Altria launched MarkTen Elite, a pod-based product. (O'Hara (JLI) Tr. 631-32 (discussing PX2086 (JLI) at 001); Willard (Altria) Tr. 1356-57). [redacted] (PX0015 (Altria) at 008 (*in camera*); *see also* CCFF ¶¶ 125-52, above).

Response to Proposed Finding No. 1195:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 125-52, Respondents incorporate their responses to those Proposed Findings herein.

1196. In 2017, Altria launched MarkTen Bold to the U.S. market, a product with four percent nicotine by weight and nicotine salts. (PX1129 (Altria), at 012; Gardner (Altria) Tr. 2656; PX9045 (Altria) at 006 (2018 CAGNY Conference Remarks, Feb. 21, 2018); Willard (Altria) Tr. 1166-67; *see also* CCFF ¶¶ 125-52, above).

Response to Proposed Finding No. 1196:

The Proposed Finding is incomplete and misleading without additional context. Bold was first introduced into the market prior to 2016, before the Deeming Rule took effect, with four percent nicotine by weight and one percent acid. (Jupe (Altria) Tr. 2229-30; RFF ¶ 1505). In 2018, Altria determined that Bold had the wrong ratio of nicotine salts. (RFF ¶ 1505). But, by that point, the Deeming Rule had effectively frozen the market, (RFF ¶ 65), and a new e-liquid would be "considered a new product, and that new product would first require authorization from [FDA] by going through this PMTA pathway." (Jupe (Altria) Tr. 2230).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 125-52, Respondents incorporate their responses to those Proposed Findings herein.

1197. In November 2017, Altria told investors that its pharmacokinetic (or PK) studies showed that MarkTen Bold offered nicotine delivery at levels approaching that of cigarettes. (PX4015 (Altria) at 013; PX9000 (Altria) at 017).

Response to Proposed Finding No. 1197:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel offers an incomplete description of the study. The pharmacokinetic or "PK" study depicted in the presentation shows the *amount* of nicotine that enters the bloodstream and the *rate* at which it enters the bloodstream, comparing the nicotine levels over time for a cigarette and MarkTen Bold. (Jupe (Altria) Tr. 2231-32). A PK study is thus "a good surrogate for nicotine satisfaction." (Jupe (Altria) Tr. 2231). As Jupe explained, it is accurate to say that MarkTen Bold offers nicotine delivery that approaches that of a cigarette because "it approaches a cigarette, but," he added, "it's not a cigarette." (Jupe (Altria) Tr. 2233). It "does not have a high enough level of nicotine" and "that nicotine is not getting into the bloodstream at the same rate as the cigarette." (Jupe (Altria) Tr. 2232-33).

Second, this slide only reflects Altria's knowledge as of November 2017, over a year before it ultimately discontinued its cig-a-like products. (Begley (Altria) Tr. 979, 981 (noting that "it was early days for a number of the product formats" and Altria's scientists were still researching nicotine salts); RFF ¶¶ 1090-92). Seven months later, in June 2018, Altria scientists presented new research showing that "use of nicotine salts or addition of acids to achieve a certain pH is **required** for a satisfying and relaxing E-vapor experience similar to the cigarette smoking experience." (PX4504 (Altria) at 006, 024 (emphasis in original)). And not just any amount of salt would do—it needed to be the "right ratio." (Jupe (Altria) Tr. 2140). But, while MarkTen Bold had a small amount of acid, it did "not have [the] optimal ratio of nicotine and salts," (RX0532 (Altria) at 006; *see also* PX4504 (Altria) at 019).

2. Despite the Deeming Rule, Other Companies Launched New Products and/or Modified Existing Products

1198. In 2018, Vuse, NJOY, and blu commercialized pod-based products with nicotine salts and a variety of flavors and nicotine strengths. (*See* CCFF ¶¶ 163-96, above; ¶¶ 1199-1201, below; O'Hara (JLI) Tr. 501-06).

Response to Proposed Finding No. 1198:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The evidence shows that, in 2018, Vuse (Reynolds), NJOY, and blu (ITG) reintroduced products that were on the market by August 2016, even if only in limited distribution. (PX8008 Huckabee (Reynolds) Decl. at 010 ¶ 18(d) (discussing Vuse Alto); [redacted]; RX1103 (Altria) at 020 (discussing "My" product by Von Erl, which was later rebranded *my*blu, (*see* RFF ¶¶ 310-12))). Complaint Counsel points to no evidence that any of these companies introduced a device or a cartridge that was not on the market as of the August 2016 Deeming Date.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 163-96 and 1199-1201, Respondents incorporate their responses to those Proposed Findings herein.

1199. Late in 2018, NJOY launched NJOY Ace, which has nicotine salts. (O'Hara (JLI) Tr. 506; PX7029 (Farrell (NJOY), Dep. at 109-10) (discussing how every NJOY device contains nicotine salts)).

Response to Proposed Finding No. 1199:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

1200. In 2018, Reynolds launched the Vuse Alto [redacted] and nicotine salts. (O'Hara (JLI) Tr. 501; [redacted]

Response to Proposed Finding No. 1200:

The Proposed Finding is incomplete and misleading without additional context. Reynolds acquired Vuse Alto from a manufacturer that introduced the product in July 2016, before the Deeming Rule went into effect, and Reynolds "reintroduced the product under the Vuse Alto brand in August 2018." (PX8008 Huckabee (Reynolds) Decl. at 010 ¶ 18(d); RFF ¶ 243(d)).

1201. In 2017, ITG launched *my*blu, their first pod product, which did not have nicotine salts and had "lower nicotine strength, around 1.8 percent," and several months later ITG launched *my*blu intense, which contained nicotine salts and higher nicotine strength. (O'Hara (JLI) Tr. 504-05; PX7012 (Eldridge (ITG), Dep. at 169); PX8011 at 004-05 (¶ 19) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 1201:

The Proposed Finding is incomplete and misleading without additional context. ITG acquired its *my*blu product from a company called Von Erl in 2017, which previously sold the product under the brand name "My." (RFF ¶¶ 310-12). According to due diligence performed by Altria when it was considering attempting to purchase the product in 2017, Von Erl launched My

in the United States in June 2016 in limited distribution. (RX1103 (Altria) at 020). ITG later reintroduced the product under the brand name *my*blu in 2017. (PX8011 Eldridge (ITG Brands) Decl. at 004-05 ¶ 19; RFF ¶¶ 311-12).

1202. [redacted] (PX3069 (ITG) at 003, 004 (*in camera*)).

Response to Proposed Finding No. 1202:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 52), or in any deposition, so there is no witness testimony explaining what these changes actually entailed.

Second, [redacted]. According to FDA guidance issued for vape shops, changes that are "consistent" with the original product specifications are not prohibited; by contrast, those that "alter the performance of the tobacco product as described or intended by the original manufacturer are." (PX1593 (Altria) at 008; RFF ¶ 68). [redacted]

By contrast, the testimony was universal and undisputed that the critical changes that were contemplated by Nu Mark to its existing products—particularly adding nicotine salts and dry puff prevention—would have resulted in a new product under the Deeming Rule and thus required pre-market approval from FDA. (RFF ¶¶ 498, 692).

1203. Schwartz testified that from the leaking JUUL pods Nu Mark looked at, they could see that JLI experienced leaking with its pod products. (Schwartz (Altria) Tr. 1885 (discussing PX1198 (Altria) at 002-03 (Altria document containing copy of JLI email to JUUL community about customers experiencing leaky pods))).

Response to Proposed Finding No. 1203:

Respondents have no specific response except to note that, although some JUUL pods leaked, Elite's "pods were uniquely leaky." (O'Hara (JLI) Tr. 548; *see also* Begley (Altria) Tr. 1103; (explaining that Elite's leaking was "worse than any other pod product" and a "real impediment"); Myers (Altria) Tr. 3324 (describing Elite's leaking as "much more pervasive," especially based on the perspective of trade partners)).

1204. JLI made a product improvement its products to address the leaking. Quigley testified that between June and November 2018, JLI changed components in its JUUL device to address a leaking issue. (Quigley (Altria) Tr. 1949-50; PX7003 (Quigley (Altria), IHT at 9, 78-79 (describing how Altria scientists presented exploded JUUL devices to the leadership team while Quigley was head of Nu Mark and showed the changes to JUUL's devices); *see also* PX3088 (PMI) at 014) (*in camera*)).

Response to Proposed Finding No. 1204:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the cited sources do not support Complaint Counsel's assertion that JLI made a change between June and November 2018. The sources show only that while Quigley was head of Nu Mark (from June to November of 2018) he learned that, at some point, JLI had previously made changes to its product to address leakage. (PX7003 Quigley (Altria) IHT at 9, 78-79).

Second, the document that Complaint Counsel showed to Quigley during his testimony does not reference any device changes to address leaking. It simply says that JUUL invested in "manufacturing scaling and quality." (Quigley (Altria) Tr. 1949-50 (discussing PX1198 (Altria) at 003)). And this is consistent with evidence that [redacted].

[redacted] In fact, JLI

implemented this design change in 2015, (PX2160 (JLI) at 104), prior to when the Deeming Rule went into effect in August 2016, (RFF ¶ 58).

1205. JLI publicly told its customers that it addressed the leaking issue in its products. (Quigley Altria)Tr. 1949-50 (discussing PX1198 (Altria) at 003 (Altria document containing copy of JLI email to JUUL community about customers experiencing leaky pods))).

Response to Proposed Finding No. 1205:

Respondents have no specific response except to note that the document that was shown to Quigley during his testimony does not reference any device changes to address leaking. It simply says that JUUL invested in "manufacturing scaling and quality." (Quigley (Altria) Tr. 1949-50 (discussing PX1198 (Altria) at 003)). And this is consistent with evidence that [redacted].

3. Despite the Deeming Rule, Altria Successfully Designed and Implemented E-Cigarette Product Improvements

a) Altria Implemented a New Gasket for MarkTen Elite Notwithstanding the FDA's Deeming Rule

1206. Schwartz testified that Altria was aware of a problem with MarkTen Elite pods leaking when Altria launched the product. (Schwartz (Altria) Tr. 1881-82).

Response to Proposed Finding No. 1206:

Respondents have no specific response except to note that Altria launched Elite in spite of the leaking because it "had nothing else." Elite "had issues, plain and simple, but that's all [Nu Mark] had" that could be put into the market consistent with the Deeming Rule. (Schwartz (Altria) Tr. 1882).

1207. Before Altria launched MarkTen Elite, Nu Mark's operations deemed MarkTen Elite's level of leaking "unacceptable," but Altria still launched the product on February 26, 2018. (Schwartz (Altria) Tr. 1881-83; O'Hara (JLI) Tr. 631-32 (discussing PX2086 (JLI) at 001)).

Response to Proposed Finding No. 1207

Respondents have no specific response except to note that Altria launched Elite in spite of the leaking because it "had nothing else." Elite "had issues, plain and simple, but that's all [Nu Mark] had" that could be put into the market consistent with the Deeming Rule. (Schwartz (Altria) Tr. 1881-82).

1208. MarkTen Elite's leaking problem "impacted [Altria's] expansion plans for MarkTen Elite, as long as Elite's pods were leaking it was hard for Altria to expand the product. (Schwartz (Altria) Tr. 1905-06).

Response to Proposed Finding No. 1208:

Respondents have no specific response except to note that, notwithstanding the leaking, Altria had plans to expand Elite's distribution to at least 23,000 stores by June or July of 2018 and Altria did in fact expand Elite to 23,000 stores by the end of June. (PX4012 (Altria) at 028; PX9047 (Altria) at 003).

1209. On March 1, 2018, Schwartz requested assistance from Altria's product development team and Nu Mark Israel ("NMI") to address the leaking problem and they began to work on the problem "immediately." (Schwartz (Altria) Tr. 1888-90 (discussing (PX1590 (Altria) at 001)).

Response to Proposed Finding No. 1209:

Respondents have no specific response.

1210. By June 8, 2018, Nu Mark fixed the leaking gasket associated with MarkTen Elite and began planning for "production [of] MarkTen Elite with the New Gasket." (Schwartz (Altria) Tr. 1895-96 (discussing PX1579 (Altria)).

Response to Proposed Finding No. 1210:

The Proposed Finding is incomplete and misleading without additional context. By June 8, 2018, Nu Mark had developed a new gasket that it believed would ameliorate the leaking. (PX1579 (Altria) at 001). [redacted]

[redacted]

1211. Altria maintained a "Change Management Team" or "CMT" to review proposed e-cigarette product changes and determine whether the changes compromised the status of the product under the FDA's Deeming Rules. (Schwartz (Altria) Tr. 1891-93).

Response to Proposed Finding No. 1211:

Respondents have no specific response.

1212. Garnick testified "The change management process was that it first goes through this committee, and if it's a risky issue, if it requires upper management, it then goes to the leadership team and goes to Howard [Willard, Altria's CEO]." (Garnick (Altria) Tr. 1802).

Response to Proposed Finding No. 1212:

Respondents have no specific response.

1213. Nu Mark submitted the MarkTen Elite gasket change to Altria's change management team. (PX7003 (Quigley (Altria), IHT at 77)).

Response to Proposed Finding No. 1213:

Respondents have no specific response.

1214. [redacted] (Willard (Altria) Tr. 1303 (*in camera*)).

Response to Proposed Finding No. 1214:

Respondents have no specific response.

1215. On August 10, 2018, Altria approved the production of MarkTen Elite with the c1A gasket. (Schwartz (Altria) Tr. 1904 (discussing PX1582 (Altria) at 002); PX7027 (Murillo (Altria/JLI), Dep. at 165-66); PX7036 (Garnick (Altria), Dep. at 142-43)).

Response to Proposed Finding No. 1215:

Respondents have no specific response except to note that [redacted]

[redacted].

1216. Units of MarkTen Elite with the c1A gasket were introduced to the U.S. market, "[f]irst through e-commerce . . . probably late August/early September [2018, and then in retail] probably . . . mid-September, late September [2018]." (Schwartz (Altria) Tr. 1910-11).

Response to Proposed Finding No. 1216:

Respondents have no specific response.

1217. As of October 22, 2018, Altria had converted its MarkTen Elite inventory network to the c1A gasket. (PX1567 (Altria) at 001 (Elite Inventory Update) ("As of today, the entire PW network has been converted over to the C1A gasket. Inventory durations are in a healthy position with additional production in transit.")).

Response to Proposed Finding No. 1217:

Respondents have no specific response.

1218. Schwartz agreed that implementing the c1A gasket change in MarkTen Elite would have "enabled Nu Mark to continue to expand . . . the distribution of MarkTen Elite." (Schwartz (Altria) Tr. 1906).

Response to Proposed Finding No. 1218:

Respondents have no specific response except to note that (1) Altria had already expanded Elite to 25,000 stores by August 2018, before the gasket change was implemented, (PX4314 (Altria) at 006; CCFF ¶ 1124), and (2) just as it had planned in February 2018, Altria anticipated that it would continue to expand Elite's distribution in the second half of the year, (PX4012 (Altria) at 028 (discussing distribution plan as of February 2018); PX4314 (Altria) at 006 (stating that, in September 2018, Elite was on track to be in 36,000 stores by November 2018)).

(1) The New Gasket Reduced Leaking in MarkTen Elite

1219. Dr. Gardner testified that the c1A gasket was developed to reduce leaking in MarkTen Elite and that it did reduce, but not eliminate, leaking in MarkTen Elite. (Gardner (Altria) Tr. 2664).

Response to Proposed Finding No. 1219:

Respondents have no specific response.

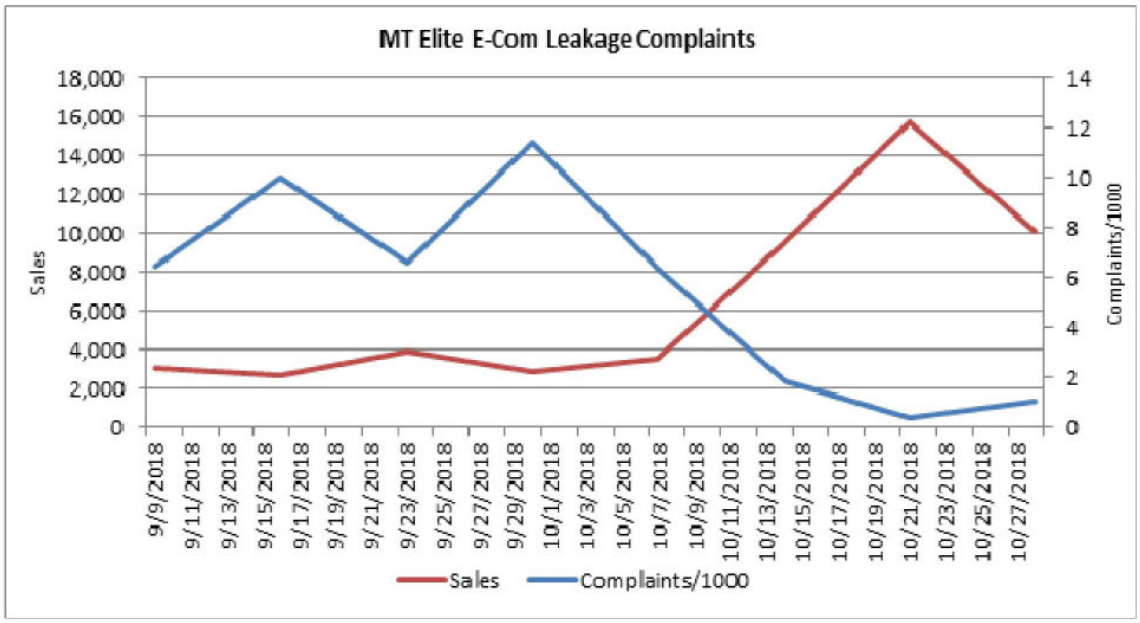
1220. Schwartz agreed that "the c1A gasket was a success in reducing minimal and excessive leakage rate in the MarkTen Elite product," based on a report from Charles Epps, "a quality

technician that worked within the quality team at Nu Mark." (Schwartz (Altria) Tr. 1907-10 (discussing PX1560 (Altria) at 001-02)). In an email dated October 22, 2018, and titled "MarkTen Elite Complaint Summary (October 2018)," Epps reported that MarkTen Elite pods produced before the gasket change had "~35% Minimal Leakage Rate" and "~6% Excessive Leakage Rate," while MarkTen Elite pods produced after the c1A gasket change had "~0.6% Minimal Leakage Rate" and "~0.2% Excessive Leakage Rate." (PX1560 (Altria) at 001-02).

Response to Proposed Finding No. 1220:

Respondents have no specific response except to note that [redacted], which is why "Pods from Production Weeks 22-31," which were made without the gasket, showed ~35% Minimal Leakage Rate" and "~6% Excessive Leakage Rate," (PX1560 (Altria) at 002). [redacted]; Schwartz (Altria) Tr. 1901-02), which is why "Pods from Production Weeks 34-35," which contained the gasket, exhibited "~0.6% Minimal Leakage Rate" and "~0.2% Excessive Leakage Rate," (PX1560 (Altria) at 002).

1221. In October 2018, after Altria implemented the gasket fix, leakage complaints for MarkTen Elite plummeted at the same time that MarkTen Elite sales grew significantly from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018 when Altria announced the discontinuation of Elite. (PX1970 (Altria) at 002 (Email from Craig Schwartz).



(PX1970 (Altria) at 002).

Response to Proposed Finding No. 1221:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 31), or in any deposition, so there is no witness testimony about what this chart actually shows. But, on its face, the chart is limited to e-commerce, and thus does not address retail sales. Moreover, it is not clear what the "Sales" line is capturing. Nothing in the document supports Complaint Counsel's assertion that the sales line reflects sales per day. There are only eight sets of data points plotted over the course of a roughly 60-day period, which is more consistent with weekly sales data. And the spike in sales in the week of October 21 is consistent with a temporary uptick in purchases following the October 25 announcement that Elite would be withdrawn from the market.

Notably, the excerpted chart only measures leakage complaints. But, as the cited exhibit notes, Elite also received complaints such as "Taste Burnt" and "Battery Will Not Charge." (PX1970 (Altria) at 007).

1222. Leaking was a common problem for pod-based e-cigarettes. (PX7018 (Schwartz (Altria), Dep. at 104-07 ("[A]ll these pods leaked, David. They all did. You know all the competition. Leaking pods was not unique to us); PX1822 (Altria) at 002 ("[I]t's relatively normal in the pod-based space for leakage in pods."); PX7012 (Eldridge (ITG), Dep. at 154 (explaining that based on what he heard from retailers and customers, all pod-based systems leak) and 172-73 [redacted] (*in camera*); PX7033 (O'Hara (JLI) Dep. at 90-91 ("Q. In 2018, in your competitive intelligence role, did you consider leaking problems in e-vapor devices to be common to many devices or were they rare? […] A. They were common to many devices")).

Response to Proposed Finding No. 1222:

The Proposed Finding is incomplete and misleading without additional context. As O'Hara explained in the portion of testimony omitted by ellipses, leaking issues "were certainly worse with some [products] than others." (PX7033 O'Hara (JLI) Dep. at 91). And, as he observed at trial, Elite's pods "were uniquely leaky." (O'Hara (JLI) Tr. 548; *see also* Begley (Altria) Tr. 1103 (explaining that Elite's leaking was "worse than any other pod product" and a "real impediment"); Myers (Altria) Tr. 3324 (describing Elite's leaking as "much more pervasive," especially based on the perspective of trade partners)). O'Hara "thought that it was pretty clear that, you know, commercially the product was a failure, and in addition to that, the excessive leaking and product quality issues [he] thought had damaged the brand[,] potentially so significantly that the brand was irreparably damaged." (O'Hara (JLI) Tr. 556; *see also* RFF ¶¶ 460-77, 753).

1223. [redacted] (Willard (Altria) Tr. 1299 (*in camera*)).

Response to Proposed Finding No. 1223:

Respondents have no specific response.

1224. Altria admitted that it submitted a White Paper, dated February 27, 2020, to FTC Staff, which stated that "Altria's pod-based product, Elite, had serious leaking problems and attempts to fix it in a way that did not require submitting a PMTA for new market authorization were unsuccessful," "[g]iven the seriousness of the issue and the potential consequences, Howard Willard changed direction and 'did not want to undertake that regulatory risk' of moving forward with the gasket change without FDA pre-approval,"

> and "[a]lthough Nu Mark attempted to design a new gasket to alleviate the leaking, the gasket resulted in a number of unintended consequences and Altria concluded that the gasket change could not be made without receiving a market order from the FDA." (PX0019 (Altria) at 005-06 (Respondent Altria's Responses and Objections to CC's Requests for Admission to Respondent Altria, Response to Request No. 8)).

Response to Proposed Finding No. 1224:

Respondents have no specific response except to note that Willard "changed direction." (CCFF ¶ 1224). As Complaint Counsel notes elsewhere, Altria's senior leadership initially approved the gasket change following an August 10 meeting attended by Willard, Gifford, Garnick, Crosthwaite, and Quigley, as well as members of the Nu Mark team. (CCFF ¶¶ 1215, 1364). [redacted]; *see also* Garnick (Altria) Tr. 1636).

As Respondents explained in their proposed findings of fact, (RFF ¶¶ 671-74), several others at Altria recall Willard's reversal, and accordingly testified at points in this proceeding that they did not believe the gasket change ever had been made. (Quigley (Altria) Tr. 1946-47; PX7027 Murillo (Altria/JLI) Dep. at 168; PX7036 Garnick (Altria) Dep. at 22; PX7003 Quigley (Altria) IHT at 81; PX7031 Willard (Altria) Dep at 59-60; PX7000 Garnick (Altria) IHT at 113-14). In fact, Willard's changed decision never was communicated to Nu Mark operations and the gasket change was implemented. (Schwartz (Altria) Tr. 1905; Garnick (Altria) Tr. 1636).

As soon as Altria realized that the gasket had in fact been implemented, it notified Complaint Counsel. (PX7036 Garnick (Altria) Dep. at 22 ("[A]fter I gave the deposition, I was informed that the gasket to the MarkTen Elite was implemented and product with the gasket was sold. When I was informed by that, I directed outside counsel to send a letter to the FTC to that

effect and identifying some documents to base that on."); RX2007 (Altria) (June 15, 2020 letter to Complaint Counsel)).

Ultimately though, the precise order of events related to the gasket matters little, as did the gasket change itself. The gasket change was an important step toward resolving Elite's leaking problems, but it was not going to transform Elite into a successful product because it did not remedy Elite's lack of nicotine satisfaction. (Quigley (Altria) Tr. 1947-48, 2057-59; *see also* PX7041 Quigley (Altria) Dep. at 153-54; PX7003 Quigley (Altria) IHT at 118-19). By the summer and fall of 2018, retailers were less concerned about Elite's leaking and "more concerned about, you know, the product itself and the fact that it wasn't moving very quickly, and because it didn't have, in their mind, the right level of nicotine and nicotine salts." (PX7038 Myers (Altria) Dep. at 87).

1225. Before June 15, 2020, Altria executives testified that Altria did not approve the c1A change and [redacted] (PX7003 (Quigley (Altria), IHT at 81-82) ("All I know is we didn't implement the gasket."); PX7004 (Willard (Altria), IHT at 206-10) (*in camera*) [redacted]; PX7000 (Garnick (Altria), IHT at 113 ("[U]ltimately, Howard [Willard] made the decision [not to make the c1A gasket change in Elite], and he did not want to undertake that regulatory risk.")).

Response to Proposed Finding No. 1225:

The Proposed Finding is incomplete and misleading without additional context. Respondents stated in their White Paper that Willard "changed direction." (PX0019 (Altria) at 005-06). As Complaint Counsel notes elsewhere, Altria's senior leadership initially approved the gasket change following an August 10 meeting attended by Willard, Gifford, Garnick, Crosthwaite, and Quigley, as well as members of the Nu Mark team. (CCFF ¶¶ 1215, 1364).

[redacted]; *see also* Garnick (Altria) Tr. 1636).

As Respondents explained in their proposed findings of fact, (RFF ¶¶ 671-74), several others at Altria recall Willard's reversal, and accordingly testified at ;points in this proceeding that they did not believe the gasket change ever had been made. (Quigley (Altria) Tr. 1946-47; PX7027 Murillo (Altria/JLI) Dep. at 168; PX7036 Garnick (Altria) Dep. at 22; PX7003 Quigley (Altria) IHT at 81; PX7031 Willard (Altria) Dep at 59-60; PX7000 Garnick (Altria) IHT at 113-14). In fact, Willard's changed decision never was communicated to Nu Mark operations and the gasket change was implemented. (Schwartz (Altria) Tr. 1905; Garnick (Altria) Tr. 1636).

As soon as Altria realized that the gasket had in fact been implemented, it notified Complaint Counsel. (PX7036 Garnick (Altria) Dep. at 22 ("[A]fter I gave the deposition, I was informed that the gasket to the MarkTen Elite was implemented and product with the gasket was sold. When I was informed by that, I directed outside counsel to send a letter to the FTC to that effect and identifying some documents to base that on."); RX2007 (Altria) (June 15, 2020 letter to Complaint Counsel)).

Ultimately though, the precise order of events related to the gasket matters little, as did the gasket change itself. The gasket change was an important step toward resolving Elite's leaking problems, but it was not going to transform Elite into a successful product because it did not remedy Elite's lack of nicotine satisfaction. (Quigley (Altria) Tr. 1947-48, 2057-59; *see also* PX7041 Quigley (Altria) Dep. at 153-54; PX7003 Quigley (Altria) IHT at 118-19). By the summer and fall of 2018, retailers were less concerned about Elite's leaking and "more concerned about,

you know, the product itself and the fact that it wasn't moving very quickly, and because it didn't have, in their mind, the right level of nicotine and nicotine salts." (PX7038 Myers (Altria) Dep. at 87).

1226. Altria admitted that on June 15, 2020, Altria sent Complaint Counsel a letter stating that "[w]e have recently learned that Nu Mark ultimately incorporated a replacement gasket into Elite and that Nu Mark distributed Elite units with the replacement gasket to its customers for sale to consumers in the fall of 2018. The replacement gasket was known as the c1A gasket . . . ." (PX0019 (Altria) at 006 (Respondent Altria's Responses and Objections to Complaint Counsel's Requests for Admission to Respondent Altria, Response to Request No. 9)).

Response to Proposed Finding No. 1226:

Respondents have no specific response.

1227. [redacted] (Willard (Altria) Tr. 1304, 1306 (*in camera*) [redacted]

Response to Proposed Finding No. 1227:

The Proposed Finding is incomplete and misleading without additional context. [redacted]; *see also* PX4178 (Altria) at 001), [redacted]

[redacted]

(2) The New Gasket Reduced Formaldehyde Generation in MarkTen Elite

1228. Dr. Gardner testified that the c1A gasket reduced formaldehyde production in MarkTen Elite, under machine testing conditions, which Dr. Gardner characterized as "a good thing." (Gardner (Altria) Tr. 2665-66).

Response to Proposed Finding No. 1228:

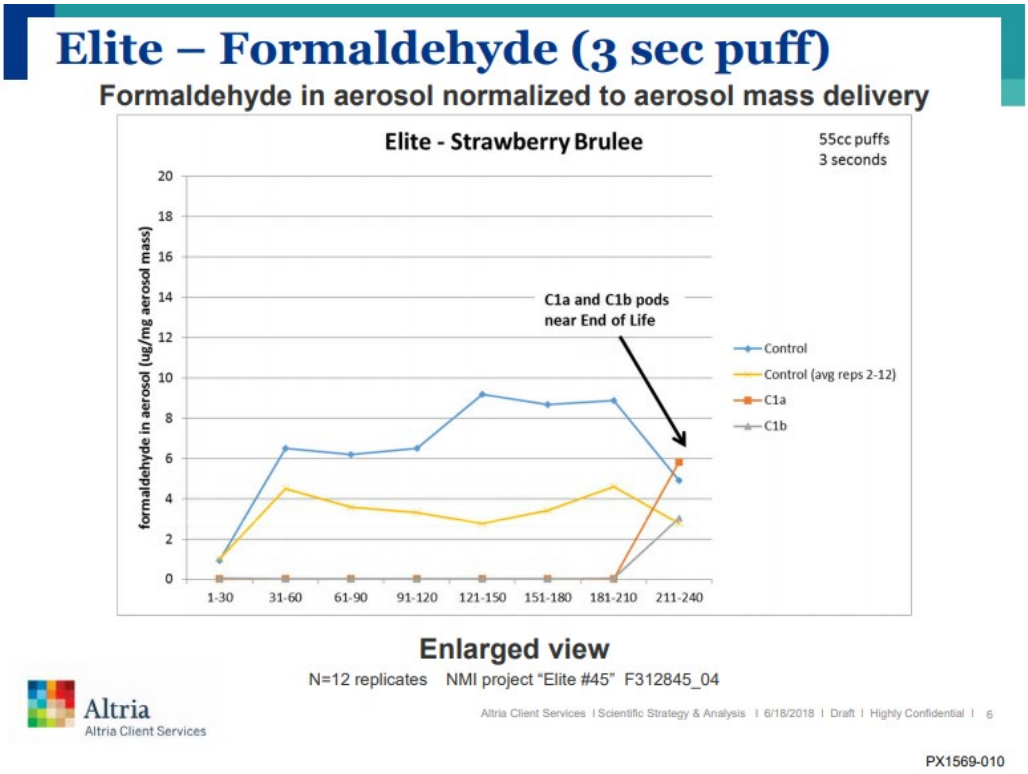
The Proposed Finding is incomplete and misleading without additional context. As Dr. Gardner explained, even with the c1A gasket, "dry puff was still experienced when using the product in testing, so thermal degradation still occurred." (Gardner (Altria) Tr. 2562-63; *see also* Gardner (Altria) Tr. 2565-67 (discussing PX4523 (Altria) at 009 and explaining that "it demonstrates that [Elite was] still generating formaldehyde at increasing levels, especially towards the end of the life of the pod, and without dry puff prevention, it would continue to be that way"); PX7026 Gardner (Altria) Dep. at 257-58 (explaining that the C1a gasket did not obviate the need for dry puff prevention because it still had a cotton wick and "once the wick started to be thermally degraded or combusted, the formaldehyde yield of the product could resemble that of a cigarette")). Thus, regardless of the new gasket, Altria's scientists continued to believe that Elite would need dry puff prevention technology to receive FDA approval. (Gardner (Altria) Tr. 2563).

1229. In a June 18, 2018, email sent in advance of a CMT discussion on the MarkTen Elite c1A gasket change, Dr. Gardner stated: "the formaldehyde in aerosol is significantly lower with the modified gaskets. Normalized on a mg aerosol mass basis, the formaldehyde in aerosol is approximately 10-600 fold lower with the modified gaskets." (PX1569 (Altria) at 001).

Response to Proposed Finding No. 1229:

The Proposed Finding is incomplete and misleading without additional context. Although Complaint Counsel chose not to show Dr. Gardner the cited exhibit at trial, (CC Exhibit Index at 18), when presented with this email in his deposition, Dr. Gardner explained that the new gasket "[d]id not eliminate" formaldehyde production. (PX7026 Gardner (Altria) Dep. at 190). "Especially towards the end of the device when the liquid was low, you see very high formaldehyde deliveries." (PX7026 Gardner (Altria) Dep. at 190; PX7026 Gardner (Altria) Dep. at 191 ("[T]his didn't eliminate the [formaldehyde] exposure.")). Thus, the C1a gasket did not obviate the need for dry puff prevention; Elite still had a cotton wick and "once the wick started to be thermally degraded or combusted, the formaldehyde yield of the product could resemble that of a cigarette." (PX7026 Gardner (Altria) Dep. at 257-58; *see also* Gardner (Altria) Tr. 2565-67 (discussing PX4523 (Altria) at 009 and explaining that "it demonstrates that [Elite was] still generating formaldehyde at increasing levels, especially towards the end of the life of the pod, and without dry puff prevention, it would continue to be that way")).

1230. A presentation prepared by Dr. Gardner and Sean Eastwood, of Nu Mark Israel, titled "Elite aerosol characterization with alternative gaskets," which was circulated in advance of a CMT meeting on the MarkTen Elite c1A gasket change, included a slide showing that the c1A gasket reduced formaldehyde generation in MarkTen Elite until the "near End of Life" of the pods. (PX1569 (Altria) at 010).



(PX1569 (Altria) at 010).

Response to Proposed Finding No. 1230:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel chose not to show Dr. Gardner the cited exhibit at trial (CC Exhibit Index at 18), and did not show the cited slide during his deposition. The slide is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question Altria's employees with knowledge about the data, should not be permitted to offer untested interpretations of it.

Second, even if the Court were to consider this slide, it does not represent a complete picture of the formaldehyde output. The data in the cited slide stops at 240 puffs. (PX1569 (Altria) at 010). But, as Dr. Gardner explained at trial, Altria's scientists did not know how many puffs adult smokers would take. (Gardner (Altria) Tr. 2568). The prior slide in the deck shows the same data but continues on through 300 puffs and shows a dramatic spike in formaldehyde levels after 200 puffs, and particularly during the last 60 puffs, which significantly exceeds the formaldehyde

levels in the control. (*Compare* PX1569 (Altria) at 009, *with* PX1569 (Altria) at 010; *see also* Gardner (Altria) Tr. 2565-66, 2568).

Third, when asked about the presentation as a whole during his deposition, Dr. Gardner explained that the new gasket "[d]id not eliminate" formaldehyde production. "Especially towards the end of the device when the liquid was low, you see very high formaldehyde deliveries." (PX7026 Gardner (Altria) Dep. at 190; PX7026 Gardner (Altria) Dep. at 191 ("[T]his didn't eliminate the [formaldehyde] exposure.")). Thus, the C1a gasket did not obviate the need for dry puff prevention; Elite still had a cotton wick and "once the wick started to be thermally degraded or combusted, the formaldehyde yield of the product could resemble that of a cigarette." (PX7026 Gardner (Altria) Dep. at 257-58; *see also* Gardner (Altria) Tr. 2565-67 (discussing PX4523 (Altria) at 009 and explaining that "it demonstrates that [Elite was] still generating formaldehyde at increasing levels, especially towards the end of the life of the pod, and without dry puff prevention, it would continue to be that way")).

1231. In June 2018, Altria prepared a JUUL "Book of Knowledge," which identified JUUL as producing similar amounts of formaldehyde (per puff) as MarkTen in testing. (Gardner (Altria) Tr. 2672-73 (discussing PX4115 (Altria), at 053 ("Formaldehyde yields (per puff) are similar to MarkTen"))). Bill Gardner testified that this level of formaldehyde production was "good." (Gardner (Altria) Tr. 2672-73).

Response to Proposed Finding No. 1231:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The study is neither up to date, nor is it representative of how consumers actually use e-cigarettes. As Dr. Gardner explained when shown this exhibit at trial, the results for MarkTen cig-a-like described in the Proposed Finding are based on "intense puffing regimes for . . . 140 puffs." (Gardner (Altria) Tr. 2673). The study "was performed in early 2017," before Altria discovered that consumers actually used "MarkTen under nonintense puffing conditions." (Gardner (Altria) Tr. 2673; RFF ¶ 357). When Altria re-ran the test later that year under non-intense puffing

conditions rather than intense, it discovered that MarkTen cig-a-like's formaldehyde yields "were higher than expected and higher than other products in the market," and "were similar to a cigarette." (Gardner (Altria) Tr. 2569-70; RFF ¶ 359). In the second study, JUUL's formaldehyde levels were "below quantification," while MarkTen produced formaldehyde levels on par with a cigarette under certain conditions. (PX4149 (Altria) at 034; RFF ¶ 362). That is because JUUL had dry puff prevention technology, while MarkTen cig-a-like and Elite did not. (RFF ¶¶ 361, 365).

(3) The New Gasket Increased Aerosol Mass in MarkTen Elite

1232. Dr. Gardner testified that the c1A gasket doubled MarkTen Elite's aerosol delivery in "machine puffing conditions." (Gardner (Altria) Tr. 2672).

Response to Proposed Finding No. 1232:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gardner noted, the results he was describing were based on "machine puffing conditions." (Gardner (Altria) Tr. 2670). Under machine puffing, a "smoking machine" is used to "provide[] reproducible and repeatable puffing of devices. So it takes the exact same puff at the exact same interval repeatedly until you stop the experiment, and it allows you to do direct comparisons between products under a fixed condition." (Gardner (Altria) Tr. 3085-86). But that is not an accurate representation of how those products will compare in terms of actual nicotine delivery to a smoker because (1) the machine "doesn't tell you how the adult smoker will actually use the product," and (2) it "doesn't tell you . . . the form the nicotine is in when it's delivered in aerosol." (Gardner (Altria) Tr. 3086). In terms of delivery, because JUUL has salts, it has "a lower pH" so "the nicotine in JUUL would go deeper into the lungs and better provide the smoking experience the . . . adult smoker was looking for." (Gardner (Altria) Tr. 3086-87). By contrast, Elite had "no nicotine salts and a higher pH," which "would not be as sufficient" to deliver nicotine "deep into

the lungs" and so "would not deliver the experience the smoker was looking for." (Gardner (Altria) Tr. 3086-87).

Second, to the extent Complaint Counsel is implying that doubling Elite's aerosol mass would make it more satisfying, Complaint Counsel is incorrect. Dr. Gardner was asked, "[i]f the product has no nicotine salts, even if you ended up delivering more nicotine per puff on a smoking machine, does that mean that the product is able to convert adult smokers?" (Gardner (Altria) Tr. 3087). He replied, "No. It's still challenged with the inefficient delivery of nicotine deep into the lung," meaning it would not be absorbed deep in the lung. "So it would be unlikely to convert adult smokers without nicotine salts even if you increased the amount of nicotine." (Gardner (Altria) Tr. 3087; *see also* Gardner (Altria) Tr. 2669; PX7015 Gogova (Altria) Dep. at 42 (explaining that "nicotine satisfaction and replacement of conventional cigarettes" require providing a "similar nicotine release profile as a conventional cigarette, and this cannot be achieved truly without the acids to create nicotine salts")). In fact, studies showed that, with Elite, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). For this reason, it makes no difference if the C1a gasket would have doubled the aerosol delivery; zero times two is still zero, and Elite would have been just as inefficient at delivering nicotine. (Jupe (Altria) Tr. 2273-74 (explaining that in a liquid with 4.5 percent nicotine and no acid, essentially zero percent of the nicotine is delivered to the lung as it would be delivered by a cigarette)).

1233. In a June 18, 2018, email sent in advance of a CMT discussion on the MarkTen Elite c1A gasket change, Dr. Gardner stated: "In summary, while the aerosol mass with the modified gaskets are is [sic] ~2x higher than the control samples." (PX1569 (Altria) at 001).

Response to Proposed Finding No. 1233:

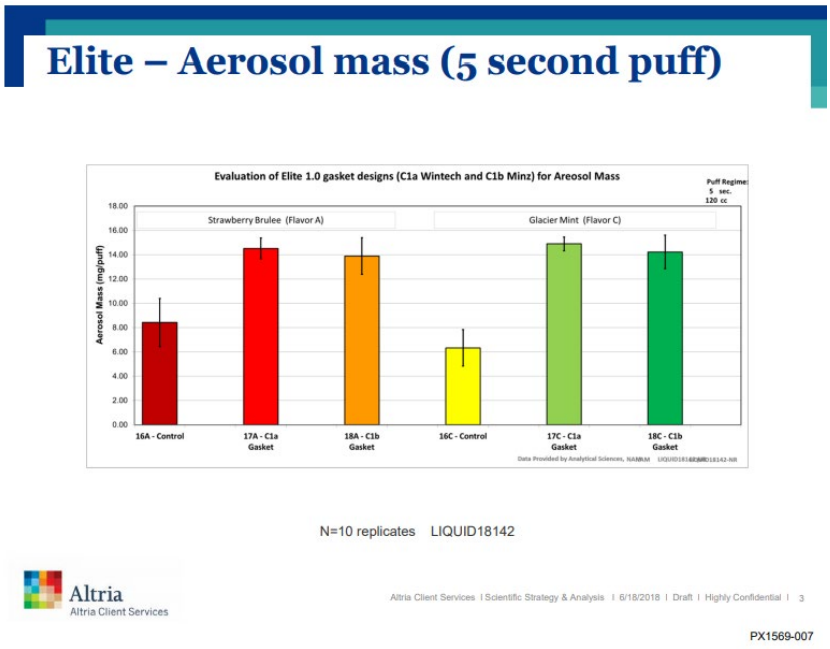
The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gardner noted during his deposition, the results he was describing were based on a "machine

puffing method." (PX7026 Gardner (Altria) Dep. at 189). Under machine puffing, a "smoking machine" is used to "provide[] reproducible and repeatable puffing of devices. So it takes the exact same puff at the exact same interval repeatedly until you stop the experiment, and it allows you to do direct comparisons between products under a fixed condition." (Gardner (Altria) Tr. 3085-86). But that is not an accurate representation of how those products will compare in terms of actual nicotine delivery to a smoker because (1) the machine "doesn't tell you how the adult smoker will actually use the product," and (2) it "doesn't tell you . . . the form the nicotine is in when it's delivered in aerosol." (Gardner (Altria) Tr. 3086). In terms of delivery, because JUUL has salts, it has "a lower pH" so "the nicotine in JUUL would go deeper into the lungs and better provide the smoking experience the . . . adult smoker was looking for." (Gardner (Altria) Tr. 3086-87). By contrast, Elite had "no nicotine salts and a higher pH," which "would not be as sufficient" to deliver nicotine "deep into the lungs" and so "would not deliver the experience the smoker was looking for." (Gardner (Altria) Tr. 3086-87).

Second, to the extent Complaint Counsel is implying that doubling Elite's aerosol mass would make it more satisfying, Complaint Counsel is incorrect. Dr. Gardner was asked, "[i]f the product has no nicotine salts, even if you ended up delivering more nicotine per puff on a smoking machine, does that mean that the product is able to convert adult smokers?" (Gardner (Altria) Tr. 3087). He replied, "No. It's still challenged with the inefficient delivery of nicotine deep into the lung," meaning it would not be absorbed deep in the lung. "So it would be unlikely to convert adult smokers without nicotine salts even if you increased the amount of nicotine." (Gardner (Altria) Tr. 3087; *see also* Gardner (Altria) Tr. 2669; PX7015 Gogova (Altria) Dep. at 42 (explaining that "nicotine satisfaction and replacement of conventional cigarettes" require providing a "similar nicotine release profile as a conventional cigarette, and this cannot be

achieved truly without the acids to create nicotine salts")). In fact, studies showed that, with Elite, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). For this reason, it makes no difference if the C1a gasket would have doubled the aerosol delivery; zero times two is still zero, and Elite would have been just as inefficient at delivering nicotine. (Jupe (Altria) Tr. 2273-74 (explaining that in a liquid with 4.5 percent nicotine and no acid, essentially zero percent of the nicotine is delivered to the lung as it would be delivered by a cigarette)).

1234. A presentation prepared by Dr. Gardner and Sean Eastwood, of Nu Mark Israel, titled "Elite aerosol characterization with alternative gaskets," which was circulated in advance of a CMT meeting on the MarkTen Elite c1A gasket change, included a slide showing that the c1A gasket nearly doubled aerosol mass in MarkTen Elite versus the control. (PX1569 (Altria) at 007).



(PX1569 (Altria) at 007).

Response to Proposed Finding No. 1234:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gardner noted during his deposition, the results he was describing were based on a "machine

puffing method." (PX7026 Gardner (Altria) Dep. at 189). Under machine puffing, a "smoking machine" is used to "provide[] reproducible and repeatable puffing of devices. So it takes the exact same puff at the exact same interval repeatedly until you stop the experiment, and it allows you to do direct comparisons between products under a fixed condition." (Gardner (Altria) Tr. 3085-86). But that is not an accurate representation of how those products will compare in terms of actual nicotine delivery to a smoker because (1) the machine "doesn't tell you how the adult smoker will actually use the product," and (2) it "doesn't tell you . . . the form the nicotine is in when it's delivered in aerosol." (Gardner (Altria) Tr. 3086). In terms of delivery, because JUUL has salts, it has "a lower pH" so "the nicotine in JUUL would go deeper into the lungs and better provide the smoking experience the . . . adult smoker was looking for." (Gardner (Altria) Tr. 3086-87). By contrast, Elite had "no nicotine salts and a higher pH," which "would not be as sufficient" to deliver nicotine "deep into the lungs" and so "would not deliver the experience the smoker was looking for." (Gardner (Altria) Tr. 3086-87).

Second, to the extent Complaint Counsel is implying that doubling Elite's aerosol mass would make it more satisfying, Complaint Counsel is incorrect. Dr. Gardner was asked, "[i]f the product has no nicotine salts, even if you ended up delivering more nicotine per puff on a smoking machine, does that mean that the product is able to convert adult smokers?" (Gardner (Altria) Tr. 3087). He replied, "No. It's still challenged with the inefficient delivery of nicotine deep into the lung," meaning it would not be absorbed deep in the lung. "So it would be unlikely to convert adult smokers without nicotine salts even if you increased the amount of nicotine." (Gardner (Altria) Tr. 3087; *see also* Gardner (Altria) Tr. 2669; PX7015 Gogova (Altria) Dep. at 42 (explaining that "nicotine satisfaction and replacement of conventional cigarettes" require providing a "similar nicotine release profile as a conventional cigarette, and this cannot be

achieved truly without the acids to create nicotine salts")). In fact, studies showed that, with Elite, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). For this reason, it makes no difference if the C1a gasket would have doubled the aerosol delivery; zero times two is still zero, and Elite would have been just as inefficient at delivering nicotine. (Jupe (Altria) Tr. 2273-74 (explaining that in a liquid with 4.5 percent nicotine and no acid, essentially zero percent of the nicotine is delivered to the lung as it would be delivered by a cigarette)).

b) Despite the Deeming Rule, Altria Implemented or Was Planning to Implement Other Product Improvements

1235. Altria developed a new mouthpiece for Apex and on August 30, 2018 was planning to implement the Apex mouthpiece without a PMTA. (PX1638 (Altria) at 001 (Email between Michael Brace and Michelle Baculis discussing new Apex plugs)).

Response to Proposed Finding No. 1235:

The Proposed Finding is inaccurate and misleading without additional context. *First*, the cited exhibit does not state that Nu Mark approved a new *mouthpiece* for Apex. Instead it discusses a silicone *plug* intended to prevent leakage during transit. "One side of the plug is inserted into the mouthpiece opening during manufacturing. The plug is then removed by the consumer and discarded at first usage." (PX1638 (Altria) at 001-02).

Second, the cited document is ambiguous on its face about whether Altria actually implemented the plug on the market version of Apex. And Complaint Counsel, which neither raised the exhibit at trial, (CC Exhibit Index at 21), nor showed it to any witness during a deposition, has no evidence that the plug was implemented.

1236. On September 27, 2018, Altria's Mark Bradby wrote in an email that Altria's Change Management Team will be recommending moving forward with a recommendation to change MarkTen Elite by adding a "Battery Seal Notch" to the product. (PX1599 (Altria) at 001).

Response to Proposed Finding No. 1236:

The Proposed Finding is inaccurate and misleading without additional context. Complaint Counsel neither raised the exhibit at trial, (CC Exhibit Index at 20), nor showed it to any witness during a deposition. As a result, there is no witness testimony about what this exhibit means, and the exhibit is ambiguous on its face about whether the battery seal notch was approved by the CMT, much less implemented. As to approval, the cited document states, "[w]e will be recommending moving forward with all 3 requests," but it is not clear if that means moving forward with additional review or moving forward with approval. (PX1599 (Altria) at 001). And the contemporaneous CMT request log notes only that a recommendation is pending. (PX1991 (Altria) at 004 (stating, in the line labeled "Battery Seal Notch," "Reviewed during 9/26/18 CMT. Draft recommendation pending")). As to implementation, the cited document states only that the Elite team wants to "move forward with the no-notch version." (PX1599 (Altria) at 001).

D. ALTRIA'S CLAIM THAT IT WITHDREW MARKTEN ELITE AND APEX BECAUSE OF YOUTH VAPING CONCERNS IS UNSUPPORTED AND PRETEXTUAL

1237. Altria's and JLI's ordinary course documents and their executives' testimony show that the claim that Altria discontinued its MarkTen Elite and Apex products because of youth vaping concerns is implausible. (*See* CCFF ¶¶ 1238-53, below).

Response to Proposed Finding No. 1237:

The Proposed Finding is inaccurate and is not supported by the cited proposed findings. The record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that, although not the only consideration, youth vaping concerns were a significant factor in Altria's decision to discontinue its pod-based products MarkTen Elite and Apex. (RFF ¶¶ 917-51). And, as explained in the responses to the proposed findings in this section, Complaint Counsel's attempt to show otherwise is based on a portrayal of the evidence that is inaccurate, incomplete, and misleading without additional context.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1238-53, Respondents incorporate their responses to those Proposed Findings herein.

1. Altria Claimed That It Discontinued MarkTen Elite and Apex Because of Youth Vaping Concerns, But That Claim Made FDA Commissioner Scott Gottlieb and JLI Skeptical

1238. On October 18, Altria's executives met with FDA Commissioner Gottlieb and his staff to discuss steps Altria was considering taking to address youth vaping issues. (Willard (Altria) Tr. 1250, 1286-187).

Response to Proposed Finding No. 1238:

Respondents have no specific response.

1239. On October 25, 2018, Willard sent a letter to FDA Commissioner Scott Gottlieb in which he wrote, "[b]ased on the publicly available information from FDA and others, we believe that pod-based products significantly contribute to the rise in youth use of e-vapor products. Although we do not believe we have a current issue with youth access to or use of our pod-based products, we do not want to risk contributing to the issue. To avoid such a risk, **we will remove from the market our *MarkTen Elite* and *Apex by Markten* pod-based products until we receive a market order from the FDA or the youth issue is otherwise addressed**" (Willard (Altria) Tr. 1236 (discussing PX2022 (JLI) at 003) (emphasis in original).

Response to Proposed Finding No. 1239:

Respondents have no specific response.

1240. After Altria announced its transaction with JLI, FDA Commissioner Gottlieb wrote to Willard on February 6, 2019 requesting a meeting "regarding representations [Altria] made in a meeting with Food and Drug Administration (FDA) senior leadership on October 18, 2018, and in a written submission that followed, where [Altria] acknowledged that Altria Group, Inc. has an obligation to take action to help address the mounting epidemic of youth addiction to tobacco products." (PX9083 (FDA) at 001.)

Response to Proposed Finding No. 1240:

Respondents object to this document as irrelevant and hearsay. As Respondents explained in a contemporaneous objection when this document was shown at trial, "[w]hat [Commissioner Gottlieb] thinks as a third party after the transaction [about] why Altria did what it did, is not relevant." (Tr. 1280 (statement of counsel)). "Commissioner Gottlieb doesn't get to decide

whether Altria engaged in a pretext or [acted] for independent business reasons and in response to his letter pulled these products. . . . It doesn't matter what he thinks. It matters what [the Court] think[s] and [the Court] find[s]." (Tr. 1283 (statement of counsel)). Further, as the Court acknowledged, the document is hearsay, (Tr. 1281 (statement of the Court)), and Respondents maintain that it should not be considered for the truth of the matter asserted.

The Proposed Finding is also incomplete and misleading without additional context. *First*, following his September 12 letter, Commissioner Gottlieb signaled that, notwithstanding concerns about youth usage, FDA continued to support keeping e-vapor products, including pod-based products, in the market in light of their potential to convert adult smokers. On October 31, 2018, after Altria's October 18 meeting with FDA and October 25 letter in which Altria announced that it was unilaterally withdrawing its pod products and non-traditional cig-a-like flavors in response to FDA's youth vaping concerns, Commissioner Gottlieb issued a statement in response to its meetings with the five e-vapor manufacturers that had received letters. (RFF ¶ 1026; RX0159 (FDA) at 002). He stated that FDA "welcome[d] the constructive dialogue [it] had with manufacturers" and affirmed that FDA "still believ[ed] that new innovations that don't use combustion, such as many e-cigarettes, may offer an important opportunity for adults to transition off combustible products" and that it "want[ed] to keep this option for adults open." (RX0159 (FDA) at 002). This statement was consistent with Altria's October 18 meeting with FDA, in which Altria did not get the "impression" that Commissioner Gottlieb was "seriously considering" pulling all pod products from the market. (Garnick (Altria) Tr. 1767-68; RFF ¶ 1000). And, although Altria remained "concerned about the youth issue," it was encouraged to go forward with the JLI negotiations following FDA's October 31 statement. (Garnick (Altria) Tr. 1769; RFF ¶ 1030).

Second, in response to FDA's letter, JLI announced a series of proactive steps to address youth usage. (RX1926 (JLI)). JLI stated that it would discontinue sales of all non-traditional flavors from retail, leaving those flavors to be sold only online, where JLI would be implementing additional age-verification measures. (RX1926 (JLI) at 001-03). JLI also stated that it would be strengthening age compliance in retail stores (where its devices and traditional flavors would remain available), developing new technology to further restrict access, and continuing to support legislation to increase the legal age for smoking to 21. (RX1926 (JLI) at 004-08). In its announcement, JLI explained that it was "sensitive to the concern articulated by Commissioner Gottlieb" about flavors. (RX1926 (JLI) at 002). Its decision to stop selling non-traditional flavored products in retail stores reflected its "common goal" with FDA to "prevent[] youth from initiating on nicotine." (RX1926 (JLI) at 001). Altria was "very encouraged" by what JLI ultimately announced: "[Altria] thought that was a step in the right direction . . . [and] reflected a commitment" to prevent youth usage of e-cigarettes, "so [it was] happy to see that." (Garnick (Altria) Tr. 1769; RFF ¶ 1040).

1241. The February 6, 2019 letter from Commissioner Gottlieb also noted that "[a]fter Altria's acquisition of a 35 percent ownership interest in JUUL Labs, Inc., [Altria's] newly announced plans with JUUL contradict the commitments [Altria] made to the FDA." (PX9083 (FDA) at 001.)

Response to Proposed Finding No. 1241:

The Proposed Finding is incomplete and misleading without additional context. Contrary to Commissioner Gottlieb's assertion, there was no contradiction between the commitment to addressing youth vaping made in Altria's October communications with FDA and its transaction with JLI.

Willard explained why there was no contradiction when asked by Complaint Counsel at the earliest stages of this case:

> [I]n making our decision to withdraw the Mark Ten Elite product, we had learned over the course of the year that it was not actually very good at converting adult cigarette smokers to the product and that it had a number of technical issues. So when it was identified as a product of concern to the FDA, we thought that that was one more reason to withdraw that product from the marketplace.
>
> In the example of JUUL, at that stage, JUUL was probably the most successful product at converting adult cigarette smokers to a noncombustible tobacco product. So it created a very significant positive public health benefit. But at the same time, the whole e-vapor category was receiving a lot of scrutiny because an increasing number of youth were engaged in the category. So when we looked at making our investment in JUUL, both we and JUUL, in discussions with the FDA, agreed that there were significant steps that should happen to help drive down youth usage of e-vapor products but preserve those products [as] available for adult cigarette smokers.
>
> And even before we invested in JUUL, JUUL had made the commitment to remove from retail stores their flavored products other than tobacco, menthol and mint, to try and address this youth issue. And they also expressed their support and ultimately Altria's support as well for a minimum age to purchase of 21 for tobacco products.
>
> So I think when we invested in JUUL, we recognized it was a very different product than Mark Ten Elite with a number of other benefits. But we also acknowledged that there were issues in the e-vapor category overall that needed to be dealt with. And we were in agreement with JUUL that we would both seek to do that.

(PX7004 Willard (Altria) IHT at 212-13).

Each of the points raised by Willard was borne out by the evidence at trial.

First, unlike MarkTen Elite and MarkTen cig-a-like, which both Altria and its competitors recognized had low conversion potential, (RFF ¶¶ 737-54), Altria "saw in the data that JUUL was converting smokers," (Garnick (Altria) Tr. 1771), so much so that it was "impacting brands across the cigarette space," (Gifford (Altria) Tr. 2828). Altria believed that JUUL "was the most . . . effective[] noncombustible product on the market to convert smokers." (Garnick (Altria) Tr. 1771).

Second, Altria had been conscious of the youth issues throughout its negotiations with JLI. (RFF ¶¶ 321, 528-36, 558, 1012-13). In the initial meeting between senior executives in July 2017,

Willard emphasized the importance of "combat[ing]" youth usage and detailed Altria's youth prevention efforts across the tobacco industry. (RX1459 (JLI) at 002; RFF ¶ 321). And following FDA's statements from April and May 2018 highlighting the risk of e-vapor attracting youth, Altria believed that FDA's concern "was clearly a factor [it] needed to consider in structuring a deal." (Willard (Altria) Tr. 1363; RFF ¶ 535). In its letter to JLI a few weeks later, Altria emphasized how it could help JLI "address serious youth vaping issues." (RX1402 (Altria) at 002; RFF ¶ 558).

Third, although Altria decided to pull its own pod products because they lacked conversion to offset any risk of youth initiation, (RFF ¶¶ 938-49), in its October 18 meeting with FDA, Altria did not get the "impression" that Commissioner Gottlieb was "seriously considering" pulling all pod products from the market. (Garnick (Altria) Tr. 1767-68; RFF ¶ 1000). And Altria was encouraged to go forward with the JLI negotiations following FDA's October 31 statement in which FDA reaffirmed its belief in the harm reduction potential of e-cigarettes and touted its constructive conversations with manufacturers. (Garnick (Altria) Tr. 1769; *see also* RX0159 (FDA) at 002; RFF ¶¶ 1026-31).

Finally, Altria was also "very encouraged" by the proactive steps taken by JLI. (Garnick (Altria) Tr. 1769). Even before FDA's September 12 letter, JLI had created a secret shopper program to verify that age enforcement standards were being followed by retailers. (RX1926 (JLI) at 004). It was investing in a new Bluetooth-enabled device that would "break new ground on access restrictions at the user level." (RX1926 (JLI) at 007). And it had already publicly endorsed increasing the legal age for purchasing tobacco products to 21. (RX1926 (JLI) at 008). Following FDA's September letter, JLI stated that it would discontinue sales of all non-traditional flavors from retail, leaving those flavors to be sold only online, where JLI would be implementing

additional age-verification measures. (RX1926 (JLI) at 001-03). JLI also stated that it was quadrupling the size of its secret shopper program in retail stores (where its devices and traditional flavors would remain available), developing new technology to further restrict access, and continuing to support legislation to increase the legal age for smoking to 21. (RX1926 (JLI) at 004-08). JLI's decision to preemptively withdraw non-traditional flavors from retail stores, which FDA had encouraged in its letter, was a particularly significant step, and one that was not taken by Reynolds, JTI, or ITG Brands, the three other manufacturers who received letters from FDA. (RFF ¶ 1041; RX1921 (FDA) at 006). Altria "thought that was a step in the right direction . . . [and] reflected a commitment" to prevent youth usage of e-cigarettes, "so [it was] happy to see that." (Garnick (Altria) Tr. 1769).

1242. Willard testified that he understood Commissioner Gottlieb's references to "commitments" to encompass both the commitments that Altria had made at the October 18, 2018 meeting and in Willard's October 25, 2018 letter to the FDA announcing the discontinuation of MarkTen Elite and Apex by MarkTen. (Willard (Altria) Tr. 1289-90).

Response to Proposed Finding No. 1242:

Respondents have no specific response except to note that Complaint Counsel, which never raised the February 2019 letter before trial, did not ask Willard a single question about his reaction to the letter or Altria's subsequent meeting with FDA in early 2019. (Willard (Altria) Tr. 1277-90).

1243. When asked about Altria's rationale for withdrawing MarkTen Elite, JLI's then-CEO, Burns, testified "it seemed in conflict that you would write this statement and still want to have discussions about investing in a company whose primary product was a pod-based e-vapor product." (PX7025 (Burns (JLI), Dep. at 172)).

Response to Proposed Finding No. 1243:

The Proposed Finding is incomplete and misleading without additional context. Burns testified that he asked Willard to clarify the seeming conflict, (PX7025 Burns (JLI) Dep. at 172), but does not "recall the specifics" what Willard said, (PX7025 Burns (JLI) Dep. at 172). Pritzker,

however, does recall that discussion. (PX7021 Pritzker (JLI) Dep. at 148). Pritzker recalls Willard explaining that Altria said that its pod "simply was not as good as Juul's product," (PX7021 Pritzker (JLI) Dep. at 148), which is consistent with Willard's trial testimony that one of the reasons Altria decided to pull Elite was that it was not successful, (Willard (Altria) Tr. 1442). [redacted] In other words, unlike JUUL, which was "probably the most successful product at converting adult cigarette smokers" and had "created a very significant positive public health benefit," Elite "was not actually very good at converting adult cigarette smokers," (PX7004 Willard (Altria) IHT at 212), so "there's no reason to keep the product on the market," (Willard (Altria) Tr. 1300).

In addition, Willard believed that Altria could assist JLI with youth prevention, (RFF ¶¶ 321, 528-36, 558), and was encouraged that JLI took "a number of actions to try and address this youth usage issue." (Willard (Altria) Tr. 1243).

2. Altria Executives Viewed the Youth Vaping Explanation As a Pretext

1244. In a September 25, 2018 FDA Letter Response Team Recommendation, Altria admitted that [redacted] This was in stark contrast to the recommendation with respect to [redacted] (PX4203 (Altria) at 001, 002 (*in camera*)). This is consistent with the fact that all other closed-system e-cigarette suppliers withdrew their flavored products, but none withdrew their pod-based products for youth concerns. (*See* CCFF ¶¶ 153-96, 207, 1132-43, 1198-201, above).

[redacted]

(PX4203 (Altria) at 002 (*in camera*)).

Response to Proposed Finding No. 1244:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Complaint Counsel never showed this exhibit at trial, (CC Exhibit Index at 63), nor showed it to any witness during a deposition. In fact, this document, which appears to be an early draft, was not sent to any senior executive at Altria, much less any witness or deponent in this case.

Second, the cited recommendation document nowhere implies—much less "admit[s]"—that youth vaping concerns were a pretext. (CCFF ¶ 1244). The most it could be read to suggest is that the JLI negotiations were *a factor* in the document author's assessment about whether to recommend that Altria withdraw Elite.

Third, the person who led the team that created this document, Greg Wilson, (Garnick (Altria) Tr. 1760-62), was not deposed or called as a witness by Complaint Counsel. [redacted] Wilson did not participate in the negotiations and [redacted]

[redacted]; *see also* PX7041 Quigley (Altria) Dep. at 85 (confirming that Wilson was not at the Ranch)).

[redacted]; *see also* Garnick (Altria) Tr. 1757-59 (discussing PX1227 (Altria) at 001)). [redacted]

Finally, Complaint Counsel's assertion that "all other closed-system e-cigarette suppliers withdrew their flavored products" is both inaccurate and unsupported by the cited Proposed Findings. (CCFF ¶ 1244). The most relevant Proposed Finding is CCFF ¶ 207, which observes that in January 2020, FDA "required all non-tobacco, non-menthol flavored cartridge-based e-cigarettes . . . [to] be removed from the market." (CCFF ¶ 207). But it says nothing about what the e-cigarette suppliers did prior to FDA's flavor ban. Contrary to Complaint Counsel's insinuation, the evidence shows that, with the exception of Altria and JLI, none of the major e-cigarette suppliers removed their flavored products in response to FDA's September 12 letter. (RFF ¶ 1041). Other companies did not remove their flavored pod-products until the flavor ban went into effect. (RFF ¶¶ 1041, 1322; Crozier (Sheetz) Tr. 1495-96). And, contrary to the proposed finding, some of those companies, including ITG, continue to sell flavored disposable e-cigarettes. (RFF ¶ 258(c)).

1245. [redacted] (PX4204 (Altria) at 001) (*in camera*)).

[redacted]

(PX4204 (Altria) at 001 (*in camera*)).

Response to Proposed Finding No. 1245:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Complaint Counsel never showed this exhibit at trial, (CC Exhibit Index at 63), nor did it show at trial another version of this document that was used at Garnick's deposition, (PX1491 (Altria) at 003; CC Exhibit Index at 16).

Second, the cited recommendation document nowhere implies, much less "admit[s]," that youth vaping concerns were a pretext. (CCFF ¶ 1245). Instead, the document shows that the JLI negotiations were just one of several factors in the author's assessment about whether to recommend that Altria withdraw Elite, and that another factor was [redacted], the reason cited in Altria's Oct. 25 letter to FDA, (PX1071 (Altria) at 003).

Third, although Complaint Counsel has chosen to cite a version of this document with no visible author, the person who authored this document, Greg Wilson, (*compare* [redacted], *with* PX1491 (Altria) at 001, [redacted]), was not involved in the JLI negotiations or the ultimate decision about how to respond to FDA's letter. [redacted]

[redacted] He did not participate in the negotiations, and [redacted]; PX1491 (Altria) at 001). [redacted]; *see also* Garnick (Altria) Tr. 1757-59 (discussing PX1227 (Altria) at 001)). [redacted]

1246. [redacted] (PX1010 (Altria) at 001, 003).

Response to Proposed Finding No. 1246:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]

[redacted] Far from evidencing pretext, this statement confirms Respondents' point that Elite's sales were insignificant and would not enable Nu Mark to either become profitable or achieve its financial targets for the coming years. (RFF ¶¶ 394-97, 431-59, 900).

[redacted]

[redacted]

1247. Altria employees consistently testified that Altria's e-cigarette products did not have a youth initiation issue. (*See* CCFF ¶¶ 1345-52, below).

Response to Proposed Finding No. 1247:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1343-52, Respondents incorporate their responses to those Proposed Findings herein.

3. Altria Executives were Aware that JUUL Had Appealed to Non-Tobacco Users, Particularly Youth, Prior to the Transaction

1248. At the time that Altria withdrew MarkTen Elite and at the time Altria and JLI entered into the transaction, JLI sold pod-based e-cigarette products. (Quigley (Altria) Tr. 1984-85).

Response to Proposed Finding No. 1248:

Respondents have no specific response.

1249. Craig Schwartz stated in an August 15, 2018 email to Altria's former chairman that "40%" of Juul's sales were to consumers aged between the legal age at the time and 21, with a "significant initiation component" which he anticipated would "present problems with the FDA when it seeks Market Authorization to continue selling beyond 2022." (PX1260 (Altria) at 001). Schwartz added that the "big issue" for JLI was "clearing FDA by 2022," adding that "cleaning [Juul] up to do so would be dilutive." (PX1260 (Altria) at 001).

Response to Proposed Finding No. 1249:

The Proposed Finding is incomplete and misleading without additional context. *First*, Schwartz was not talking about youth usage. He was talking about consumers who were of the legal age. (PX1260 (Altria) at 001).

Second, although Altria had been conscious of the youth issues throughout its negotiations with JLI, (RFF ¶¶ 321, 528-36, 558, 1012-13), it both believed that JUUL "was the most . . . effective[] noncombustible product on the market to convert smokers," (Garnick (Altria) Tr. 1771), and was "very encouraged" by the proactive steps taken by JLI to address youth usage issues by the time of the transaction. (Garnick (Altria) Tr. 1769). In particular, Altria was encouraged by JLI's decision to discontinue sales of all non-traditional flavors from retail in response to FDA's September 12 letter. (RX1926 (JLI) at 001-03; Garnick (Altria) Tr. 1769). Altria also believed it could offer JLI valuable youth prevention services. (RFF ¶¶ 321, 347, 558).

1250. Paige Magness testified: "At the time of the transaction, I remember being concerned about, based on my understanding of PMTAs, that the youth usage issue would be very difficult for JUUL in a PMTA context." (PX7017 (Magness (Altria), Dep. at 232-33)). Ms. Magness also testified that she was aware of articles and news reports linking JUUL's discrete form factor to potential youth usage of the product. PX7017 (Magness (Altria), Dep. at 268-69)).

Response to Proposed Finding No. 1250:

The Proposed Finding is incomplete and misleading without additional context. *First*, Magness was asked about the likelihood that JUUL would be able to achieve FDA authorization, and she pointed to the youth usage issue as one consideration alongside "some impressive data shared publicly about switching" (meaning adult smoker conversion). (PX7017 Magness (Altria) Dep. at 232-33).

Second, Magness did not suggest that the youth vaping concern was unique to JUUL. She observed that "the category showed a rise in youth usage of e-vapor," and JUUL drew a lot of attention as "the predominant product in the category." (PX7017 Magness (Altria) Dep. at 268).

Third, although Altria had been conscious of the youth issues throughout its negotiations with JLI, (RFF ¶¶ 321, 528-36, 558, 1012-13), it both believed that JUUL "was the most . . . effective[] noncombustible product on the market to convert smokers," (Garnick (Altria) Tr. 1771),

and was "very encouraged" by the proactive steps taken by JLI, (Garnick (Altria) Tr. 1769), particularly its decision to discontinue sales of all non-traditional flavors from retail in response to FDA's September 12 letter, (RX1926 (JLI) at 001-03; Garnick (Altria) Tr. 1769; *see also* RX1926 (JLI) at 005 (explaining that JLI was eliminating its social media accounts or otherwise confining them to non-promotional content)). Altria also believed it could offer JLI valuable youth prevention services. (RFF ¶¶ 321, 347, 558).

1251. Willard testified that the JUUL product's ability to convert adult smokers "came with a negative in that as more adults chose e-vapor, more youth were choosing e-vapor." (Willard (Altria) Tr. 1360). Willard testified that around October 25, 2018, "the evidence pointed to the fact that it [JUUL] was also the number one product that was being utilized by youth." (Willard (Altria) Tr. 1240-42).

Response to Proposed Finding No. 1251:

The Proposed Finding is incomplete and misleading without additional context. As to the first sentence, in the same answer Willard observed that "the key was to keep the adults using e-vapor and eliminate youth usage," (Willard (Altria) Tr. 1360), and throughout the negotiations Altria offered to assist JLI by providing youth prevention services, (RFF ¶¶ 321, 347, 558).

As to the second sentence of the Proposed Finding, in that same exchange, Willard explained:

> [T]here's no question that in considering an investment in JUUL, we sought to fully understand JUUL's contribution to this potential youth issue, and we had to really make ourselves comfortable that -- that the youth issue could be addressed, that we could see declines in youth usage of the product. And one of the reasons we were communicating with FDA about our actions on our portfolio of products was to help the FDA do what their objective was, which was to really address this youth issue and drive down youth usage, so that the product could continue to be available as an alternative to adult cigarette smokers, which was another priority of the FDA.

(Willard (Altria) Tr. 1242-43). Meanwhile, Willard noted that JLI took a "number of actions to try and address this youth usage issue," including by "restrict[ing] the sale of their flavored products." (Willard (Altria) Tr. 1243).

1252. Draft talking points prepared for Howard Willard for an Altria "Town Hall" event state: "JUUL is a radically disruptive e-vapor product. It took 10 years to develop JUUL as a product that could convert adult smokers. At the same time JUUL has created a youth usage epidemic. We cannot allow that to continue." (PX1184 (Altria) at 005).

Response to Proposed Finding No. 1252:

The Proposed Finding is incomplete and misleading without additional context. *First*, the cited document is a draft script, dated October 11, 2018, (PX1184 (Altria) at 004), for a town hall that was not slated until October 25, (PX1184 (Altria) at 002), two weeks later. Complaint Counsel has identified no evidence that the draft reflects statements that were actually made at the town hall. To the contrary, the draft script was later revised to make clear that it was *FDA* that had labeled youth usage of e-vapor products an "epidemic." (PX1066 (Altria) at 002-03 (revised script dated October 24, 2018 and circulated on October 25)).

Second, although Altria had been conscious of the youth issues throughout its negotiations with JLI, (RFF ¶¶ 321, 528-36, 558, 1012-13), it both believed that JUUL "was the most . . . effective[] noncombustible product on the market to convert smokers," (Garnick (Altria) Tr. 1771), and was "very encouraged" by the proactive steps taken by JLI to address the youth usage issue by the time of the transaction. (Garnick (Altria) Tr. 1769). In particular, Altria was encouraged by JLI's decision to discontinue sales of all non-traditional flavors from retail in response to FDA's September 12 letter. (RX1926 (JLI) at 001-03; Garnick (Altria) Tr. 1769). Altria also believed it could offer JLI valuable youth prevention services, (RFF ¶¶ 321, 347, 558).

1253. [redacted] (RX0950 (Altria) at 022 (*in camera*)).

Response to Proposed Finding No. 1253:

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted], are from a June 2019 presentation, (RX0950 (Altria) at 001). Complaint Counsel has cited no evidence that Altria was aware of these projections when it withdrew Elite in October 2018 or entered into the transaction with JLI in December 2018.

Second, Complaint Counsel never showed this slide to any witness, so there is no testimony about the premises on which those projections are based or the extent to which Altria considered them reliable.

Third, although Altria had been conscious of the youth issues throughout its negotiations with JLI, (RFF ¶¶ 321, 528-36, 558, 1012-13), it both believed that JUUL "was the most . . . effective[] noncombustible product on the market to convert smokers," (Garnick (Altria) Tr. 1771), and was "very encouraged" by the proactive steps taken by JLI to address the youth usage issue by the time of the transaction, (Garnick (Altria) Tr. 1769), particularly its decision to discontinue sales of all non-traditional flavors from retail in response to FDA's September 12 letter, (RX1926 (JLI) at 001-03; Garnick (Altria) Tr. 1769). Altria also believed it could offer JLI valuable youth prevention services. (RFF ¶¶ 321, 347, 558).

E. ALTRIA'S CLAIM THAT IT EXITED THE E-CIGARETTE MARKET BECAUSE ITS PRODUCTS COULD NOT ACHIEVE PMTA APPROVAL IS UNSUPPORTED AND PRETEXTUAL

1254. Altria claims that it "concluded that Elite, as well as Nu Mark's preexisting MarkTen products, could not obtain PMTA approval in their current form. . ." (PX0027 at 004 (Altria's Answers and Defenses)).

Response to Proposed Finding No. 1254:

Respondents have no specific response except to note that the answer is an accurate statement of Altria's conclusions, as confirmed by the wealth of evidence adduced at trial. (RFF ¶¶ 351-67, 486-509, 596-700, 725-47, 1085-89).

1255. Altria's and JLI's ordinary course documents and their executives' testimony show that the claim that Altria concluded it could not obtain PMTA approval for its e-cigarette products is implausible. (*See* CCFF ¶¶ 1256-352, below).

Response to Proposed Finding No. 1255:

The Proposed Finding, like the preceding heading, is inaccurate and is not supported by the cited proposed findings. The record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that Nu Mark's products could not secure PMTA approval for a number of reasons, including that they were not converting adult smokers and lacked dry puff prevention, resulting in higher formaldehyde levels in comparison to other e-vapor products. (RFF ¶¶ 351-67, 486-509, 596-700, 725-47, 1085-89). And, as explained in the responses to the proposed findings in this section, Complaint Counsel's attempt to show otherwise is based on a portrayal of the evidence that is inaccurate, incomplete, and misleading without additional context.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1256-352, Respondents incorporate their responses to those Proposed Findings herein.

1. Altria's Efforts to Achieve PMTA Approval Were Well Advanced at the Time of the Transaction

1256. The FDA's Deeming Rules require manufacturers to submit a PMTA before marketing an e-cigarette product or to keep a predicate product on the market after the Deeming Deadline. (*See* CCFF ¶¶ 197-207, above).

Response to Proposed Finding No. 1256:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 197-207, Respondents incorporate their responses to those Proposed Findings herein.

1257. In 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022. (Murillo (Altria/JLI) Tr. 2944-45; Garnick (Altria) Tr. 1796, 1800; PX0017 (Altria) at 23 (Altria's Minority Investment in JUUL Labs, Apr. 2, 2019)).

Response to Proposed Finding No. 1257:

The Proposed Finding is incomplete and misleading without additional context. In March 2018, certain public health organizations filed a lawsuit challenging the August 2022 PMTA deadline. (RFF ¶ 118). This led Altria's regulatory team to think in 2018 that the deadline could be accelerated. (Murillo (Altria/JLI) Tr. 2944). And, in fact, in 2019, the deadline was accelerated two years as a result of this lawsuit. (RFF ¶ 118; *see also* RFF ¶¶ 113-21 (discussing the evolving PMTA deadline)).

a) Altria's PMTA Plans and Progress for MarkTen Were Well Advanced at the Time of the Transaction

1258. In November 2017, Altria's former Chairman and CEO, Marty Barrington, told investors "We firmly believe that Altria has assembled the best talent, skills and capability in the industry, equipped them with the resources they need and set them in the right direction: to introduce new, FDA-authorized, reduced-risk products as the next leg of our commercial success." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 1258:

The Proposed Finding is incomplete and misleading without additional context. *First*, Barrington's comments were not specific to e-vapor; he was talking about all "reduced-risk products," and his comment was made in the context of discussing Altria's Center for Research and Technology (CRT), which housed "more than 400 scientists, physicians, product developers, engineers, [and] regulatory experts." (PX9000 (Altria) at 005). But, although 2017 marked the

ten-year anniversary of the CRT, (PX9000 (Altria) at 005), Altria had never developed a successful potential reduced risk product, either for e-vapor or in another product format, (RFF ¶¶ 140-91).

Second, the cited statement was made in November 2017, and the company's knowledge of the problems with Nu Mark's existing portfolio grew substantially thereafter. Nu Mark had not even launched its pod-based product, Elite, and thus did not yet know how that product would perform on the market. (Schwartz (Altria) Tr. 1871). Knowing whether Elite could be successful is a critical piece of information in assessing Nu Mark's portfolio, as pod-based products came to dominate the market by 2018 and were necessary for any company seeking to compete. (RFF ¶¶ 563-65, 1325). Moreover, as of this time, Altria had not yet conducted the comprehensive assessment of Nu Mark's existing e-vapor portfolio that took place after Howard Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-743, 839-877). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of succeeding in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-877).

1259. [redacted] (Begley (Altria) Tr. 1022-23 (discussing PX4042 (Altria) at 006) (*in camera*); *see also* PX4042 (Altria) at 007 [redacted]

Response to Proposed Finding No. 1259:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

The cited statement was also made in 2017, before Altria uncovered problems with Nu Mark's products that led to delays in the PMTA timeline. As Michelle Baculis, then-Director of Strategy & Brand Development at Nu Mark, explained, "[t]he problem with the PMTA work was much like the problems that [Nu Mark] experienced with the product development work, where unforeseen things change the schedule and the timeline." (PX7014 Baculis (Altria) Dep. at 255). In fact, the PMTA timelines for MarkTen were continually pushed back after the cited memo. For example, in March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was "delayed—date TBD." (RX0630 (Altria) at 019; *see also* RX0270 (Altria) at 001, 007). At that time, Garnick sent an email to Willard and Gifford informing them that Altria's "timeline [for PMTA submissions] presented at investor day will have to be modified" because "both Mark Ten and Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (RX0270 (Altria) at 001; *see also* Garnick (Altria) Tr. 1600-01 (discussing RX0270 (Altria) at 001)). And by the summer of 2018, Altria's scientists had concluded that none of Nu Mark's existing products could satisfy the PMTA standard. (RFF ¶¶ 698-99). Although Altria continued to work on the PMTA with an eye toward keeping MarkTen cig-a-like in the market while it worked on a revised version, it had to push back the estimated timeline for filing to the fourth quarter of 2020. (RX0552 (Altria) at 004). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1260. A November 2, 2017, Nu Mark Investor Day presentation prepared for delivery by Begley prompted him to say "we plan to file PMTAs for our *MarkTen* products in 2018 with MRTP applications to follow." (PX1129 (Altria) at 018).

Response to Proposed Finding No. 1260:

The Proposed Finding is incomplete and misleading without additional context. The cited presentation was made in 2017, before Altria uncovered problems with Nu Mark's products that led to delays in the PMTA timeline. As Michelle Baculis, then-Director of Strategy & Brand Development at Nu Mark, explained, "[t]he problem with the PMTA work was much like the problems that [Nu Mark] experienced with the product development work, where unforeseen things change the schedule and the timeline." (PX7014 Baculis (Altria) Dep. at 255). In fact, the PMTA timelines for MarkTen were continually pushed back after the cited presentation. For example, in March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was "delayed—date TBD." (RX0630 (Altria) at 019; *see also* RX0270 (Altria) at 001, 007). At that time, Garnick sent an email to Willard and Gifford informing them that Altria's "timeline [for PMTA submissions] presented at investor day will have to be modified" because "both Mark Ten and Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (RX0270 (Altria) at 001; *see also* Garnick (Altria) Tr. 1600-01 (discussing RX0270 (Altria) at 001)). And by the summer of 2018, Altria's scientists had concluded that none of Nu Mark's existing products could satisfy the PMTA standard. (RFF ¶¶ 698-99). Although Altria continued to work on the PMTA with an eye toward keeping MarkTen cig-a-like in the market while it worked on a revised version, it had to push back the estimated timeline for filing to the fourth quarter of 2020. (RX0552 (Altria) at 004). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1261. A February 21, 2018, public Altria investor presentation stated that Altria planned "to file PMTAs" for its MarkTen cigalike products "with MRTPAs to follow." (PX9044 (Altria) at 044 (Altria Presentation: 2018 Consumer Analyst Group of New York (CAGNY) Investor Presentation)).

Response to Proposed Finding No. 1261:

The Proposed Finding is incomplete and misleading without additional context. The cited presentation was made before Altria fully uncovered problems with Nu Mark's products that led to delays in the PMTA timeline. As Michelle Baculis, then-Director of Strategy & Brand Development at Nu Mark, explained, "[t]he problem with the PMTA work was much like the problems that [Nu Mark] experienced with the product development work, where unforeseen things change the schedule and the timeline." (PX7014 Baculis (Altria) Dep. at 255). In fact, the PMTA timelines for MarkTen were continually pushed back after the cited presentation. For example, in March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was "delayed—date TBD." (RX0630 (Altria) at 019; *see also* RX0270 (Altria) at 001, 007). At that time, Garnick sent an email to Willard and Gifford informing them that Altria's "timeline [for PMTA submissions] presented at investor day will have to be modified" because "both Mark Ten and Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (RX0270 (Altria) at 001; *see also* Garnick (Altria) Tr. 1600-01 (discussing RX0270 (Altria) at 001)). And by the summer of 2018, Altria's scientists had concluded that none of Nu Mark's existing products could satisfy the PMTA standard. (RFF ¶¶ 698-99). Although Altria continued to work on the PMTA with an eye toward keeping MarkTen cig-a-like in the market while it worked on a revised version, it had to push back the estimated timeline for filing to the fourth quarter of 2020. (RX0552 (Altria) at 004). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1262. On February 21, 2018, Willard stated at an Altria investor conference that Altria was planning "to file PMTAs for MarkTen [in 2018]." (PX9045 (Altria) at 006 ("We plan to file PMTAs for MarkTen this year, with MRTP applications to follow. In those

applications, we expect to submit robust scientific evidence to demonstrate MarkTen's harm reduction potential compared to cigarettes.")).

Response to Proposed Finding No. 1262:

The Proposed Finding is incomplete and misleading without additional context. The cited statement was made before Altria fully uncovered problems with Nu Mark's products that led to delays in the PMTA timeline. As Michelle Baculis, then-Director of Strategy & Brand Development at Nu Mark, explained, "[t]he problem with the PMTA work was much like the problems that [Nu Mark] experienced with the product development work, where unforeseen things change the schedule and the timeline." (PX7014 Baculis (Altria) Dep. at 255). In fact, the PMTA timelines for MarkTen were continually pushed back after the cited statement. For example, in March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was "delayed—date TBD." (RX0630 (Altria) at 019; *see also* RX0270 (Altria) at 001, 007). At that time, Garnick sent an email to Willard and Gifford informing them that Altria's "timeline [for PMTA submissions] presented at investor day will have to be modified" because "both Mark Ten and Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (RX0270 (Altria) at 001; *see also* Garnick (Altria) Tr. 1600-01 (discussing RX0270 (Altria) at 001)). And by the summer of 2018, Altria's scientists had concluded that none of Nu Mark's existing products could satisfy the PMTA standard. (RFF ¶¶ 698-99). Although Altria continued to work on the PMTA with an eye toward keeping MarkTen cig-a-like in the market while it worked on a revised version, it had to push back the estimated timeline for filing to the fourth quarter of 2020. (RX0552 (Altria) at 004). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1263. An August 10, 2018, presentation entitled "Nu Mark Brand Update," which was submitted by Quigley to Willard, Gifford, Garnick, and Crosthwaite ahead of a meeting on "Elite

performance & distribution and the MarkTen PMTA" recommended "completing the MarkTen PMTA as is. . ." and completing "a thorough business case review for long-term Elite investment." (Quigley (Altria) Tr. 1967-68 (discussing PX1013 (Altria) at 017, 020)).

Response to Proposed Finding No. 1263:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Contrary to the Proposed Finding's characterization, the question up for discussion at the August 10 meeting was not whether to pursue a PMTA for MarkTen cig-a-likes generally. The question was "whether or not it made sense to continue the PMTA *for all 14 SKUs versus a smaller subset of those*." (PX7014 Baculis (Altria) Dep. at 257 (emphasis added); *see also* PX1013 (Altria) at 019 (explaining that the "options" under consideration for the PMTA were (1) "Maintain current plan," (2) "Eliminate 2 SKUs," or (3) "Eliminate multiple SKUs")). According to Baculis, who led the PMTA presentation, Altria decided at that time to continue with all the SKUs because, based on the way the research was structured, discontinuing SKUs would actually cause "[a]n increase to the resources [Altria] would need to complete the PMTA." (PX7014 Baculis (Altria) Dep. at 257; *see also* Quigley (Altria) Tr. 2051-52).

The presentation contained no analysis of the PMTA work that remained to be done and the likelihood that it could be completed successfully. (*See* PX1013 (Altria)). Indeed, by the summer of 2018, Altria's scientists had concluded that none of Nu Mark's existing products could satisfy the PMTA standard. (RFF ¶¶ 698-99). As a result, the plan at the time was to try to file a placeholder PMTA for certain products on the market so that those products could stay on the market while Nu Mark attempted to develop fixes for those products and obtain regulatory approval to sell the revised products. (RFF ¶ 700; *see also* RFF ¶ 523).

1264. An August 10, 2018, presentation entitled "MarkTen Regulatory Strategy Update," which was submitted by Quigley to Willard, Gifford, Garnick, and Crosthwaite ahead of a meeting on Nu Mark's regulatory strategy stated "MarkTen PMTA application is 75% complete." (PX1013 (Altria) at 019; PX4136 (Altria) at 003; PX7036 (Garnick (Altria),

Dep. at 114-15); *see also* PX1013 (Altria) at 020 (recommending that Altria "[m]aintain current MarkTen PMTA approach with all 14 SKUs")).

Response to Proposed Finding No. 1264:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Magness, who at the time was responsible for Altria's e-vapor PMTA's, explained, the completion estimate was determined using project management software that merely "calculates the number tasks you have and, you know, are those tasks complete." (PX7017 Magness (Altria) Dep. at 66). As a result, the 75 percent determination was merely a "measurement of how many tasks in a project were getting to the next milestone." (PX7017 Magness (Altria) Dep. at 68). The software treated all tasks equally, and thus the completion estimate "doesn't speak to . . . how impossible that last 25 percent might have been," (PX7017 Magness (Altria) Dep. at 68); the remaining tasks "may be very difficult, unwinnable tasks," (PX7017 Magness (Altria) Dep. at 67).

Baculis, who led the cited PMTA presentation, explained that "[t]he problem with the PMTA work was much like the problems that [Nu Mark] experienced with the product development work, where unforeseen things change the schedule and the timeline." (PX7014 Baculis (Altria) Dep. at 255; *see also* Quigley (Altria) Tr. 2051-52). According to Baculis, "the work for the MarkTen PMTA could [not] be considered on schedule" because "the schedule changed as the information changed." (PX7014 Baculis (Altria) Dep. at 255-256). "At the time when I gave this presentation to Howard Willard," she said, "we had about 75 percent of the work for the application done, but the timeline for completing that PMTA application had changed a number of times throughout the course of the work on it." (PX7014 Baculis (Altria) Dep. at 256).

And, although the PMTA work was ongoing at that point, by the summer of 2018 Altria's scientists had concluded that none of Nu Mark's existing products could satisfy the PMTA standard. (RFF ¶¶ 698-99). As a result, the plan at the time was to try to file a placeholder PMTA

for certain products on the market so that those products could stay on the market while Nu Mark attempted to develop fixes for those products and obtain regulatory approval to sell the revised products. (RFF ¶ 700; *see also* RFF ¶ 523).

Second, to the extent that Complaint Counsel is implying that on August 10 Altria was making a decision about whether to continue pursuing a PMTA for MarkTen cig-a-like, that implication is belied by the evidence. The question was "whether or not it made sense to continue the PMTA *for all 14 SKUs versus a smaller subset of those*." (PX7014 Baculis (Altria) Dep. at 257 (emphasis added); *see also* PX1013 (Altria) at 019 (explaining that the "options" under consideration for the PMTA were (1) "Maintain current plan," (2) "Eliminate 2 SKUs," or (3) "Eliminate multiple SKUs")). According to Baculis, Altria decided at that time to continue with all the SKUs because, based on the way the research was structured, discontinuing SKUs would actually cause "[a]n increase to the resources [Altria] would need to complete the PMTA." (PX7014 Baculis (Altria) Dep. at 257; *see also* Quigley (Altria) Tr. 2051-52). The presentation contained no analysis of the PMTA work that remained to be done and the likelihood that it could be completed successfully. (*See* PX1013 (Altria)).

1265. Dr. Gardner testified that Altria continued to work on PMTAs for its MarkTen cigalike products until Altria announced that it would discontinue the products in December 2018. (Gardner (Altria) Tr. 2685).

Response to Proposed Finding No. 1265:

The Proposed Finding is incomplete and misleading without additional context. Altria was continuing to work on PMTA studies for the on-market version of MarkTen cig-a-like so that it could keep that product on the market while it was preparing and awaiting FDA review of a PMTA for a revised version of MarkTen. (RFF ¶ 700). But, as explained in a June 2018 email by an Altria scientist, "no one thinks we can get a PMTA on current Mark Ten product." (PX1890 (Altria) at 001; Garnick (Altria) Tr. 1723-27 (discussing PX1890 (Altria))). As for the revised

version, Altria scientists ultimately decided that they were "not going to start PMTA studies until [they] definitively kn[e]w [they could] make the product as intended and bridge to the 2016 product." (Gardner (Altria) Tr. 2579 (discussing PX4107 (Altria) at 008)). And, in fact, Altria "never started the PMTA studies" for the revised version. (Gardner (Altria) Tr. 2580). One of the revisions would have been to add dry puff prevention technology and, as late as November 2018, Altria's scientists still were not sure that they had a dry puff prevention fix that they could submit for a PMTA. (RFF ¶¶ 1085-86).

1266. [redacted] (PX1104 (Altria) at 046 (*in camera*) (Regulatory Affairs Town Hall, Dec. 2018) (*emphasis in original*); *see also* PX7003 (Quigley (Altria), IHT at 30-31)).

Response to Proposed Finding No. 1266:

The Proposed Finding is incomplete and misleading without additional context. *First*, these completion estimates were merely calculations of the number of tasks that had been completed, treating all tasks as equal. The completion estimates did not consider the difficulty of the remaining tasks or whether the PMTA would be successful. (PX7017 Magness (Altria) Dep. at 66-68).

Second, Altria was continuing to work on PMTA studies for the on-market version of MarkTen cig-a-like so that it could keep that product on the market while it was preparing and awaiting FDA review of a PMTA for a revised version of MarkTen. (RFF ¶ 700). But, as explained in a June 2018 email by an Altria scientist, "no one thinks we can get a PMTA on current Mark Ten product." (PX1890 (Altria) at 001; Garnick (Altria) Tr. 1723-27 (discussing PX1890 (Altria))). As for the revised version, Altria scientists ultimately decided that they were "not going to start PMTA studies until [they] definitively kn[e]w [they could] make the product as intended

and bridge to the 2016 product." (Gardner (Altria) Tr. 2579 (discussing PX4107 (Altria) at 008)). And, in fact, Altria "never started the PMTA studies" for the revised version. (Gardner (Altria) Tr. 2580). One of the revisions would have been to add dry puff prevention technology and, as late as November 2018, Altria's scientists still were not sure that they had a dry puff prevention fix that they could submit for a PMTA. (RFF ¶¶ 1085-86).

b) Altria Thought That MarkTen Elite Could Achieve PMTA Approval

1267. An April 26, 2018, Altria presentation, entitled "Elite 2.0 Gate 2 Presentation" and circulated to Richard Jupe, Dr. William Gardner, and Jody Begley, states that at a meeting dated March 15, 2018, "Decision was made to PMTA MarkTen Elite." (PX1930 (Altria) at 009) (Nu Mark NPC Meeting, Apr. 26, 2018).

Response to Proposed Finding No. 1267:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel conflates two different versions of Elite. What Altria termed "Elite 1.0," the version of the product that was on the market, had fundamental problems that were fatal to its PMTA application, including elevated levels of formaldehyde at the end of the cartridge life, caused by lack of dry puff prevention, as well as low conversion potential, due to low nicotine levels and the absence of salts, among other problems. (RFF ¶¶ 512-18, 678-700, 725-47). "Elite 2.0" was a concept for an improved product that Altria hoped might remedy the many defects of Elite 2.0. (RFF ¶¶ 519-20).

When Altria decided to pursue a PMTA for Elite, the plan was to focus Altria's resources on developing Elite 2.0 and preparing a PMTA for that product. Altria planned to "get the 1.0 [PMTA] in at the very last moment knowing that it was going to be an insufficient application" so that "it wouldn't be pulled from the market by its timeline" and to "allow for that review time on the preferred version of the 2.0." (PX7017 Magness (Altria) Dep. at 102).

As the cited presentation explains, as of April 2018, the focus was on Elite 2.0. The presentation was titled "Elite 2.0 Gate 2 Presentation." (PX1930 (Altria) at 008). The substance of the presentation focused on the "'must have' changes for Elite 2.0." (PX1930 (Altria) at 009, 11). And the presentation framed Elite 1.0 as a contingency: In a slide entitled "Elite PMTA Strategy" it said, "Complete Elite 2.0 PMTA by 8/2021"; "Complete Elite 1.0 PMTA" and "[f]ile by 8/7/2022 *only if necessary*." (PX1930 (Altria) at 014 (emphasis added)). Elsewhere, a slide entitled "Elite 1.0 PMTA Proposed Strategy (If Needed)" once again framed the Elite 1.0 PMTA as a contingency; the presentation explained that Altria would conduct a handful of studies specific to Elite 1.0 but for "[e]verything else" it would attempt to bridge from studies conducted on Elite 2.0. (PX1930 (Altria) at 022).

As for Elite 2.0, it "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (Elite 2.0 "was a concept; it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614).

1268. As of August 30, 2018, Altria planned to submit a PMTA for MarkTen Elite at the then-PMTA deadline in August 2022. (PX4318 (Altria) at 015 (Nu Mark NPC Meeting)).

Response to Proposed Finding No. 1268:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel conflates two different versions of Elite. What Altria termed "Elite 1.0," the version of the product that was on the market, had fundamental problems that were fatal to its PMTA application, including elevated levels of formaldehyde at the end of the cartridge life, caused by lack of dry puff prevention, as well as low conversion potential, due to low nicotine levels and the absence of salts, among other problems. (RFF ¶¶ 512-18, 678-700, 725-47). "Elite 2.0" was a

concept for an improved product that Altria hoped might remedy the many defects of Elite 2.0. (RFF ¶¶ 519-20).

When Altria decided to pursue a PMTA for Elite, the plan was to focus Altria's resources on developing Elite 2.0 and preparing a PMTA for that product. Altria planned to "get the 1.0 [PMTA] in at the very last moment knowing that it was going to be an insufficient application" so that "it wouldn't be pulled from the market by its timeline" and to "allow for that review time on the preferred version of the 2.0." (PX7017 Magness (Altria) Dep. at 102).

As the cited presentation illustrates, as of August 2018, the focus was on Elite 2.0. The presentation contains a lengthy overview of the changes contemplated for Elite 2.0, (PX4318 (Altria) at 008-09, 011), and an extended status update, (PX4318 (Altria) at 012-13). There is no update on the status of the PMTA work for Elite 1.0. (PX4318 (Altria)). As for Elite 2.0, it "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (Elite 2.0 "was a concept; it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614).

1269. As of August 30, 2018, Altria assessed that MarkTen Elite "achieved overall satisfaction primarily due to perceptions of 'fullness' throughout the overall inhale/exhale experience." (PX4318 (Altria) at 006 (Nu Mark NPC Meeting)).

Response to Proposed Finding No. 1269:

The Proposed Finding is incomplete and misleading without additional context. *First*, any satisfaction provided by "fullness" is not the same as mimicking the nicotine experience of a cigarette as is necessary to convert adult smokers. As Altria's scientists testified, "salts [are] necessary for e-vapor products to convert adult smokers." (PX7026 Gardner (Altria) Dep. at 242-43; *see also* Gardner (Altria) Tr. 2642 ("[F]or e-vapor products, nicotine salts are a critical part of

nicotine satisfaction."); PX4504 (Altria) at 024). That is because with Elite and products like it, which had both low nicotine strength and no salts, "almost zero percent of [the] nicotine [was] being delivered into the lung the way it would be delivered in a cigarette." (Jupe (Altria) Tr. 2274). Drawing on this finding and other evidence, in July 2018, a cross-functional team of Altria employees concluded that Elite had low conversion potential for adult smokers looking to switch to e-vapor products. (RFF ¶¶ 737-42). And every Altria witness who was asked about conversion in this proceeding, all fifteen of them, agreed with that conclusion, (RFF ¶ 743), as did other participants in the e-vapor space, (Robbins (JLI) Tr. 3251; [redacted]; *see also* RFF ¶¶ 744-47).

Indeed, the cited slide illustrates this distinction, explaining that Elite provided a *vaping experience* while JUUL provided a *cigarette experience*. It explains, "JUUL achieved overall satisfaction primarily due to perceptions of an immediate and familiar nicotine experience, and a familiar amount of harshness." (PX4318 (Altria) at 006). By contrast, Elite offered a "full-vapor experience." (PX4318 (Altria) at 006). "Obviously, [Nu Mark's] primary interest was . . . converting . . . cigarette smoker[s] and what was it going to take for us to win in what we thought was the lion's share of the opportunity." (PX7002 Schwartz (Altria) IHT at 110). Conversely, "the vaping experience . . . was by far the smaller opportunity in the space at the time." (PX7002 Schwartz (Altria) IHT at 144).

This is consistent with other consumer research, which showed that JUUL "provide[d] a more 'familiar cigarette-like experience' and demonstrate[d] immediacy in replacing cigarette usage occasions among . . . those who are still predominantly smoking cigarettes[]." (RX2015 (Altria) at 007). Meanwhile, "Elite provide[d] more 'non-traditional vaping experiences' and demonstrate[d] higher usage among . . . those who are more familiar with e-vapor product usage."

(RX2015 (Altria) at 007). Consistent with that insight, quantitative data from a multi-week home use test showed that among research participants who had not used a vapor product in the last seven days—meaning those who were "predominantly cigarette smokers"—JUUL immediately began replacing cigarette smoking occasions in numbers that were statistically significant. (Jupe (Altria) Tr. 2251-52). By contrast, Elite did not start to show any impact until five or six weeks into the study, well after a consumer would have rejected a product, and even then, it was not statistically meaningful. (Jupe (Altria) Tr. 2252-53).

1270. Quigley testified that, in 2018, Altria was "doing 'work planning' for a PMTA for Elite," meaning that Altria was "Determining what studies needed to be done, how long it would take, how many people." (PX7003 (Quigley (Altria), IHT at 30)).

Response to Proposed Finding No. 1270:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel conflates two different versions of Elite. What Altria termed "Elite 1.0," the version of the product that was on the market, had fundamental problems that were fatal to its PMTA application, including elevated levels of formaldehyde at the end of the cartridge life, caused by lack of dry puff prevention, as well as low conversion potential, due to low nicotine levels and the absence of salts, among other problems. (RFF ¶¶ 512-18, 678-700, 725-47). "Elite 2.0" was a concept for an improved product that Altria hoped might remedy the many defects of Elite 2.0. (RFF ¶¶ 519-20).

When Altria decided to pursue a PMTA for Elite, the plan was to focus Altria's resources on developing Elite 2.0 and preparing a PMTA for that product. Altria planned to "get the 1.0 [PMTA] in at the very last moment knowing that it was going to be an insufficient application" so that "it wouldn't be pulled from the market by its timeline" and to "allow for that review time on the preferred version of the 2.0." (PX7017 Magness (Altria) Dep. at 102). As for Elite 2.0, it "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (Elite

2.0 "was a concept; it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614).

1271. Altria was aware of the toxicological and product issues associated with MarkTen Elite when it introduced the product to the market in 2018. (Gardner (Altria) Tr. 2660-61).

Response to Proposed Finding No. 1271:

The Proposed Finding is incomplete and misleading without additional context. The evidence shows that Altria was aware of some of the defects with Elite upon the product's launch in late February 2018, including the potential for leaking, the absence of dry puff prevention, and its limited conversion potential. (RFF ¶¶ 365-67, 373-87, 460-63). But, at that time Altria did not yet fully understand the scope of the problems, nor had it decided whether to pursue a PMTA. (RFF ¶¶ 368, 373, 510-11). As Gardner explained, the view at the time the product was launched was that Elite was "appropriate for . . . a few years in the market, but not for a lifetime of use." (Gardner (Altria) Tr. 2660-61). Even so, Altria launched Elite because it "had nothing else"; Elite "had issues, plain and simple, but that's all [Nu Mark] had" that could be put into the market consistent with the Deeming Rule. (Schwartz (Altria) Tr. 1881-82).

1272. Quigley testified that MarkTen Elite had design issue, but Altria "had the PMTA plan to try to solve those." (PX7003 (Quigley (Altria), IHT at 153 ("[T]here were lots of issues with the product, including chemicals, including formaldehyde, the way it was designed, but we had the PMTA plan to try to solve those."); *see also* PX7014 (Baculis (Altria), Dep. at 162-63) (("Q. The plan was to launch Elite as soon as possible with the knowledge that Elite could be improved in future generations, correct? . . . A. Yes.")).

Response to Proposed Finding No. 1272:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. To the extent Complaint Counsel is implying that Quigley thought, as claimed in the section heading, that the on-market Elite could achieve FDA approval, Complaint Counsel is

incorrect. In fact, Quigley said the opposite. He explained, "[t]here were a lot of warts in the Elite 1.0 product outside of the leaking, and we did not believe that Elite 1.0 would get FDA approval through the PMTA pathway." (PX7003 Quigley (Altria) IHT at 118). Instead, Altria "had to be in a position to execute the PMTA for Elite 2.0, which I think there was some heater and some other elements of the device itself that we wanted to submit so we could keep Elite 1.0 on the market, hopefully get 2.0 approved. And then if 2.0 got approved before 1.0 got pulled off the market, we could swap them out. Saying it even seems like a long shot, but that was what the plan was." (PX7003 Quigley (Altria) IHT at 118-19). In other words, the PMTA for Elite 1.0 was "a contingency plan" in case FDA did not act on a PMTA application for the envisioned Elite 2.0 "prior to the PMTA date in 2022." (PX7003 Quigley (Altria) IHT at 120). As for Elite 2.0, it "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (Elite 2.0 "was a concept; it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614).

1273. Dr. Gardner testified that Bob Arents, Altria's "Senior Director of E-Vapor Product Development" and a "mechanical engineer" by training, held the view that Altria's "product integrity requirements were too strict" and that MarkTen Elite had "generally acceptable materials" in connection with "PMTA viability." (Gardner (Altria) Tr. 2661-64 (discussing PX4109 (Altria), at 002, 010)).

Response to Proposed Finding No. 1273:

The Proposed Finding is incomplete and misleading without additional context. *First*, the Proposed Finding is limited to Arents's view as to whether the product had "generally acceptable materials," meaning "ABS, nickel wires, etc." (Gardner (Altria) Tr. 2663; PX4109 (Altria) at 002). There is no evidence that Arents, who Complaint Counsel did not depose or call as a witness, disagreed with the Altria scientists' assessment that Elite's lack of dry puff prevention and nicotine

salts, among other problems, meant that Elite could not obtain FDA approval. Quite the opposite. The attached slides assessed "Temp control/dry puff prevention" and gave Elite a red "X" in that category. (PX4109 (Altria) at 006). And, beyond suggesting that the presentation clarify whether it was referring to the existing product or including Elite 2.0, Arents had no comment on that conclusion. (PX4019 (Altria) at 002). The slides also assessed "Conversion," looking to, among other variables, pH, and colored Elite red, unlike JUUL, which was colored green. (PX4109 (Altria) at 006). Arents did not take issue with this assessment either. (PX4109 (Altria) at 002). Nor did he take issue with the pH chart at the back of the deck, which plotted the pH's of various products in a bar graph and was titled "JUUL achieves superior satisfaction vs current and planned Nu Mark products." (PX4109 (Altria) at 002, 011).

Second, whatever Arents's personal opinion, there is no evidence that he had any expertise in product integrity. As the Proposed Finding notes, Arents was a "mechanical engineer." (CCFF ¶ 1273). And, as Gardner explained, the product integrity standards were "based on the foundation of toxicology risk," which was the province of toxicologists. (Gardner (Altria) Tr. 2661).

1274. Dr. Gardner testified that Arents questioned the characterization of MarkTen Elite as "red for materials," meaning that the product "contains materials of concern," in an August 2018 presentation that Dr. Gardner prepared for Willard for a board of directors meeting. (Gardner (Altria) Tr. 2661-64 (discussing PX4109 (Altria) at 002, 003, 010)).

Response to Proposed Finding No. 1274:

The Proposed Finding is incomplete and misleading without additional context. *First*, the Proposed Finding is limited to Arents's view as to whether the product had "generally acceptable materials," meaning "ABS, nickel wires, etc." (Gardner (Altria) Tr. 2663; PX4109 (Altria) at 002). There is no evidence that Arents, who Complaint Counsel did not depose or call as a witness, disagreed with the Altria scientists' assessment that Elite's lack of dry puff prevention and nicotine salts, among other problems, meant that Elite could not obtain FDA approval. Quite the opposite.

The attached slides assessed "Temp control/dry puff prevention" and gave Elite a red "X" in that category. (PX4109 (Altria) at 006). And, beyond suggesting that the presentation clarify whether it was referring to the existing product or including Elite 2.0, Arents had no comment on that conclusion. (PX4019 (Altria) at 002). The slides also assessed "Conversion," looking to, among other variables, pH, and colored Elite red, unlike JUUL, which was colored green. (PX4109 (Altria) at 006). Arents did not take issue with this assessment either. (PX4109 (Altria) at 002). Nor did he take issue with the pH chart at the back of the deck, which plotted the pH's of various products in a bar graph and was titled "JUUL achieves superior satisfaction vs current and planned Nu Mark products." (PX4109 (Altria) at 002, 011).

Second, whatever Arents's personal opinion, there is no evidence that he had any expertise in product integrity. As the Proposed Finding notes, Arents was a "mechanical engineer." (CCFF ¶ 1274). And, as Gardner explained, the product integrity standards were "based on the foundation of toxicology risk," which was the province of toxicologists. (Gardner (Altria) Tr. 2661).

2. Altria had a Contingency Plan in Place for Addressing Any Potential Delays in the PMTA Process

a) Altria Was Developing an Improved Version of Its MarkTen Cigalike Product, MarkTen BVR 2.8

1275. The FDA has not provided a formaldehyde-production level for e-cigarette products seeking PMTA approval and will assess formaldehyde production and other toxicological risks holistically. (Gardner (Altria) Tr. 2666-68).

Response to Proposed Finding No. 1275:

The Proposed Finding is incomplete and misleading without additional context. When asked if FDA has specified what level of formaldehyde production is acceptable for e-vapor products, Gardner answered, "They have not provided a specific number for formaldehyde, but they do require that the product is reduced risk compared to conventional cigarettes, and having the same levels of formaldehyde, it would be hard to demonstrate that. . . . We know the levels [of

formaldehyde in MarkTen's products] were similar to conventional cigarettes, so there was no risk reduction with respect to formaldehyde." (Gardner (Altria) Tr. 2666-67).

1276. In "late 2017, we [Altria] learned how the adult smokers used the MarkTen cigalike product, and in chemistry studies, under those conditions, we demonstrated formaldehyde yields were higher than expected and higher than other products in the market, and those levels for MarkTen cigalike under those conditions were similar to a cigarette" which "posed a risk to the PMTA filing" for the product. (Gardner (Altria) Tr. 2570).

Response to Proposed Finding No. 1276:

Respondents have no specific response except to note that in light of the "risk" posed to the PMTA filing, by the summer of 2018 none of Altria's scientists thought that Altria could get FDA approval for the MarkTen cig-a-like. (RFF ¶¶ 698-99).

1277. Altria developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which used "dry puff prevention" to address the products' formaldehyde generation issue. (Gardner (Altria) Tr. 2569-71, 2684-85; Murillo (Altria/JLI) Tr. 3057-61; PX7016 (Jupe (Altria), Dep. at 114-15); PX1407 (Altria) at 004)).

Response to Proposed Finding No. 1277:

The Proposed Finding is incomplete and misleading without additional context. *First*, "[c]hanging the electronics would be a product change, and that required premarket approval from [FDA]." (Gardner (Altria) Tr. 2570). Thus, Altria would need to go through the PMTA process before it could sell MarkTen cig-a-like with the BVR 2.8 battery. (RFF ¶ 498).

Second, Altria never was able to successfully complete the BVR 2.8 battery replacement. (RFF ¶¶ 500-09, 1085-89). Altria developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8." (Gardner (Altria) Tr. 2571). As the exhibit cited in the Proposed Finding, dated November 2018, explains, "[q]uality issues [were] observed during new chip scale-up, and need to be resolved." (PX1407 (Altria) at 004). Altria also needed to "[b]etter understand [the] difference in aerosol mass" associated with the new battery, the root causes of which were still "under investigation." (PX1407 (Altria) at 004). This was a significant

issue because a difference in aerosol mass would limit Altria's ability to bridge studies from the version of MarkTen with BVR 2.3 to one with BVR 2.8. (RFF ¶¶ 505, 508). In addition, the new battery "require[d] cartridges to undergo an annealing process" and Altria was still working on "feasibility testing." (PX1407 (Altria) at 013).

1278. Studies showed that the BVR 2.8 was successful at reducing formaldehyde in the MarkTen cigalike. PX7017 (Magness (Altria), Dep. at 155); PX7027 (Murillo (Altria/JLI), Dep. at 118); PX7036 (Garnick (Altria), Dep. at 73-74); PX1407 (Altria) at 004)).

Response to Proposed Finding No. 1278:

The Proposed Finding is incomplete and misleading without additional context. *First*, "[c]hanging the electronics would be a product change, and that required premarket approval from [FDA]." (Gardner (Altria) Tr. 2570). Thus, Altria would need to go through the PMTA process before it could sell MarkTen cig-a-like with the BVR 2.8 battery. (RFF ¶ 498).

Second, BVR 2.8 "d[id] not eliminate" formaldehyde production. (PX1407 (Altria) at 014). It only "reduced" it, and it only did so when "operating as intended," but Altria "had challenges with it being reproducible." (Gardner (Altria) Tr. 2685).

Third, Altria never was able to successfully complete the BVR 2.8 battery replacement. (RFF ¶¶ 500-09, 1085-89). Altria had developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8." (Gardner (Altria) Tr. 2571). Altria needed to "[b]etter understand [the] difference in aerosol mass" associated with the new battery, the root causes of which were still "under investigation." (PX1407 (Altria) at 004). This was a significant issue because a difference in aerosol mass would limit Altria's ability to bridge studies from the version of MarkTen with BVR 2.3 to one with BVR 2.8. (RFF ¶¶ 505, 508). In addition, the new battery "require[d] cartridges to undergo an annealing process" and Altria was still working on "feasibility testing." (PX1407 (Altria) at 013).

1279. On March 19, 2018, Garnick sent an email to Willard and Gifford informing them that Altria's "timeline [for PMTA submissions] presented at investor day will have to be modified" because "both MarkTen and Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (Garnick (Altria) Tr. 1600-01 (discussing RX0270 (Altria) at 001)). The March 19, 2018 email that Garnick sent to Willard and Gifford included information indicating that the required MarkTen modification involved the installation of a new battery, the BVR 2.8, to address a "dry puffing formaldehyde issue." (Garnick (Altria) Tr. 1601-02 (discussing RX0270 (Altria) at 005)).

Response to Proposed Finding No. 1279:

The Proposed Finding is incomplete and misleading without additional context. *First*, "[c]hanging the electronics would be a product change, and that required premarket approval from [FDA]." (Gardner (Altria) Tr. 2570). Thus, Altria would need to go through the PMTA process before it could sell MarkTen cig-a-like with the BVR 2.8 battery. (RFF ¶ 498).

Second, Altria never completed the design of BVR 2.8. (RFF ¶¶ 500-09, 1085-89). As Garnick testified, "it was a proposed fix." (Garnick (Altria) Tr. 1601). Altria had developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8." (Gardner (Altria) Tr. 2571). As of November 2018, "[q]uality issues [were] observed during new chip scale-up, and need to be resolved." (PX1407 (Altria) at 004). Altria also needed to "[b]etter understand [the] difference in aerosol mass" associated with the new battery, the root causes of which were still "under investigation." (PX1407 (Altria) at 004). This was a significant issue because a difference in aerosol mass would limit Altria's ability to bridge studies from the version of MarkTen with BVR 2.3 to one with BVR 2.8. (RFF ¶¶ 505, 508). In addition, the new battery "require[d] cartridges to undergo an annealing process" and Altria was still working on "feasibility testing." (PX1407 (Altria) at 013).

Respondents note further that the pin cite for the exhibit being discussed in the second sentence of the Proposed Finding is 007, not 005.

1280. Dr. Gardner testified that Altria continued to work on developing the BVR 2.8 until Altria announced that it would discontinue its cigalike products in December 2018. (Gardner (Altria) Tr. 2684-85).

Response to Proposed Finding No. 1280:

The Proposed Finding is incomplete and misleading without additional context. *First*, "[c]hanging the electronics would be a product change, and that required premarket approval from [FDA]." (Gardner (Altria) Tr. 2570). Thus, Altria would need to go through the PMTA process before it could sell MarkTen cig-a-like with the BVR 2.8 battery. (RFF ¶ 498).

Second, Altria never completed the design of BVR 2.8. (RFF ¶¶ 500-09, 1085-89). Altria had developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8." (Gardner (Altria) Tr. 2571). As of November 2018, "[q]uality issues [were] observed during new chip scale-up, and need to be resolved." (PX1407 (Altria) at 004). Altria also needed to "[b]etter understand [the] difference in aerosol mass" associated with the new battery, the root causes of which were still "under investigation." (PX1407 (Altria) at 004). This was a significant issue because a difference in aerosol mass would limit Altria's ability to bridge studies from the version of MarkTen with BVR 2.3 to one with BVR 2.8. (RFF ¶¶ 505, 508). In addition, the new battery "require[d] cartridges to undergo an annealing process" and Altria was still working on "feasibility testing." (PX1407 (Altria) at 013).

b) Altria Was Developing an Improved Version of MarkTen Elite, MarkTen Elite 2.0

1281. [redacted] (Willard (Altria) Tr. 1302-03) (*in camera*).

Response to Proposed Finding No. 1281:

The Proposed Finding is incomplete and misleading without additional context. *First*, the "notionally upgraded version" of Elite 1.0, which was dubbed Elite 2.0, "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (stating that Elite 2.0 "was a

concept, it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614-15).

Second, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1282. Jupe wrote in a June 9, 2018, email to Crosthwaite that he had "a plan for [MarkTen] Elite 2.0 (design for PMTA)" and Jupe testified that by "design for PMTA" he meant "the PMTA approval process for e-cigarettes." (Jupe (Altria) Tr. 2157 (discussing PX1086 (Altria) at 001)).

Response to Proposed Finding No. 1282:

The Proposed Finding is incomplete and misleading without additional context. The "notionally upgraded version" of Elite 1.0, which was dubbed Elite 2.0, "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (stating that Elite 2.0 "was a concept, it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614-15).

Even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years

of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1283. An Altria presentation titled "Product Portfolio Review" and dated June 26, 2018, was presented to Altria's leadership team and described plans for an improved version of MarkTen Elite called MarkTen Elite 2.0, stating "This product will be greatly improved by material changes, electronic upgrades, and additional flavor offerings. The product enhancements are meant to improve the likelihood of PMTA success." (PX4063 (Altria) at 019).

Response to Proposed Finding No. 1283:

The Proposed Finding is incomplete and misleading without additional context. The "notionally upgraded version" of Elite 1.0, which was dubbed Elite 2.0, "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (stating that Elite 2.0 "was a concept, it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0. (Garnick (Altria) Tr. 1614-15).

Indeed, according to the cited exhibit, Altria expected that development work would continue well into 2020 and that it would not be ready to submit a PMTA until June 2022. (PX4063 (Altria) at 018; *see also* RX0450 (Altria) at 069). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1284. At or around the summer of 2018, the Altria product development team had concluded that a general 4:3 percent nicotine to acid ratio was approximately the right ratio needed to achieve nicotine satisfaction. (Jupe (Altria) Tr. 2144-45).

Response to Proposed Finding No. 1284:

The Proposed Finding is incomplete and misleading without additional context. *First*, realizing the importance of salts and identifying the optimal ratio of nicotine to salts was only the first step in developing an e-liquid formula that could be appealing to adult cigarette smokers.

(Quigley (Altria) Tr. 2008-09). As Jupe explained, Altria still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod, within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Altria would still need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334). In sum, if Altria "kn[e]w the right ratio" of nicotine to acids, there were still "a lot more pieces to the puzzle" of designing "a successful product that has the potential to convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334).

Second, even if Altria had been able to solve all of the "pieces to the puzzle" in 2018, it still would be "two years too late because the market had [already] been locked" by the Deeming Rule. (Jupe (Altria) Tr. 2142; PX7016 Jupe (Altria) Dep. at 334). Altria could not add nicotine salts to its e-vapor formulations "and commercialize it, because now that was considered a new product, and that new product would first require authorization from the agency by going through [the] PMTA pathway." (Jupe (Altria) Tr. 2230; *see also* Jupe (Altria) Tr. 2256; Murillo (Altria/JLI) Tr. 2927-28; Begley (Altria) Tr. 1081). Even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the

first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1285. At the time that Altria's flavorists were developing advanced nicotine salt formulas for testing in MarkTen Elite 2.0, Altria's engineers were working on improvements to the Elite 2.0 device itself. (Jupe (Altria) Tr. 2148 ("there was a litany of issues with the device that our engineers were working on, as well as you've rightfully identified, not having the right nicotine to salt mix in the product.")).

Response to Proposed Finding No. 1285:

The Proposed Finding is incomplete and misleading without additional context. *First*, for the new e-liquid formula, even assuming Altria's scientists had identified the optimal ratio, there were still "a lot more pieces to the puzzle" of designing "a successful product that has the potential to convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334). Altria still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod, within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Nu Mark still would need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334).

Second, as to the device, Jupe testified that "there [were] a litany of issues with the [Elite] device," (Jupe (Altria) Tr. 2148), and because Altria was "still assessing Elite," it "didn't even know all the ways that [Elite 2.0] had to be better yet," (Murillo (Altria/JLI) Tr. 3050). Among other problems, Altria was "relying on the BVR 2.8 technology [from MarkTen cig-a-like] . . . and the associated process to be the solution that [it] would need to implement to Elite." (PX7016 Jupe (Altria) Dep. at 115). And Altria never completed BVR 2.8. (RFF ¶¶ 500-09, 1085-89).

Third, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1286. As of August 2018, Altria was planning three studies in September 2018 to support MarkTen Elite 2.0 development, all of which involved qualitatively assessing the performance of MarkTen Elite 2.0 prototypes by having adult tobacco consumers sample the product. (PX1671 (Altria) at 008 (MarkTen Elite, Aug. 2018)).

Response to Proposed Finding No. 1286:

The Proposed Finding is incomplete and misleading without additional context. *First*, the scheduled studies were preliminary. When Complaint Counsel asked Jupe about the scheduled formula development research in his deposition, he explained that this was "foundational work." (PX7016 Jupe (Altria) Dep. at 135). Based on lab work, Altria *thought* it had a "better handle" on the "appropriate level of nicotine as a ratio to the appropriate level of salt." (PX7016 Jupe (Altria) Dep. at 135-36, 138). And Jupe wanted to test that ratio "with the consumer." (PX7016 Jupe (Altria) Dep. at 138).

Second, even assuming Altria's scientists had identified the optimal ratio, there were still "a lot more pieces [to] the puzzle" of designing "a successful product that has the potential to

convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334). Altria still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod, within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Nu Mark still would need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334).

Third, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1287. Altria's August 2018 initial test results indicated that MarkTen's 4.5 percent nicotine-by-weight and 3 percent salt formulation achieved results similar to JUUL. (PX1985 (Altria), at 002, 011).

Response to Proposed Finding No. 1287:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 32), or in any deposition. The test results are not self-explanatory and Complaint Counsel, which has foregone

the opportunity to question Altria's employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

Second, the cited tests were performed not with consumers, but rather in a lab using a "Physical Model" and a "Denuder Tube." (PX1985 (Altria) at 002; *see also* RFF ¶ 632 (explaining the operation of a denuder tube)). Altria had not yet confirmed what ratio was effective with consumers. (PX7016 Jupe (Altria) Dep. at 138).

Third, even assuming Altria's scientists had identified the optimal ratio, there were still "a lot more pieces [to] the puzzle" of designing "a successful product that has the potential to convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334). Altria still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod, within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Nu Mark still would need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334).

Fourth, even if Altria could have developed the Elite 2.0 with nicotine salts it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first

quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1288. In August 2018, Altria was planning a study in December 2018 to support MarkTen Elite 2.0 development, the objective of which was "[t]o qualitatively assess the performance of the MarkTen Elite prototypes final formulations prior to design freeze." (PX1671 (Altria) at 008 (MarkTen Elite, Aug. 2018)).

Response to Proposed Finding No. 1288:

The Proposed Finding is incomplete and misleading without additional context. *First*, the cited timeline, which is dated August 2018, establishes no more than that Altria's *goal* was to be able to assess the performance of MarkTen Elite prototypes by December. (Jupe (Altria) Tr. 2298-300 (explaining that the timeline for Elite 2.0 was the "most optimistic plan")). As Jupe explained, in his experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

Second, even if could have tested final formulations in December 2018, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)).

1289. As of August 2018, Altria planned for MarkTen Elite 2.0 to have nicotine salts, toxicologically acceptable materials, reduced pod leakage (the c1A gasket), limited carbonyl formation, a battery life LED indicator, new flavors, and nicotine strengths of 1.8 percent and 2.5 to 4 percent. (PX1671 (Altria) at 006 (MarkTen Elite, Aug. 2018); PX4318 (Altria) at 008 (Nu Mark NPC Meeting).

Response to Proposed Finding No. 1289:

The Proposed Finding is incomplete and misleading without additional context. *First*, the cited list of product attributes was a set of aspirations. Elite 2.0 "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (stating that Elite 2.0 "was a concept, it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that

would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0, nor was it ever sold in the market. (Garnick (Altria) Tr. 1614).

Second, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1290. Jupe testified that Altria was planning a September 2018 study involved testing a prototype MarkTen Elite 2.0 on adult smoker consumers with an e-liquid containing four percent nicotine by weight and three percent acids, which Jupe testified "was the ratio that our sensory and flavorists would say this will give you, if you will, the best satisfaction, closest to a cigarette." (PX7016 (Jupe (Altria), Dep. at 38 (discussing PX1941 (Altria) at 001); *see also* Jupe (Altria) Tr. 2149 ("Q. So consumers would actually have the opportunity to sample these ratios of Sweet Original flavor here, in this example, with these reformulated acid formulas and provide feedback. Is that correct? A. That was the plan.")).

Response to Proposed Finding No. 1290:

The Proposed Finding is incomplete and misleading without additional context. *First*, the scheduled studies were preliminary. When Complaint Counsel asked Jupe about the scheduled formula development research in his deposition, he explained that this was "foundational work." (PX7016 Jupe (Altria) Dep. at 135). Based on lab work, Altria *thought* it had a "better handle" on the "appropriate level of nicotine as a ratio to the appropriate level of salt." (PX7016 Jupe (Altria) Dep. at 135-36, 138). And Jupe wanted to test that ratio "with the consumer." (PX7016 Jupe (Altria) Dep. at 138).

Second, even assuming Altria's scientists had identified the optimal ratio, there were still "a lot more pieces [to] the puzzle" of designing "a successful product that has the potential to convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334). Altria

still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod, within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Nu Mark still would need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334).

Third, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

Respondents note further that the quoted passage appears on page 138 of Jupe's deposition, not page 38.

1291. Altria sponsored a four-day consumer research study between October 1 and October 4, 2018 with the goal of gaining insight from participants' use of MarkTen Elite 2.0 prototypes with different nicotine salt levels and mixes. (PX4512 (Altria) at 004).

Response to Proposed Finding No. 1291:

The Proposed Finding is incomplete and misleading without additional context. *First*, the scheduled studies were preliminary. When Complaint Counsel asked Jupe about the scheduled

formula development research in his deposition, he explained that this was "foundational work." (PX7016 Jupe (Altria) Dep. at 135). Based on lab work, Altria *thought* it had a "better handle" on the "appropriate level of nicotine as a ratio to the appropriate level of salt." (PX7016 Jupe (Altria) Dep. at 135-36, 138). And Jupe wanted to test that ratio "with the consumer." (PX7016 Jupe (Altria) Dep. at 138).

Second, even assuming Altria's scientists had identified the optimal ratio, there were still "a lot more pieces [to] the puzzle" of designing "a successful product that has the potential to convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334). Altria still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod, within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Nu Mark still would need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334).

Third, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's

many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1292. In the October Elite 2.0 consumer research study, participants described one Elite 2.0 prototype mix as having a "smooth but not too smooth draw," with "a full and consistent volume of vapor upon inhale and exhale that was reminiscent of a cigarette experience," and "immediate nicotine satisfaction achieved within 3-4 puffs." (PX4512 (Altria) at 006).

Response to Proposed Finding No. 1292:

The Proposed Finding is incomplete and misleading without additional context. *First*, the scheduled studies were preliminary. When Complaint Counsel asked Jupe about the scheduled formula development research in his deposition, he explained that this was "foundational work." (PX7016 Jupe (Altria) Dep. at 135). Based on lab work, Altria thought it had a "better handle" on the "appropriate level of nicotine as a ratio to the appropriate level of salt." (PX7016 Jupe (Altria) Dep. at 135-36, 138). And Jupe wanted to test that ratio "with the consumer." (PX7016 Jupe (Altria) Dep. at 138).

Second, even assuming Altria's scientists had identified the optimal ratio, there were still "a lot more pieces [to] the puzzle" of designing "a successful product that has the potential to convert smokers from cigarettes to e-vapor products." (PX7016 Jupe (Altria) Dep. at 334). Altria still needed to determine "[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?" (Jupe (Altria) Tr. 2140). And what is the "right ratio of those three acids in combination with the right ratio of the nicotine[?]" (Jupe (Altria) Tr. 2140). In addition, Altria would have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 Jupe (Altria) Dep. at 333). Further, Altria would have to determine that the salts formula used would not "degrade" the components in the product but could instead "survive within the pod,

within a packed-down environment for at least six months to a year." (PX7016 Jupe (Altria) Dep. at 333-34). Finally, if it managed the steps above, Nu Mark still would need to put that salts formula "in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes." (PX7016 Jupe (Altria) Dep. at 334).

Third, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1293. Altria had plans to introduce a new battery system for MarkTen Elite 2.0 to address formaldehyde generation in MarkTen Elite, leveraging learnings from addressing a similar problem with MarkTen's cigalike products. (PX7016 (Jupe (Altria), Dep. at 89-90 ("Q. Mr. Jupe was there a similar project underway relating to battery work or any other projects designed to reduce carbonyl levels in the MarkTen Elite line? A. When Nu Mark acquired Elite, we didn't have this type of mechanism built in. So we were looking at a project to incorporate the same type of approach into the Elite as what we were looking for – looking towards for the MarkTen cigalike."); *see also* PX7016 (Jupe (Altria), Dep. at 115) ("[I]f we figured it out for one product, we should have been able to implement it for another product.")).

Response to Proposed Finding No. 1293:

The Proposed Finding is incomplete and misleading without additional context. As Jupe explained, Altria was "relying on the BVR 2.8 technology [from MarkTen cig-a-like] . . . and the associated process to be the solution that [it] would need to implement to Elite." (PX7016 Jupe (Altria) Dep. at 115). And Altria never completed BVR 2.8. (RFF ¶¶ 500-09, 1085-89). Altria had developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8." (Gardner (Altria) Tr. 2571). As of November 2018, "[q]uality issues [were] observed during new chip scale-up, and need to be resolved." (PX1407 (Altria) at 004). Altria also needed to "[b]etter understand [the] difference in aerosol mass" associated with the new battery, the root

causes of which were still "under investigation." (PX1407 (Altria) at 004). This was a significant issue because a difference in aerosol mass would limit Altria's ability to bridge studies from the version of MarkTen with BVR 2.3 to one with BVR 2.8. (RFF ¶¶ 505, 508). In addition, the new battery "require[d] cartridges to undergo an annealing process" and Altria was still working on "feasibility testing." (PX1407 (Altria) at 013). Having not yet sorted out the kinks with BVR 2.8 for the MarkTen cig-a-like, Altria was still a long way from having a dry puff solution for Elite.

1294. Altria expected designs for MarkTen Elite 2.0 to be locked by the second quarter of 2020. (PX1316 (Altria) at 030 (Sept. 22, 2018 draft [Reduced Harm Products] presentation "Elite 2.0 development timeline — 2Q '18 to 2Q '20")).

Response to Proposed Finding No. 1294:

The Proposed Finding is incomplete and misleading without additional context. *First*, the cited timeline, which is dated August 2018, establishes no more than that Altria's *goal* was to achieve design lock by the second quarter of 2020. (Jupe (Altria) Tr. 2298-300 (explaining that the timeline for Elite 2.0 was the "most optimistic plan")). But Altria's *expectations* were more measured. Murillo explained, "A problem, in my experience, with the e-vapor products that I worked on when I was at Altria was that we rarely got to product lock. Even though we thought we were at product lock, things would happen with the products and they became unlocked, and that presented tremendous difficulties." (PX7007 Murillo (Altria/JLI) IHT at 40; *see also* Jupe (Altria) Tr. 2299 (explaining that, in his years of experience, "[e]very single time," the projected schedule would "go backwards")).

Second, Altria was not on track to meet the timeline. One key assumption of the timeline was that Altria would achieve "design freeze" by December 2018, (PX1316 (Altria) at 030), meaning that product engineers "have a design that is likely to result in a locked design," (PX7007 Murillo (Altria/JLI) IHT at 39). But the design for Elite 2.0 could not be completed without dry puff prevention, for which Elite 2.0 was piggybacking off the BVR 2.8 for MarkTen cig-a-like,

(PX7016 Jupe (Altria) Dep. at 115), and that project experienced a series of technical challenges that were never resolved, (RFF ¶¶ 500-09, 1085-89; *see also* PX1407 (Altria) at 004).

c) Altria Was Planning to Submit PMTAs for Improved Versions of Its Products in Case Its Commercialized Products Could Not Achieve PMTA Approval

1295. An August 10, 2018, presentation entitled "MarkTen Regulatory Strategy Update," which was submitted by Quigley to Willard, Gifford, Garnick, and Crosthwaite ahead of a meeting on Nu Mark's regulatory strategy stated "Transitioning application from BVR 2.3 to BVR 2.8 will be accomplished primarily by bridging." (PX1011 (Altria) at 020 (MarkTen Regulatory Strategy Update, Aug. 10, 2018); *see also* PX1930 (Altria) at 013-14, 022 (Nu Mark NPC Meeting, Apr. 26, 2018)).

Response to Proposed Finding No. 1295:

The Proposed Finding is incomplete and misleading without additional context. *First*, the transition plan existed because none of Altria's scientists thought that Altria could get a PMTA on the existing MarkTen cig-a-like. (RFF ¶¶ 698-700; *see also* PX1890 (Altria) at 001 ("[N]o one thinks we can get a PMTA on current Mark Ten product . . . .")).

Second, Altria never completed BVR 2.8. Altria had developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8," (Gardner (Altria) Tr. 2571), including quality issues with the chip, changed aerosol mass, and a new need to anneal the cartridges, which was still undergoing feasibility testing. (PX1407 (Altria) at 004, 013; RFF ¶¶ 505, 508). And PMTA work on BVR 2.8 had not yet begun because Altria's scientists decided that they were "not going to start PMTA studies until [they] definitively kn[e]w [they could] make the product as intended and bridge to the 2016 product." (Gardner (Altria) Tr. 2579; *see also* PX4107 (Altria) at 008). In fact, Altria "never started the PMTA studies for [that version, called] BVR 2.8." (Gardner (Altria) Tr. 2580). As late as November 2018, Altria's scientists were still not sure that they had a dry puff prevention fix that they could submit for a PMTA. (RFF ¶¶ 1085-86).

Third, bridging requires a substantial degree of similarity in the performance of the products, as well as "enforceability testing" to demonstrate that data associated with one product is applicable to another. (PX7027 Murillo (Altria/JLI) Dep. at 74-75, 161-62; RFF ¶ 92). Among other things, the "two products [need to] behave[] the same in delivering an aerosol." (Gardner (Altria) Tr. 2573). But the modified product with BVR 2.8 had lower aerosol mass yields than the initial product so Altria was never able to demonstrate that the original MarkTen cig-a-like and the proposed new MarkTen cig-a-like with BVR 2.8 performed comparably enough to permit bridging. (Gardner (Altria) Tr. 2571-74; RFF ¶ 508).

1296. Dr. Gardner explained "Bridging is an approach that's allowed" meaning that "[t]he FDA accepts it in the pharmaceutical industry and has mentioned it's appropriate for use in tobacco products, too -- also. So bridging is literally bridging -- building a bridge from the prior data to a new product. So for this application [meaning MarkTen cigalike], it would be using the existing data for BVR 2.3, the cigalike product that was in the market, and then bridge it to the new product. So we would -- we wouldn't have to repeat every single study that we had already completed. So we would be able to use existing science, but not all of it." (Gardner (Altria) Tr. 2572).

Response to Proposed Finding No. 1296:

The Proposed Finding is incomplete and misleading without additional context. *First*, the transition plan existed because none of Altria's scientists thought that Altria could get a PMTA on the MarkTen cig-a-like. (RFF ¶ 698-700; *see also* PX1890 (Altria) at 001 ("[N]o one thinks we can get a PMTA on current Mark Ten product . . . .")).

Second, Altria never completed BVR 2.8. Altria had developed a prototype but it "encountered technical problems throughout the entire process of BVR 2.8," (Gardner (Altria) Tr. 2571), including quality issues with the chip, changed aerosol mass, and a new need to anneal the cartridges, which was still undergoing feasibility testing. (PX1407 (Altria) at 004, 013; RFF ¶¶ 505, 508). And PMTA work on BVR 2.8 had not yet begun because Altria's scientists decided that they were "not going to start PMTA studies until [they] definitively kn[e]w [they could] make

the product as intended and bridge to the 2016 product." (Gardner (Altria) Tr. 2579; *see also* RX4107 (Altria) at 008). In fact, Altria "never started the PMTA studies for [that version, called] BVR 2.8." (Gardner (Altria) Tr. 2580). As late as November 2018, Altria's scientists were still not sure that they had a dry puff prevention fix that they could submit for a PMTA. (RFF ¶¶ 1085-86).

Third, bridging requires a substantial degree of similarity in the performance of the products, as well as "enforceability testing" to demonstrate that data associated with one product is applicable to another. (PX7027 Murillo (Altria/JLI) Dep. at 74-75, 161-62; RFF ¶ 92). Among other things, the "two products [need to] behave[] the same in delivering an aerosol." (Gardner (Altria) Tr. 2573). But the modified product with BVR 2.8 had lower aerosol mass yields than the initial product so Altria was never able to demonstrate that the original MarkTen cig-a-like and the proposed new MarkTen cig-a-like with BVR 2.8 performed comparably enough to permit bridging. (Gardner (Altria) Tr. 2571-74; RFF ¶ 508).

1297. Quigley testified that Altria developed a "bridge plan" to address the risk relating to the PMTA process for MarkTen Elite: "So as part of the bridge plain, to keep Elite on the market, we would need to -- we had to submit just the base PMTA to stay on the market. The, I think, advice I had been given was there was very low confidence that we could actually generate the science to get a PMTA authorized. So at the same time we would have to develop a new PMTA for an Elite product that was called 2.0 and hope that Elite 2.0 would get authorized before Elite 1.0 got turned down by FDA." (Quigley (Altria) Tr. 2065)).

Response to Proposed Finding No. 1297:

The Proposed Finding is incomplete and misleading without additional context. *First*, the cited Quigley's testimony confirms Respondents' point that Elite 1.0 could not get FDA approval. (Quigley (Altria) Tr. 2065; *see also* Quigley (Altria) Tr. 2065-66 ("Q. . . . [Y]ou were going to submit a PMTA for Elite 1.0, even though folks within the organization didn't believe it would be authorized, correct? A. Yes.")).

Second, Quigley also testified that this plan was both "a long shot," (PX7003 Quigley (Altria) IHT at 118-19), and a "long plan," one that would take "five to seven years' worth of work" to execute, (Quigley (Altria) Tr. 2032).

Third, the revised version of Elite, Elite 2.0, "didn't exist." (Murillo (Altria/JLI) Tr. 3050; *see also* PX7017 Magness (Altria) Dep. at 111 (stating that Elite 2.0 "was a concept, it didn't exist")). "[T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn't even know all the ways that it had to be better yet because [it was] still assessing Elite." (Murillo (Altria/JLI) Tr. 3050). Altria never finalized the design of Elite 2.0, nor was it ever sold in the market. (Garnick (Altria) Tr. 1614).

Fourth, even if Altria could have developed the Elite 2.0 it had conceptualized, Nu Mark's "most optimistic plan" estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). And in Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

1298. With regard to Altria's PMTA plans for MarkTen Elite, Murillo testified: "Well, the idea of the strategy was to -- assuming we could cobble together a PMTA for Elite and we -- we were allowed to continue selling Elite, we would file for Elite 1.0, continue preparing 2.0, and quickly follow. Hopefully, by the time they were adjudicating what would be some very thorny issues, at least by this time, with respect to Elite 1.0, we would have amended with 2.0 and said, We hear you, and please let us pursue this improvement and let us, you know, explain to you what we've done." (PX7027 (Murillo (Altria/JLI), Dep. at 161)).

Response to Proposed Finding No. 1298:

The Proposed Finding is incomplete and misleading without additional context. *First*, the cited Murillo's testimony confirms Respondents' point that Elite 1.0 could not get FDA approval. (PX7027 Murillo (Altria/JLI) Dep. at 161).

Second, Murillo also testified that he did not have a view of the prospects of Elite 2.0 because it "didn't exist. So there were -- there were theories that we're going to fix this and do that

and add this and whatever, but they were theories; they were not reality." (Murillo (Altria/JLI) Tr. 2958).

1299. As of August 30, 2018, Altria planned to submit a PMTA for MarkTen Elite 2.0 in January 2022, while waiting until the then-PMTA deadline in August 2022, seven months later, to submit a PMTA for MarkTen Elite 2.0. (PX4318 (Altria) at 015 (Nu Mark NPC Meeting)).

Response to Proposed Finding No. 1299:

The Proposed Finding is incomplete and misleading without additional context. *First*, even if Altria could have developed the Elite 2.0 it had conceptualized, the timeline for Elite 2.0 was the "most optimistic plan." (Jupe (Altria) Tr. 2298-300). In Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

Second, even if the timeline had proven feasible, Altria was already anticipating that the PMTA deadline might be accelerated. In March 2018, certain public health organizations filed a lawsuit challenging the August 2022 PMTA deadline. (RFF ¶ 118). This led Altria's regulatory team to think in 2018 that the deadline could be accelerated. (Murillo (Altria/JLI) Tr. 2944). And, in fact, in 2019, the deadline was accelerated two years as a result of this lawsuit. (RFF ¶ 118; *see also* RFF ¶¶ 113-21 (discussing the evolving PMTA deadline)).

1300. Filing a PMTA for MarkTen Elite 1.0 could buy time for the FDA to review and approve MarkTen Elite 2.0's PMTA and thereby help Altria avoid a scenario where it did not have a product on the shelf. (PX7016 (Jupe (Altria), Dep. at 116-17) ("At this point in time, Elite 1.0 also had to go through the application process, okay, because we didn't think we could sequence things in a timely manner in accordance with the requirements to get Elite 2.0 into the agency and out of the agency. We thought we would run into a period of time where we would have no product on the market.")).

Respondents Proposed Finding No. 1300:

The Proposed Finding is incomplete and misleading without additional context. *First*, even if Altria could have developed the Elite 2.0 it had conceptualized, the timeline for Elite 2.0 was the "most optimistic plan." (Jupe (Altria) Tr. 2298-300). In Jupe's many years of experience, "[e]very single time," the projected schedule would "go backwards." (Jupe (Altria) Tr. 2299).

Second, even if the timeline had proven feasible, Altria was already anticipating that the PMTA deadline might be accelerated. In March 2018, certain public health organizations filed a lawsuit challenging the August 2022 PMTA deadline. (RFF ¶ 118). This led Altria's regulatory team to think in 2018 that the deadline could be accelerated. (Murillo (Altria/JLI) Tr. 2944). And, in fact, in 2019, the deadline was accelerated two years as a result of this lawsuit. (RFF ¶ 118; *see also* RFF ¶¶ 113-21 (discussing the evolving PMTA deadline)).

3. Altria's Claim That Its E-Cigarette Products Did Not Have Sufficient Conversion Potential to Achieve PMTA Approval Is Unsupported

1301. Altria executives suggested that MarkTen Elite's low sales figures and market share relative to JUUL indicated that the product did not have sufficient conversion potential to achieve PMTA approval. (PX7026 (Gardner (Altria), Dep. at 24-26); [redacted]

Response to Proposed Finding No. 1301:

Respondents have no specific response except to note that low sales figures and market share are, in fact, indicative of low conversion potential. (RFF ¶¶ 602-05).

1302. However, Dr. Gardner testified that he was "not aware of the [e-vapor] industry getting a consensus together on e-vapor conversion" and "I don't think we [Altria] understood what drove conversion to e-vapor products." (Gardner (Altria) Tr. 2649, 2651; PX7026 (Gardner (Altria), Dep. at 59)).

Response to Proposed Finding No. 1302:

The Proposed finding is incomplete and misleading without additional context. Dr. Gardner was asked, "In 2018, there wasn't consensus in the e-vapor industry on what factors drove conversion rates for e-vapor products, correct?" (Gardner (Altria) Tr. 2649). And he replied, "I am not aware of the industry getting a consensus together on e-vapor conversion. The scientists within Altria discussed it." (Gardner (Altria) Tr. 2649). But the fact that industry participants had not pooled their thinking on one of the key features that differentiated their products with

consumers or the ingredients in their proprietary e-liquids is not evidence that Altria's conclusions were either pretextual or unreliable.

Gardner explained that even though Altria did not fully "underst[an]d what drove conversion to e-vapor products," it could evaluate whether a specific product was effective at conversion by looking to studies of "actual usage behavior," "the pharmacokinetics of the product, you know, nicotine delivery," and "through consumer research and other science studies." (PX7026 Gardner (Altria) Dep. at 59-60). And, he added, "you ultimately learn what drove adult smoker conversion . . . through, you know, launching it into the market" and seeing whether "smokers move permanently from cigarettes to the product." (PX7026 Gardner (Altria) Dep. at 60).

As detailed in Respondents' proposed findings, the evidence showed that each of Altria's in-market products performed poorly on these metrics:

- **MarkTen cigalike:** Consumer research about the MarkTen cig-a-like "indicate[d] . . . that satisfaction was not there." (Jupe (Altria) Tr. 2234; RFF ¶¶ 601-08, 612-13, 737-47, 1504).
- **MarkTen Bold:** Pharmacokinetic (or PK) studies confirmed that Bold was not delivering nicotine to the bloodstream as quickly as combustible cigarettes and were "not an indicator of conversion potential." (Jupe (Altria) Tr. 2231-34 (discussing RX0176 (Altria) at 142); RFF ¶¶ 612-13, 638-51, 737-47, 1505).
- **Elite:** Consumer research showed that, while JUUL "demonstrate[d] immediacy in replacing cigarette usage occasions among . . . those who are still predominantly smoking cigarettes," Elite "demonstrate[d] higher usage among . . . those who are

more familiar with e-vapor product usage." (RX2015 (Altria) at 007; RFF ¶¶ 601-07, 609-13, 737-47, 1513).

- **Apex:** Apex had "no nicotine salts," (Begley (Altria) Tr. 1083), and low nicotine concentration, (Murillo (Altria/JLI) Tr. 2960), meaning it did not "satisf[y] versus the smokers' requirements," (PX7023 Fernandez (Altria) Dep. at 197; s*ee also* RFF ¶¶ 737-47, 1520).

1303. Dr. Gardner also testified the FDA has not specified a particular level of sales or particular trend in market share that a product must demonstrate in order to show conversion potential or achieve PMTA approval. (Altria (Gardner) Tr. 2660).

Response to Proposed Finding No. 1303:

The Proposed Finding is incomplete and misleading without additional context. Dr. Gardner testified that Altria knows, "based on [FDA] draft guidance and working with the agency," how it will assess conversion potential for purposes of the PMTA process: It "will assess nicotine pharmacokinetics as well as do adult smokers actually demonstrate that they use the product over time. So do they stop smoking by using that product?" (Gardner (Altria) Tr. 2641). And, although Altria does "not know definitively a number" FDA will look to for conversion rate, much less sales levels or market share, (Gardner (Altria) Tr. 2641, 2660), Altria knows that the conversion rate "must be a sufficient number to have a significant impact on population health," (Gardner (Altria) Tr. 2641). Drawing on this knowledge and the substantial expertise they have developed over the course of hundreds of applications to FDA, (Gardner (Altria) Tr. 2610), Altria's scientists concluded that none of the products that Altria had on the market—not MarkTen cigalike, not Bold, not Elite—could provide the satisfaction necessary to convert smokers and get approved by FDA, (Gardner (Altria) Tr. 2590).

1304. Quigley testified that, as of September 19, 2018, the following statement in an Altria presentation was accurate: "We can't/haven't measured conversion potential of any of our products to effectively know what is working, what isn't and why." (Quigley (Altria) Tr.

2095 (discussing RX1175 (Altria), at 010); *see also* PX1323 (Altria) at 013 ("Innovative Products Game Plan Input, Altria Game Plan")).

Response to Proposed Finding No. 1304:

The Proposed Finding is incomplete and misleading without additional context. The relevant slide, which is from a September 19, 2018 presentation, was describing what Quigley learned during his 100-day game-planning process, namely that Nu Mark had not *previously* measured conversion potential. (Quigley (Altria) Tr. 2095 (discussing RX1175 (Altria) at 010)). But the deck also notes that, under Quigley's leadership, Nu Mark had conducted that analysis. (RX1175 (Altria) at 009 (noting that, by August 13, 2018, Nu Mark had developed an "[Adult Smoker] Conversion Model system"), 014 (illustrating system)). In fact, in June 2018, Quigley had created a team tasked with assessing whether each Nu Mark product "ha[d] appropriate nicotine satisfaction and enjoyment to convert [adult tobacco consumers]." (RX0450 (Altria) at 026). The following month, that team prepared a presentation that, drawing on consumer research, market trends, and scientific studies, concluded that each of Nu Mark's cig-a-like and hybrid products—including MarkTen cig-a-like, MarkTen Bold, Elite, Cync, and Apex—had limited conversion potential. (RX0532 (Altria) at 005, 006, 008, 010, 011).

1305. Quigley testified that he never reviewed any conversion studies for MarkTen Elite. (Quigley (Altria) Tr. 2094-95).

Response to Proposed Finding No. 1305:

The Proposed Finding is incomplete and misleading without additional information. The relevant exchange of testimony indicates that Quigley was uncertain what Complaint Counsel meant by "conversion study," a term that is never used in nearly 2,500 exhibits offered in this case. When asked if he ever "reviewed any type of Altria conversion study, whether it was for a PMTA or for marketing," Quigley responded, "Umm, I'm not exactly sure, because I -- I have seen -- I had seen results from PMTAs before and an MRTP on my smokeless business," indicating that he

understood the question to be focused on regulatory studies. (Quigley (Altria) Tr. 2094). Complaint Counsel then narrowed the question to Elite and Quigley responds, "Not that I can recall." (Quigley (Altria) Tr. 2094-95). But there is no reason why Quigley would have seen any PMTA studies for Elite. Nu Mark did not decide to pursue a PMTA for Elite until March 2018, (RFF ¶ 511), much of the early work focused on scoping out the many design problems with Elite, (RFF ¶¶ 513-18), and, by early September, Altria had decided to stop all work on current and future iterations of Elite—including PMTA work—to free up resources for the Growth teams, (RFF ¶¶ 909-13).

But Quigley did not need to review "conversion studies" to assess the conversion potential of Elite. He testified that, based on the information available to him, including Altria scientists' research on the necessity of nicotine salts, he concluded that Nu Mark did not have a "product that had the ability" to switch adult smokers, (PX7041 Quigley (Altria) Dep. at 162), and that Elite in particular was not providing nicotine satisfaction, (Quigley (Altria) Tr. 2017), which was the number one requirement for adult smokers, (RFF ¶ 704).

1306. Murillo testified that he could not recall any quantitative research on MarkTen Elite's conversion potential, and pointed to Pascal Fernandez's group as the source of any such research. (PX7027 (Murillo (Altria/JLI), Dep. at 187-88)).

Response to Proposed Finding No. 1306:

The Proposed Finding is incomplete and misleading without additional context. When asked if he was aware of any quantitative research on Elite, Murillo said, "I'm sure that there was quantitative research. I just—I don't remember." (PX7027 Murillo (Altria/JLI) Dep. at 187-88). He added that the consumer research department under Pascal Fernandez would have performed that work. (PX7027 Murillo (Altria/JLI) Dep. at 188).

1307. Pascal Fernandez, the former SVP of Altria's Consumer and Market Insights Group testified that Altria never conducted any studies to evaluate the conversion potential of MarkTen Elite. (PX7023 (Fernandez (Altria), Dep. at 88-90)).

Response to Proposed Finding No. 1307:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Fernandez testified that Altria did conduct quantitative research of Elite, explaining that "the home use test is a quantitative piece of consumer research." (PX7023 Fernandez (Altria) Dep. at 92; *see also* PX7014 Baculis (Altria) Dep. at 296 ("A home use test is a type of quantitative research . . . .")). And, when Complaint Counsel asked whether Altria had conducted a "conversion study," a term that is never used in the nearly 2,500 exhibits in this case, Fernandez responded, "I haven't done a so-called conversion study, though we have included metrics that were indicators" in home use studies, which "track usage behavior over a three to six-week's period," to provide "important indicators of what could happen with conversion." (PX7023 Fernandez (Altria) Dep. at 88-89).

Fernandez testified that Altria's consumer research showed Elite was "not going to be able to be a product that was able to convert consumers." (PX7023 Fernandez (Altria) Dep. at 85). "The problem we were having is the consumer[s] who intended to buy this product were more likely to be dual users and were not converting, or there was little evidence of conversion and the product really sticking." (PX7023 Fernandez (Altria) Dep. at 79). Elite just "didn't satisfy to the extent it needed to satisfy" to convert smokers. (PX7023 Fernandez (Altria) Dep. at 152).

1308. On August 14, 2018, Murillo commented on a draft presentation to Altria's board of directors that "in fairness to Nu Mark, the 'x' for conversion potential is an opinion based on current performance and comparison to Juul. It would be fair to have an x with a ?, especially if this encompasses possible Elite 2.0." (PX1600 (Altria) at 001; *see also* PX1625 (Altria) at 033).

Response to Proposed Finding No. 1308:

The Proposed Finding is incomplete and misleading without additional context. Murillo's comment only confirms that the regulatory team at Altria believed that the *on-market* version of Elite lacked conversion potential. As for Elite 2.0, as Murillo explained at trial, "it didn't exist";

it was simply a "notionally upgraded version" but Altria did not yet know what it would look like because it was "still assessing Elite." (Murillo (Altria/JLI) Tr. 3050; *see also* Jupe (Altria) Tr. 2156 (explaining that, assuming all went well, Elite 2.0 was five to six years away from being introduced into the market)).

1309. Conversion rates are a measure of the rate at which consumers that use an e-cigarette product stop smoking, whereas market share is a measure of sales percentage relative to competitors. (Altria (Gardner) Tr. 2645).

Response to Proposed Finding No. 1309:

The Proposed Finding is incomplete and misleading without additional context. Market share is not equivalent to conversion rate, but "market share tells you . . . what the adult smokers are actually doing in the market with their money." (Gardner (Altria) Tr. 2644-45). "[T]hat piece of data, combined with other information, is used to assess the conversion potential of the product." (Gardner (Altria) Tr. 2645).

4. Altria Had Evidence That Its E-Cigarette Products Had Conversion Potential

1310. A November 2, 2017, Nu Mark Investor Day presentation prepared for delivery by Jody Begley, Altria's current EVP and COO and former President of Nu Mark, prompts him to say "we expect to demonstrate that *MarkTen* e-vapor products can facilitate switching from conventional cigarettes without materially impacting cessation efforts or tobacco initiation among non-users." (PX1129 (Altria) at 019).

Response to Proposed Finding No. 1310:

The Proposed Finding is incomplete and misleading without additional context. Begley emphasized that, at the time of this presentation, "it was early days for a number of the product formats." (Begley (Altria) Tr. 979). And the presentation slide notes quoted by Complaint Counsel are discussing a potential PMTA for the MarkTen cig-a-like, (PX1129 (Altria) at 018), and merely highlight what Altria "*expect[ed]* to demonstrate" as of that time, (PX1129 (Altria) at 019 (emphasis added)). Seven months later, in June 2018, Altria scientists presented new research

showing that "use of nicotine salts or addition of acids to achieve a certain pH is **required** for a satisfying and relaxing E-vapor experience similar to the cigarette smoking experience." (PX4504 (Altria) at 024 (emphasis in original)). And not just any amount of salt would do—it needed to be the "right ratio." (Jupe (Altria) Tr. 2140). But the original MarkTen cig-a-like had no salts whatsoever, (RFF ¶ 1504), and, while MarkTen Bold had a small amount of acid, it did "not have [the] optimal ratio of nicotine and salts," (RX0532 (Altria) at 006; *see also* PX4504 (Altria) at 019).

1311. A January 19, 2018, Altria presentation reported the results of a HUT study performed by Altria comparing MarkTen Elite, CYNC, and JUUL and indicated that "By 3 weeks of testing, Elite begins to demonstrate its propensity to replace cigarette occasions among" adult users of both e-cigarettes and traditional cigarettes. (PX1225 (Altria) at 008).

Response to Proposed Finding No. 1311:

The Proposed Finding is incomplete and misleading without additional context. The data point quoted in the proposed finding looks at the results for adult smokers *and vapers*. (PX1225 (Altria) at 016). When the data is broken out to separate adult vapers (typified by study participants who had used a vaping product in the last seven days) from adult smokers (typified by those who had not used vapor within the past seven days), with the latter being the key demographic for measuring conversion potential, Elite had almost no impact on adult smokers until the five-week mark. (PX1225 (Altria) at 016; Jupe (Altria) Tr. 2251-52; *see also* PX7002 Schwartz (Altria) IHT at 110-11). JUUL, on the other hand, immediately began replacing cigarette smoking occasions in numbers that were statistically significant. (Jupe (Altria) Tr. 2251-52).

As Jupe explained, the five-week time lag for Elite illustrated why the product could not convert adult smokers. A pack-a-day smoker "would have to buy 35 pods and continue using them for five weeks to figure out that you could put your cigarettes down," which is "really unlikely" to happen in the marketplace. (Jupe (Altria) Tr. 2253). Consumers "don't go and buy 35 new

products. The first one is going to tell you what you are going to need to know." (Jupe (Altria) Tr. 2253). And, even assuming that Elite started replacing cigarettes at the three-week mark, there is no reason to think that consumers in the real world would buy 21 pods; to Jupe's point, they would decide based on the first one.

1312. According to an email written by Craig Schwartz on May 1, 2018, Altria's HUT study results "confirm[ed] we [Altria] have a good horse in the race that truly merits incenting Trial at all levels / channels." (PX1225 (Altria) at 001). Craig Schwartz wrote that the HUT study indicated that MarkTen Elite "could thrive." (PX4129 (Altria) at 001).

Response to Proposed Finding No. 1312:

The Proposed Finding is incomplete and misleading without additional context. Regarding the first sentence, Schwartz acknowledged that he "didn't always stay in [his] lane" and had a tendency to "try and perhaps embellish things a bit because [he] had a large organization" and wanted to "keep people . . . motivated." (PX7002 Schwartz (Altria) IHT at 140). In the email cited by Complaint Counsel, Jennifer Schmidt, who "ran" the analysis of the HUT data, explained that the attached slides lend "reinforcement to the idea that Elite, Cync & Apex are more for those seeking the vaping experience than the smoking experience. JUUL tends to have the most behavioral impact among those seeking the smoking experience (at least through 3 weeks of testing)." (PX1225 (Altria) at 001). When asked about his email in his deposition, Schwartz explained that "it's important to recognize what Jennifer says in her note," namely that "products like [MarkTen] Elite seem to do well in terms of satisfying that vaping experience. Whereas, JUUL tends to be a product that seems to do quite well in terms of satisfying adults who are looking for that cigarette experience." (PX7002 Schwartz (Altria) IHT at 110-11). "Obviously, [Nu Mark's] primary interest was . . . converting . . . cigarette smoker[s] and what was it going to take for us to win in what we thought was the lion's share of the opportunity." (PX7002 Schwartz

(Altria) IHT at 110). Conversely, "the vaping experience . . . was by far the smaller opportunity in the space at the time." (PX7002 Schwartz (Altria) IHT at 144).

As to the second sentence of the Proposed Finding, Schwartz wrote that Elite "could thrive *if the [home use test] was an indicator of success*." (PX4129 (Altria) at 001 (emphasis added)). But a home use test is not a substitute for market results. "[T]he test at the end of the day is what people are buying at retail." (Jupe (Altria) Tr. 2247-48; *see also* Begley (Altria) Tr. 1098 (observing that the retail environment is where manufacturers "get the best learnings in terms of how appealing [a] product [is] to consumers"); PX7023 Fernandez (Altria) Dep. at 156 (explaining that while HUT results are "indicators," manufacturers "get the real answer in the marketplace")). And Elite failed on the market. Despite Altria's heavy promotional efforts, Elite never achieved more than a one percent share of e-vapor cartridge unit sales. (RX1217 Murphy Report ¶ 12; RFF ¶ 442). A senior manager at JLI put it bluntly: Elite's "US sales [were] absolutely terrible, no traction whatsoever." (RX1165 (JLI) at 004).

1313. Dr. Gardner testified that some Altria employees thought that Elite had long-term conversion potential in 2018. (Gardner (Altria) Tr. 2675).

Response to Proposed Finding No. 1313:

The Proposed Finding is incomplete and misleading without additional context. As explained in Response to Proposed Finding No. 1314, some Nu Mark employees initially took the view that Elite had high conversion potential among consumers who were seeking flavor exploration, rather than nicotine satisfaction. But, following subsequent conversations where the scientists challenged the assumption that smokers who were interested in flavor exploration were not also seeking nicotine satisfaction, the brand representatives agreed with the scientists that Elite had low conversion potential. (Gardner (Altria) Tr. 3092-94 (discussing RX0532 (Altria) at 008)). As detailed in Respondents' proposed findings of fact, the conclusion that Elite, as well as all of

Nu Mark's other products, had low conversion potential reflected the consensus of every Altria witness who was asked about conversion in this proceeding, all fifteen of them. (RFF ¶ 743(a)-(o)). It was also the view of other players in the e-vapor space. For example, JLI's cofounder, Adam Bowen, observed that Elite "do[es]n't provide cig-like nicotine satisfaction." (RX1420 (JLI) at 001; *see also* Robbins (JLI) Tr. 3251 (observing that Elite "didn't seem to be effective at converting cigarette smokers")). [redacted]

1314. A July 2018 presentation prepared by employees of Nu Mark's brand organization identified MarkTen Elite as having "high conversion potential" for certain consumers (PX4060 (Altria) at 010); Gardner (Altria) Tr. 2676-77 (discussing PX4060)). Dr. Gardner testified that Altria's brand organization viewed MarkTen Elite as having high conversion potential at the time. (Gardner (Altria) Tr. 2676-77).

Response to Proposed Finding No. 1314:

The Proposed Finding is incomplete and misleading without additional context. The presentation was prepared as part of e-vapor portfolio assessment undertaken by a cross-functional team tasked with, among other things, mapping each product to the appropriate consumer audience and assessing whether each product "ha[d] appropriate nicotine satisfaction and enjoyment to convert [adult tobacco consumers]." (RX0450 (Altria) at 026; see also RFF ¶ 737). The presentation cited by Complaint Counsel, which was prepared during one of the early meetings, focused on identifying the most promising consumer segment for each product. (PX4060 (Altria) at 008-12). These segments included "Replicate" for those consumers looking to replicate a cigarette experience; "Keep it Simple," for those looking for convenient, no frills nicotine satisfaction; and "Flavor Exploration" for those seeking a rich, flavorful experience in a variety of flavors. (PX4060 (Altria) at 008).

Elite, which had an assortment of flavors that had tested well with consumers, was assigned to the Flavor Exploration segment. (PX4060 (Altria) at 010; RX1291 (Altria) at 006). In the slide deck prepared after the meeting, the Brand team rated Elite as having "High" conversion potential within the Flavor Exploration segment. (PX4060 (Altria) at 010; PX1398 (Altria) at 001). Notably, nicotine satisfaction was not listed among the requirements for the Flavor Exploration segment. (PX4060 (Altria) at 008).

By contrast, the on-market Nu Mark products assigned to consumer segments that required nicotine satisfaction, such as Keep it Simple, were rated as having "Low," or at best "Low-Medium," conversion potential within those segments. (PX4060 (Altria) at 011 to 012; *see also* Gardner (Altria) Tr. 3090-91). The summary slide at the end of the deck observed that Nu Mark had a number of "Portfolio Gaps" including, "[p]roducts that provide both immediate nicotine satisfaction and a pull/draw similar to a cigarette." (PX4060 (Altria) at 013).

At trial, Gardner testified that the scientists disagreed with the draft deck's characterization of Elite. In a contemporaneous email written to her colleagues on the regulatory team, Dr. Gogova, Vice President of Regulatory Sciences, "challeng[ed] [the] assumption" that the "'flavor exploration' segment does not use the product for nicotine satisfaction." (PX1398 (Altria) at 001). Dr. Gardner agreed that the assumption was "not [reflective of] what the adult smokers are actually looking for." (Gardner (Altria) Tr. 3089). Rather, the scientists understood that the primary requirement for smokers who are looking to convert is nicotine satisfaction. (Gardner (Altria) Tr. 3089-90).

The next week, following additional conversations with the scientists, the portfolio assessment team prepared a revised framework. (Gardner Tr. 3091; RX0532 (Altria) at 001). That framework, which is discussed in greater detail in Respondents' proposed findings of fact, (RFF

¶¶ 738-42), concluded that MarkTen cig-a-like, Elite, Cync, and Apex—which all lacked salts—had "low" conversion potential. (RX0532 (Altria) at 005, 008, 010, 011; *see also* Gardner (Altria) Tr. 3092-94 (discussing slides for MarkTen and Elite)). MarkTen Bold, Nu Mark's only product with salts, was deemed to have "Low-Med" conversion potential, with the caveat that it was in a declining product format and did not have the "optimal ratio of nicotine and salts" to "provide expected nicotine satisfaction." (RX0532 (Altria) at 006). Notably, following the subsequent conversations, the brand representatives from Nu Mark and the scientists all agreed on those assessments, including the conclusion that Elite had low conversion potential for adult smokers looking to switch. (Gardner (Altria) Tr. 3092-94).

1315. On August 8, 2018, Baculis stated in an email that the results of Altria Home Use Tests ("HUTs") indicate that MarkTen "Elite has a role to play" in that it "should be able to peel off some of the folks that are using Juul but would really rather have something else" even though Elite could not compete "head to head with Juul where Juul is strong (immediate nicotine satisfaction)" because Elite and Juul have "different opportunities and strengths." (PX1141 (Altria) at 001).

Response to Proposed Finding No. 1315:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Baculis testified that the set of consumers who might prefer Elite to JUUL was a "small group of people" who were primarily interested in "a better inhale/exhale experience and . . . better-tasting flavors." (PX7014 Baculis (Altria) Dep. at 164-65). She further explained, "the vast majority of smokers were looking for nicotine satisfaction in a vapor product that would enable them to make that switch more easily from a cigarette to a vapor long term. Elite did not have that." (PX7014 Baculis (Altria) Dep. at 174). There is no evidence that the "small group of people" who might prioritize flavors and a better inhale/exhale experience could support a profitable product or that Nu Mark could demonstrate sufficient conversion potential to

demonstrate that the product was appropriate for the protection of public health, particularly given FDA's concern about flavors. (RFF ¶ 922).

1316. Baculis testified that Elite 1.0 could appeal to JUUL consumers that "would be willing to trade off a little bit of nicotine satisfaction" for "a better inhale/exhale experience" and "better-tasting flavors." (PX7014 (Baculis (Altria) Dep. at 164-65)).

Response to Proposed Finding No. 1316:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Complaint Counsel omits the remainder of Baculis's answer: "But you've got to remember, that was a small group of people. Most . . . of the people, particularly smokers, that were looking to get into or were already participating in the vapor category were really looking for that nicotine satisfaction that JUUL offered, but Elite 1.0 did not." (PX7014 Baculis (Altria) Dep. at 165-66). There is no evidence that the "small group of people" who might prioritize flavors and a better inhale/exhale experience could support a profitable product or that Nu Mark could demonstrate sufficient conversion potential to demonstrate that the product was appropriate for the protection of public health, particularly given FDA's concern about flavors. (RFF ¶ 922).

1317. In 2018, Altria was developing low-nicotine strength flavors for MarkTen Elite 2.0 to keep those flavors available for consumers that wanted them. (PX7016 (Jupe (Altria), at 129) ("[I]f we saw some traction over the next couple of years in Elite in the market with those pre-existing flavors, we didn't want to extract them from the market.")).

Response to Proposed Finding No. 1317:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the cited discussion further confirms that Altria had concluded that the version of Elite that was on the market would not get FDA approval. Jupe was asked, in the context of discussing a June 2018 presentation about the Elite PMTA, (PX1373 (Altria) at 007, 011), why Altria was "reformulating" the existing flavors for use in Elite 2.0 and he explained, "We had to get it through the FDA. So we had to reformulate it," (PX7016 Jupe (Altria) Dep. at 131). Altria

"did not feel comfortable with a lot of these flavors because of the stability questions." (PX7016 Jupe (Altria) Dep. at 131).

Second, Complaint Counsel ignores that around the time the relevant presentation was prepared Altria's scientists presented recent research on nicotine salts and concluded, "use of nicotine salts or addition of acids to achieve a certain pH is **required** for a satisfying and relaxing E-vapor experience similar to the cigarette smoking experience." (PX4504 (Altria) at 024 (emphasis in original)). Based on that conclusion the scientists recommended use of "nicotine salt technology" for all e-vapor products, "regardless of nicotine content." (PX4504 (Altria) at 024; *see also* PX4504 (Altria) at 019 (showing that an e-liquid with 2.5 percent nicotine by weight and 1.5 percent acid would result in significantly higher nicotine absorption than an e-liquid with 4 percent nicotine by weight and 1 percent acid)).

1318. Baculis testified that her "assumption was that the cigalike category would remain viable for a niche group of consumers." (PX7014 (Baculis (Altria) Dep. at 158-59)).

Response to Proposed Finding No. 1318:

The Proposed Finding is incomplete and misleading without additional context. *First*, even if there remained a "niche group of consumers" interested in cig-a-likes, as Complaint Counsel's own expert emphasized, firms like Altria have "economic incentives to invest in segments that are growing rather than shrinking." (PX5000 Rothman Report ¶ 94).

Second, a "niche" consumer following is not indicative of conversion potential. Baculis testified that when she left Nu Mark in late 218, it did not have a single product that delivered nicotine satisfaction to users. (PX7014 Baculis (Altria) Dep. at 115; *see also* PX7014 Baculis (Altria) Dep. at 118-19 (discussing MarkTen Bold)). And, in her opinion, a company cannot "succeed in [the e-vapor] category without [the] type of product" that offers immediate nicotine satisfaction. (PX7014 Baculis (Altria) Dep. at 128).

1319. Because "MarkTen cigalikes was [sic] meeting the needs of a small niche of consumers," Baculis "didn't see any reason why [Altria] should stop selling them." (PX7014 (Baculis (Altria) Dep. at 161)).

Response to Proposed Finding No. 1319:

The Proposed Finding is incomplete and misleading without additional context. Baculis testified that "[i]t was not [her] job, actually, to make recommendations of what should or should not be on the marketplace." (PX7014 Baculis (Altria) Dep. at 161). And the reason she personally favored keeping MarkTen in the marketplace was that, "It was the only thing we really had to sell, and that helped offset the cost for development. And plus, if you're not selling anything, I don't know why you'd need an operating company." (PX7014 Baculis (Altria) Dep. at 160). And, when an operating company like Nu Mark is downsized or shuttered, as it ultimately was, people like Baculis, as well as the team that reported to her, "no longer had a job." (PX7014 Baculis (Altria) Dep. at 291-92). The mere fact that Baculis personally favored keeping MarkTen cig-a-like in the market to preserve the operating company that employed her and her team says nothing about MarkTen's conversion potential.

1320. On September 7, 2018, Craig Schwartz sent several Altria colleagues a presentation titled "MarkTen Elite Potential Investment Justification Information" which included the results of a HUT study that showed that MarkTen Elite produced conversion rates comparable to or better than JUUL under certain circumstances, and he stated that the results "could support a decision to further invest in MarkTen Elite 1.0 – if that's what we decide to do." (PX4313 (Altria) at 001, 004).

Response to Proposed Finding No. 1320:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Schwartz did not write that the slide cited by Complaint Counsel, (PX4313 (Altria) at 004), could support a decision to invest in Elite. He was referring to the "information included in the attached," namely two separate PowerPoint presentations containing approximately a half dozen slides, (PX4313 Altria at 001, 004-06, 009-12).

Second, Complaint Counsel chose not to show the cited exhibit at trial, (CC Exhibit Index at 67), or in any deposition. The analysis is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question Altria's employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

The most the Court should consider is the limited witness testimony offered by Jupe, who testified about a slide containing much of the same data as the one cited by Complaint Counsel. (*Compare* PX4313 (Altria) at 004, *with* RX0496 (Altria) at 019). Jupe's testimony refutes the interpretation advanced by Complaint Counsel. Jupe explained that when the data is broken out to separate adult vapers (typified by study participants who had used a vaping product in the last seven days) from adult smokers (typified by those who had not used vapor within the past seven days), with the latter being the key demographic for measuring conversion potential, Elite had almost no impact on smokers until the five-week mark. (RX0496 (Altria) at 019; Jupe (Altria) Tr. 2251-52; *see also* PX7002 Schwartz (Altria) IHT at 110-11). JUUL, on the other hand, immediately began replacing cigarette smoking occasions in numbers that were statistically significant. (Jupe (Altria) Tr. 2251-52).

As Jupe explained, the five-week time lag for Elite illustrated why the product could not convert adult smokers. A pack-a-day smoker "would have to buy 35 pods and continue using them for five weeks to figure out that you could put your cigarettes down," which is "really unlikely" to happen in the marketplace. (Jupe (Altria) Tr. 2253). Consumers "don't go and buy 35 new products. The first one is going to tell you what you are going to need to know." (Jupe (Altria) Tr. 2253).

1321. In 2018, Altria published an "Actual Use Study" that involved giving MarkTen cigalike products to a sample of adult smokers over an eight-week period. (PX4357 (Altria) at 094-95) ("A Longitudinal Study to Assess the Actual Use of E-Vapor Products Currently Marketed as MarkTen | MarkTen Actual Use Study, Oct. 3, 2018).

Response to Proposed Finding No. 1321:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The "Actual Use Study," formally titled "A Longitudinal Study to Assess the Actual Use of E-Vapor Products Currently Marketed as MarkTen," is a 591-page scientific report written in scientific jargon with section headings such as "Protocol Deviation, "Study Stimuli," and "Final Sample Disposition." (PX4357 (Altria) at 001, 004). Complaint Counsel chose not to show the document at trial, (CC Exhibit Index at 68), or in any deposition. The study is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question Altria's employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

The most the Court should consider is the witness testimony offered by Dr. Gardner when asked about an email referencing the study, which refutes the interpretation advanced by Complaint Counsel. In the relevant email, Dr. Gogova writes, "[The] data we presented externally were only on 'per protocol analysis' which eliminated those who rejected the product after initial trial phase. Remember we recruited little over 2,000 folks at the beginning but the 'per protocol sample' was only ~600. So if we would scale the data to entire study sample, the conversion rates would be very different. Our justification for 'per protocol analysis' was that we wanted to test conversion only among those who did not reject the concept right from the beginning." (PX1891 (Altria) at 001). When asked about this language, Dr. Gardner explained, "The actual use study was a study performed for the PMTA, and per protocol, adult smokers were allowed to, I believe, try the product for a little while, and if they rejected it, they were removed from the actual use study, which required them to use the product for a few weeks. . . . What she's saying here is that study was specifically for the adult smokers in the study that didn't reject. *If we included the smokers that rejected it, which I'm guessing was about 1,400 out of 2,000 smokers, then the*

conversion potential, the interpretation of that would have been significantly less, smoker conversion." (PX7026 Gardner (Altria) Dep. at 179-80 (emphasis added)).

1322. None of the participants in Altria's "Actual Use Study" for MarkTen reported plans to quit smoking at the outset of the study, but "[b]y the end of the study, 77% of the Total Sample indicated that they would like to quit smoking. Of those, 39% reported plans to quit in the next 30 days, and of those, 89% reported currently trying to quit." (PX4357 (Altria), at 97).

Response to Proposed Finding No. 1322:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The "Actual Use Study," formally titled "A Longitudinal Study to Assess the Actual Use of E-Vapor Products Currently Marketed as MarkTen," is a 591-page scientific report written in scientific jargon with section headings such as "Protocol Deviation, "Study Stimuli," and "Final Sample Disposition." (PX4357 (Altria) at 001, 004). Complaint Counsel chose not to show the document at trial, (CC Exhibit Index at 68), or in any deposition. The study is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question Altria's employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

The most the Court should consider is the witness testimony offered by Dr. Gardner when asked about an email referencing the study, which refutes the interpretation advanced by Complaint Counsel. In the relevant email, Dr. Gogova writes, "[The] data we presented externally were only on 'per protocol analysis' which eliminated those who rejected the product after initial trial phase. Remember we recruited little over 2,000 folks at the beginning but the 'per protocol sample' was only ~600. So if we would scale the data to entire study sample, the conversion rates would be very different. Our justification for 'per protocol analysis' was that we wanted to test conversion only among those who did not reject the concept right from the beginning." (PX1891 (Altria) at 001). When asked about this language, Dr. Gardner explained, "The actual use study was a study performed for the PMTA, and per protocol, adult smokers were allowed to, I believe,

try the product for a little while, and if they rejected it, they were removed from the actual use study, which required them to use the product for a few weeks. . . . What she's saying here is that study was specifically for the adult smokers in the study that didn't reject. *If we included the smokers that rejected it, which I'm guessing was about 1,400 out of 2,000 smokers, then the conversion potential, the interpretation of that would have been significantly less, smoker conversion*." (PX7026 Gardner (Altria) Dep. at 179-80 (emphasis added)).

Were the Court to consider the study itself, the passage cited by Complaint Counsel is not indicative of conversion potential. It is describing the participants "quitting intentions," not their actual behavior. (PX4357 (Altria) at 097). At most it shows that study participants became more likely to want to quit smoking. But FDA looks not to aspirations but whether "existing users of tobacco products *will stop* using such products." (21 U.S.C. § 387g(a)(3)(B)(i)(II) (emphasis added)).

5. An E-Cigarette's Impact on Youth Initiation Is an Important Factor in the FDA's PMTA Process, and Altria's E-Cigarettes Did Not Raise Youth Initiation Concerns

1323. Altria's, JLI's, and third parties' ordinary course documents and their executives' testimony show that a relationship between an e-cigarette and youth initiation is a PMTA risk factor, but that Altria's products did not have a youth initiation problem and were not subject to that PMTA risk factor. (*See* CCFF ¶¶ 1324-52, below).

Response to Proposed Finding No. 1323:

The Proposed Finding is incomplete and misleading without additional context. A low risk of youth initiation is not sufficient to secure PMTA approval; the manufacturer must also demonstrate that the product is capable of converting adult smokers. (RFF ¶¶ 73-76; 112). Conversion is "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2585-86). "[I]f adult smokers don't convert to the product, you're not reducing harm to the population and to the adult smokers, so . . . the

product had no reason for being in the market." (Gardner (Altria) Tr. 2586; *see also* PX7017 Magness (Altria) Dep. at 279 ("If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")). From a PMTA perspective, "if a product is, like, super good at risk reduction and could be controlled in the manufacturing sense and so forth, but doesn't convert smokers, then it's a failure . . . ." (Murillo (Altria/JLI) Tr. 2954-55).

1324. Initiation refers to "a non-tobacco consumer, of any age, starting to use a tobacco nicotine product." (Quigley (Altria) Tr. 1987).

Response to Proposed Finding No. 1324:

Respondents have no specific response.

1325. Quigley testified that "as part of a PMTA, the -- the measure for whether a product is appropriate for the protection of public health . . . there's a calculation that needs to be supported by science, and that calculation is what is the product form the tobacco consumer was using, what product did they move to, what was the relative risk reduction that those users were exposed to, and if studies demonstrated initiation, that would be an offset to the -- to the reduction of constituents. So that was a -- if you think about reduction in constituents was a positive, initiation was a negative." (Quigley (Altria) Tr. 1986).

Response to Proposed Finding No. 1325:

Respondents have no specific response.

1326. Altria's goal was to have e-cigarette products that did not cause initiation. (Quigley (Altria) Tr. 1986).

Response to Proposed Finding No. 1326:

Respondents have no specific response.

1327. Willard testified that "a potential risk of youth usage is a relevant factor in a tobacco applicant's chances of getting a PMTA approval." (Willard (Altria) Tr. 1247). Willard testified that the FDA was "executing against this delicate balance that they were trying to achieve," which weighed e-cigarettes "promise to improve public health amongst adults . . . against the concern they [the FDA] had about increased levels of youth usage of e-cigarette or ENDS products." (Willard (Altria) Tr. 1362-63 (discussing RX0155 (FDA) at 004 (FDA Press Release, dated April 23, 2018)); *see also* Gardner (Altria) Tr. 2655).

Response to Proposed Finding No. 1327:

Respondents have no specific response.

a) Cigalikes Do Not Raise the Same Youth Vaping Concerns as Pod-Based Products, Which Can Be an Advantage in the PMTA Process

1328. On October 25, 2018, Willard sent a letter to FDA Commissioner Scott Gottlieb in which he wrote: "Based on the publicly available information from FDA and others, we believe that pod-based products significantly contribute to the rise in youth use of e-vapor products." (Willard (Altria) Tr. 1240 (discussing PX2022 (Altria) at 003).

Response to Proposed Finding No. 1328:

Respondents have no specific response except to note that, contrary to the section heading, cig-a-likes' shape was not necessarily an advantage in the PMTA process. Because cig-a-likes "look[] like a cigarette," that product format "unfortunately still carried some of the stigmas of smoking," (Begley (Altria) Tr. 1100), which impaired the ability of cig-a-likes to convert adult smokers to e-cigarettes: "[S]mokers who wanted to convert to non-combustible tobacco products did not want to appear to be smoking a cigarette, and so the form of the product was just wrong for conversion." (PX7036 Garnick (Altria) Dep. at 135; *see also* Willard (Altria) Tr. 1347 ("It turned out, people that are quitting cigarettes to pick up vapor don't want a vapor product that looks like a cigarette."); Jupe (Altria) Tr. 2228 (explaining that "gimmicky" looking cig-a-likes were the "wrong" format); Gardner (Altria) Tr. 2604 ("[A]dult smokers no longer wanted . . to look like they were smoking a cigarette and the stigma associated with that."); O'Hara (JLI) Tr. 624-25 (explaining that a cigarette shape "isn't ideal for people that are trying to switch from cigarettes"); PX7033 O'Hara (JLI) Dep. at 191 ("[Cig-a-likes] generally were not . . . a strong form factor for converting smokers.")). By contrast, pod-based products, by virtue of not looking like a cigarette, offer "an emotional benefit to an adult smoker, because they aren't viewed as a smoker. It really solves a problem for them." (Begley (Altria) Tr. 1079).

1329. An April 2020 FDA guidance document entitled "Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised)" states that "Of particular concern are the design features that appear to make the cartridge-based products so popular with young people.

> Attributes typically present in cartridge-based products include a relatively small size that allows for easy concealability, and intuitive and convenient features that facilitate ease of use, including draw activation, prefilled cartridges or pods, and USB rechargeability. Small products may allow youth to use the product in circumstances where use of tobacco products is prohibited, such as a school. . . . Additionally, depending on the size and shape of the product, it may also blend in with other equipment that is expected in that setting (*e.g.* , if the ENDS is shaped like a flash drive, for example, next to a computer, where an actual flash drive would be used), or it may otherwise go undetected because parents, teachers, or coaches do not recognize the product as an ENDS." (PX9112 (FDA) at 001, 017).

Response to Proposed Finding No. 1329:

Respondents have no specific response except to note that the FDA guidance document, which is from April 2020, post-dates the transaction by nearly 18 months, (PX9112 (FDA) at 001), and is not probative of Altria's motivations when it withdrew its pod products and flavored cig-a-likes in October 2018, (RFF ¶¶ 1003-03).

1330. JUUL is shaped like a USB or flash drive. (Crozier (Sheetz) Tr. 1555-56; Farrell (NJOY) Tr. 210-11); Begley (Altria) Tr. 1095.

Response to Proposed Finding No. 1330:

The Proposed Finding is incomplete and misleading without additional context. The publicly available information from FDA raised questions about pod-based products in general, not just JUUL. (Willard (Altria) Tr. 1240 (discussing PX2022 (Altria) at 003)). Pod products can vary in shape. (Huckabee (Reynolds) Tr. 385). Some are "rectangular in nature," including Reynolds's Vuse Alto and JUUL. (Huckabee (Reynolds) Tr. 385; Willard (Altria) Tr. 1348). Others are "more diamond-shaped," as Elite was. (Willard (Altria) Tr. 1348). And some are oval, like NJOY Ace. (Farrell (NJOY) Tr. 210).

1331. Altria's MarkTen and MarkTen Bold were cigalikes, meaning that they were narrow and tubular in nature, and they look similar to a cigarette. (Huckabee (Reynolds) Tr. 385; Farrell (NJOY) Tr. 210-211, 213-214; PX4029 (Altria) at 007; PX7026 (Gardner (Altria), Dep. at 48)).

Response to Proposed Finding No. 1331:

Respondents have no specific response except to note that, contrary to the section heading, cig-a-likes' shape was not necessarily an advantage in the PMTA process. Because cig-a-likes "look[] like a cigarette," that product format "unfortunately still carried some of the stigmas of smoking." (Begley (Altria) Tr. 1100), which impaired the ability of cig-a-likes to convert adult smokers to e-cigarettes: "[S]mokers who wanted to convert to non-combustible tobacco products did not want to appear to be smoking a cigarette, and so the form of the product was just wrong for conversion." (PX7036 Garnick (Altria) Dep. at 135; *see also* Willard (Altria) Tr. 1347 ("It turned out, people that are quitting cigarettes to pick up vapor don't want a vapor product that looks like a cigarette."); Jupe (Altria) Tr. 2228 (explaining that "gimmicky" looking cig-a-likes were the "wrong" format); Gardner (Altria) Tr. 2604 ("[A]dult smokers no longer wanted . . to look like they were smoking a cigarette and the stigma associated with that."); O'Hara (JLI) Tr. 624-25 (explaining that a cigarette shape "isn't ideal for people that are trying to switch from cigarettes"); PX7033 O'Hara (JLI) Dep. at 191 ("[Cig-a-likes] generally were not . . . a strong form factor for converting smokers.")). By contrast, pod-based products, by virtue of not looking like a cigarette, offer "an emotional benefit to an adult smoker, because they aren't viewed as a smoker. It really solves a problem for them." (Begley (Altria) Tr. 1079).

b) Low-Nicotine Strength E-Cigarettes Do Not Raise the Same Youth Vaping Concerns as High-Nicotine Strength E-Cigarettes, Which Can Be an Advantage in the PMTA Process

1332. [redacted] (PX3026 at 001, 019) (*in camera*).

[redacted] (PX3026 [redacted] at 019) (*in camera*).

Response to Proposed Finding No. 1332

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]. Complaint Counsel chose not to show it at trial, (CC Exhibit Index at 51), or in any deposition. The study is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question [redacted] employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

Second, Complaint Counsel has offered no evidence that [redacted] (21 U.S.C. § 387g(a)(3)(B)(i)(II); CCFF ¶ 1332). [redacted]

[redacted]

Conversion is "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2586). "[I]f adult smokers don't convert to the product, you're not reducing harm to the population and to the adult smokers, so . . . the product had no reason for being in the market." (Gardner (Altria) Tr. 2586; *see also* PX7017 Magness (Altria) Dep. at 279 ("If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")).

1333. [redacted] (PX3026 [redacted] at 025) (*in camera*).

Response to Proposed Finding No. 1333

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]. Complaint Counsel chose not to discuss it at trial, (CC Exhibit Index at 51), or in any deposition. The study is not self-explanatory and Complaint Counsel, which has foregone the opportunity to question [redacted] employees with knowledge about this study, should not be permitted to offer untested interpretations of it.

Second, [redacted] (21 U.S.C. § 387g(a)(3)(B)(i)(II); CCFF ¶ 1333). [redacted]

[redacted] Conversion is "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2586). "[I]f adult smokers don't convert to the product, you're not reducing harm to the population and to the adult smokers, so . . . the product had no reason for being in the market." (Gardner (Altria) Tr. 2586; *see also* PX7017 Magness (Altria) Dep. at 279 ("If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")).

1334. MarkTen Elite had a nicotine strength of 1.8 percent (PX4115 (Altria) at 010 (JUUL "Book of Knowledge" prepared by Altria in June 2018)).

Response to Proposed Finding No. 1334:

Respondents have no specific response except to note that, by contrast, JUUL had a 5 percent nicotine formula and used nicotine salts. (RFF ¶¶ 224, 1504).

1335. Altria's MarkTen cigalike products included nicotine strengths of 2.5 percent and 2.4 percent. (PX4357 (Altria) at 001 (MarkTen Actual Use Study)).

Response to Proposed Finding No. 1335:

Respondents have no specific response except to note that, by contrast, JUUL had a 5 percent nicotine formula, used nicotine salts, and was in the pod-based form that consumers overwhelmingly preferred. (RFF ¶¶ 217, 224, 1504).

c) E-Liquids Lacking Nicotine Salts Do Not Raise the Same Youth Vaping Concerns as E-Liquids With Nicotine Salts, Which Can Be an Advantage in the PMTA Process

1336. An April 2020 FDA guidance document entitled "Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization (Revised)" states that "[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) at 001, 021, 042).

Response to Proposed Finding No. 1336:

The Proposed Finding is incomplete and misleading without additional context. *First*, the guidance document also acknowledges that the effects of salts—higher nicotine exposure and faster rate of absorption, (RFF ¶¶ 618-20)—are important for adult smoker conversion. The sentence following the one cited in the Proposed Finding states, "However, for many individual addicted cigarette smokers, the potential for ENDS to act as a substitute for cigarettes, thereby encouraging smokers to seek to switch completely away from combustible cigarettes, may be dependent, in part, upon the product having acceptability and abuse liability more comparable to a cigarette." (PX9112 (FDA) at 021). Accordingly, FDA "refined its enforcement priorities . . . to focus on flavored, cartridge-based ENDS products (other than tobacco- and menthol-flavored). This approach strikes an appropriate balance between restricting youth access to such products, while maintaining availability of potentially less harmful options for current and former adult smokers who have transitioned or wish to transition completely away from combusted tobacco products." (PX9112 (FDA) at 021).

Second, the FDA guidance document, which is from April 2020, post-dates the transaction by nearly 18 months, (PX9112 (FDA) at 001), and is not probative of Altria's motivations when it withdrew its pod products and flavored cig-a-likes in October 2018, (RFF ¶¶ 1001-03).

1337. Dr. Gardner testified that nicotine salts in e-cigarettes create unique toxicological risks that have to be analyzed in the PMTA process. (Gardner (Altria) Tr. 2657-59).

Response to Proposed Finding No. 1337:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Dr. Gardner did not testify that nicotine salts were uniquely risky. He testified that "[a]ny chemical in an e-vapor product must be assessed for toxicological risk. Nicotine salts is an ingredient in the product and must be assessed." (Gardner (Altria) Tr. 2657-58).

1338. MarkTen Elite did not have nicotine salts. (Begley (Altria) Tr. 1084).

Response to Proposed Finding No. 1338:

Respondents have no specific response except to note that the Proposed Finding does not support the section's heading. Without nicotine salts, Elite could not convert adult smokers, as is "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2586).

1339. Other than MarkTen Bold Classic and MarkTen Bold Menthol, Altria's cigalike products did not have nicotine salts. (PX7013 (Brace (Altria), Dep. at 181)).

Response to Proposed Finding No. 1339:

Respondents have no specific response except to note that the Proposed Finding does not support the section's heading. Without nicotine salts, Nu Mark's cig-a-like products could not convert adult smokers, as is "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2586).

d) Non-Flavored E-Cigarette Products Do Not Raise the Same Youth Vaping Concerns as Flavored Ones, and Altria's Sales Were Mainly Non-Flavored

1340. On October 25, 2018, Willard sent a letter to FDA Commissioner Scott Gottlieb in which he wrote: "We believe underage use of e-vapor products is further compounded by flavors in these products that go beyond traditional tobacco flavors. This presents a challenge from a tobacco harm reduction perspective." (PX2022 (Altria) at 003).

Response to Proposed Finding No. 1340:

Respondents have no specific response.

1341. On October 25, 2018, Altria withdrew its flavored e-cigarette products, claiming that its actions were in response to the FDA's youth vaping concerns. (PX2172 (JLI), at 001, 019) (Altria's 2018 3Q Earnings Call Transcript).

Response to Proposed Finding No. 1341:

Respondents have no specific response except to note that the statement in the October 25 earnings call is an accurate description of one of the bases for Altria's decision to discontinue Nu Mark's e-cigarette products with non-traditional flavors. (RFF ¶¶ 917-51).

1342. Dr. Rothman assessed that Altria's e-cigarette sales of consumables were mainly non-flavored. (PX5000 at 064 (¶ 119) (Rothman Expert Report)).

Response to Proposed Finding No. 1342:

The Proposed Finding is incomplete and misleading without additional context. *First*, most of Altria's sales of non-traditional flavors were of cig-a-likes. As Professor Murphy explained in his report, "Altria had a relatively large share of its sales made up of cig-a-likes, and its cig-a-like sales had a higher share of tobacco and menthol flavored pods than its pod-based vaporizer cartridges. This, in part, accounts for the high percentage of Altria's sales that were made up of tobacco and menthol flavored cartridges in Dr. Rothman's calculation. However, cig-a-likes were declining in demand[.]" (RX1217 Murphy Report ¶ 157).

By contrast, Nu Mark's pod-based offering, Elite, was heavily dependent on non-traditional flavors and it is not clear that any of its cartridges could have remained on the market

in the wake of the flavor ban, which took effect in February 2020. (RFF ¶¶ 1470, 1474). Four of the five cartridge offerings for Elite indisputably would be barred by the flavor ban. (PX1647 (Altria) at 014 (listing Strawberry Brulee, Apple Cider, Hazelnut Cream, and Glacier Mint)). The fifth, "Sweet Original," was described by Altria as having "a balanced tobacco blend with honeysuckle and fruit flavors," (PX1647 (Altria) at 014), and it is not clear how FDA would have classified it, (PX9016 (FDA) at 002). What is clear is that, had Altria not discontinued all sales of its Elite product in October 2018, the flavor ban would have forced the company to discontinue selling nearly all or all of its MarkTen Elite pods beginning in February 2020. Even if Sweet Original had been allowed to remain on the market, "that flavor constituted less than one-quarter of MarkTen Elite sales and only 2.2 percent of Altria's total e-cigarette product sales in 2018." (RX1217 Murphy Report ¶ 53).

1343. [redacted]

Response to Proposed Finding No. 1343:

The Proposed Finding is incomplete and misleading without additional context. *First*, most of Altria's sales of non-traditional flavors were of cig-a-likes. As Professor Murphy explained in his report, "Altria had a relatively large share of its sales made up of cig-a-likes, and its cig-a-like sales had a higher share of tobacco and menthol flavored pods than its pod-based vaporizer cartridges. This, in part, accounts for the high percentage of Altria's sales that were made up of tobacco and menthol flavored cartridges in Dr. Rothman's calculation. However, cig-a-likes were declining in demand[.]" (RX1217 Murphy Report ¶ 157).

By contrast, Nu Mark's pod-based offering, Elite, was heavily dependent on non-traditional flavors and it is not clear that any of its cartridges could have remained on the market in the wake of the flavor ban, which took effect in February 2020. (RFF ¶¶ 1470, 1474). Four of the five cartridge offerings for Elite indisputably would be barred by the flavor ban. (PX1647 (Altria) at 014 (listing Strawberry Brulee, Apple Cider, Hazelnut Cream, and Glacier Mint)). The fifth, "Sweet Original," was described by Altria as having "a balanced tobacco blend with honeysuckle and fruit flavors," (PX1647 (Altria) at 014), and it is not clear how FDA would have classified it, (PX9016 (FDA) at 002). What is clear is that, had Altria not discontinued all sales of its Elite product in October 2018, the flavor ban would have forced the company to discontinue selling nearly all or all of its MarkTen Elite pods beginning in February 2020. Even if Sweet Original had been allowed to remain on the market, "that flavor constituted less than one-quarter of MarkTen Elite sales and only 2.2 percent of Altria's total e-cigarette product sales in 2018." (RX1217 Murphy Report ¶ 53).

Second, to the extent Complaint Counsel is implying that Altria's sales would have increased in a world without non-traditional flavored cartridges, that implication would be belied

by the evidence. Although Dr. Rothman claims that Altria's sales of non-traditional-flavored cig-a-likes "would have put Altria in a favorable position given the FDA's emerging concerns in 2018 about youth vaping and flavored products," (PX5000 Rothman Report ¶ 119), Dr. Rothman made no attempt to test whether the percent of tobacco and menthol flavored cartridges within a company's portfolio of cartridge sales prior to the flavor ban predicts sales or sales growth post flavor ban, (RX1217 Murphy Report ¶¶ 155-56). Professor Murphy's analysis shows there is no correlation between pre-flavor ban sales and post-flavor ban sales. For example, JTI, which had the highest share of tobacco and menthol flavored cartridges in 2018, accounted for only 2.2 percent of cartridge sales from January through September of 2020, after the flavor ban. (RX1217 Murphy Report ¶ 155).

1344. After Altria withdrew its flavored products, "approximately 80% of Nu Mark's e-vapor volume in the third-quarter of 2018 [remained] on the market." (PX2172 (JLI) at 019 (Altria's 2018 3Q Earnings Call Transcript)).

Response to Proposed Finding No. 1344:

Respondents have no specific response except to note that this illustrates how low Elite's sales were by confirming that the vast majority of Altria's sales were in the declining cig-a-like segment, (RFF ¶¶ 1324-29, 1459-63), which accounted for 90 percent of Altria's sales before it pulled its pod-based devices and non-traditional flavors, (RX1217 Murphy Report ¶ 12; Murphy Tr. 3106-07).

e) Altria Executives Consistently Testified That Altria Did Not Have a Youth Vaping Issue

1345. In May 2018, the FDA sent a letter to a number of e-cigarette manufacturers requiring them "to provide critical information so the agency can better examine youth use and product appeal" and to "tak[e] a hard look whether certain design features and product marketing practices are fueling the youth use of such products." (RX0156 (FDA) at 001)).

Response to Proposed Finding No. 1345:

Respondents have no specific response.

1346. The FDA's press release explained that the manufacturers that received the May 2018 letter were chosen because their products had "product attributes that overlap with those of JUUL, including . . . the use of e-liquids that contain nicotine salts with corresponding high nicotine concentration, [a] small size which makes these products easily concealable; and [p]roduct design features that are intuitive, even for novice users." (RX0156 (FDA) at 002).

Response to Proposed Finding No. 1346:

Respondents have no specific response.

1347. Willard testified that Altria did not receive the May 2018 FDA letter because MarkTen Elite "did not have those components." (Willard (Altria) Tr. 1368-69 (discussing RX0156 (FDA) at 002) ("Q. Your Elite pod product did not have those components, right? A. No. Unfortunately, it did not.")).

Response to Proposed Finding No. 1347:

The Proposed Finding is incomplete and misleading without additional context. Both the question posed to Willard and his answer were limited to one set of components—"use of e-liquids that contain nicotine salts with corresponding high nicotine concentration." (Willard (Altria) Tr. 1369 (discussing RX0156 (FDA) at 002)).

1348. On October 25, 2018, Willard sent a letter to FDA Commissioner Scott Gottlieb in which he wrote "we do not believe we have a current issue with youth access to or use of our pod-based products." (Willard (Altria) Tr. 1240-41 (discussing PX2022 (Altria) at 3).

Response to Proposed Finding No. 1348:

The Proposed Finding is incomplete and misleading without additional context. As Willard testified when asked about this passage from the letter at trial, Altria had no reason to believe that its products were attracting youth, particularly because its products were not "prominently featured . . . in the external research" on this issue. (Willard (Altria) Tr. 1241). "However," he added, "we couldn't be sure that there weren't some youth that were acquiring our products, we had a pretty good age verification system, but that doesn't mean that some of the products couldn't have been used by youth. But we just wanted to be clear with the FDA that it wasn't like we had evidence

that we were one of the primary products used by youth, but that didn't mean we couldn't help the FDA contribute to a set of actions that would help solve the problem." (Willard (Altria) Tr. 1241).

1349. When asked whether Altria had any data that suggested that Elite was contributing to the youth vaping epidemic, Magness testified "No, we did not with regard to Elite. Frankly, I think our statement was pretty clear too, that we didn't necessarily attribute the problem to our own products, but we didn't want to really have a risk of contributing to the issue." (PX7017 (Magness (Altria), at 194-95)).

Response to Proposed Finding No. 1349:

Respondents have no specific response.

1350. Pascal Fernandez testified that Altria had no evidence that its e-vapor products were used by minors. (PX7023 (Fernandez (Altria), Dep. at 77-78)).

Response to Proposed Finding No. 1350:

Respondents have no specific response.

1351. [redacted] (PX4274 (Altria) at 001, 003) (*in camera*)).

Response to Proposed Finding No. 1351:

Respondents have no specific response.

1352. Willard testified that Altria had no reason to believe youth were using MarkTen Elite. (Willard (Altria) Tr. 1423, 1426 ("Q. Now, did you have reason to believe that youth were using your product [MarkTen Elite]? A. We did not.")).

Response to Proposed Finding No. 1352:

The Proposed Finding is incomplete and misleading without additional context. Willard explained that, in assessing the regulatory prospects for Elite, Altria gave it a question mark on the "no unintended consequences" factor. (Willard (Altria) Tr. 1426 (discussing PX4149 (Altria) at 036)). As he explained, "the product had failed in the marketplace to such degree, I don't think our market research people felt like they had a big enough sample to know whether or not it was a youth problem or not, and out of an -- I think probably out of some conservatism, they said, listen,

we don't know yet. And I think that was probably a fair assessment." (Willard (Altria) Tr. 1426). Even so, Altria wanted to "help the FDA contribute to a set of actions that would help solve the problem." (Willard (Altria) Tr. 1241).

F. ALTRIA'S CLAIM THAT ITS DECISION TO EXIT THE E-CIGARETTE MARKET MERELY COINCIDED WITH THE TRANSACTION IS IMPLAUSIBLE

1353. Altria claims that it "did not withdraw its own products to facilitate a JLI deal. . ." (PX0027 (Altria) at 1 (Altria's Answers and Defenses)).

Response to Proposed Finding No. 1353:

Respondents have no specific response except to note that the evidence adduced at trial confirms that Altria did not withdraw Nu Mark's products to facilitate a JLI deal. (RFF ¶¶ 276-1214).

1354. Altria's and JLI's ordinary course documents and their executives' testimony show that Altria's claim it did not withdraw its products to facilitate a JLI deal is implausible. (*See* CCFF ¶¶ 1355-407, below).

Response to Proposed Finding No. 1354:

The Proposed Finding is inaccurate and is not supported by the cited proposed findings. The record evidence set forth in Respondents' proposed findings of fact overwhelmingly shows that Altria withdrew Nu Mark's products for independent business reasons. Altria first pulled Elite and non-traditional flavored MarkTen cig-a-like products in response to regulatory concerns about youth usage of those types of products: It did not make sense to create even a risk of youth initiation with those products where they were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 938-51). Altria subsequently pulled Nu Mark's remaining MarkTen cig-a-like products based on a determination that those products had no pathway to profitability and thus did not merit further investment; those remaining products were in a dying product segment, were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 1074-91). The record evidence further demonstrates

that JLI did not view Nu Mark's existing products as competitive threats and did not care if those products stayed on the market. (RFF ¶¶ 748-61). As a result, JLI never insisted that Altria remove Nu Mark's products as a pre-condition to the investment; to the contrary, JLI always contemplated that Nu Mark's products would stay on the market after the investment and that any disposition of those products would take place as part of FTC review. (RFF ¶¶ 1203-07). And, as explained in the responses to the proposed findings in this section, Complaint Counsel's attempt to show otherwise is based on a portrayal of the evidence that is inaccurate, incomplete, and misleading without additional context.

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 1355-407, Respondents incorporate their responses to those proposed findings herein.

1. Altria Executives Were Committed to Competing in the Closed-System E-Cigarette Market until JLI Indicated a Non-Compete Was Necessary for a Deal

1355. Altria executives involved in transaction negotiations began to deprecate Altria's e-cigarette products and to discuss discontinuing them after JLI indicated it wanted a non-compete, which surprised and confused Altria employees that were not involved in transaction negotiations. (*See* CCFF ¶¶ 1356-78, below).

Response to Proposed Finding No. 1355:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As detailed in Respondents' proposed findings of fact, (RFF ¶¶ 276-536, 562-747), in the months *before* the exchange of the first term sheet on July 30, 2018, Altria had identified significant issues with its e-vapor portfolio and was in the midst of overhauling its strategy for that product category:

- Altria had determined that cig-a-likes would not provide a path to profitability and that Nu Mark would need a successful pod product if it hoped to stem its substantial financial losses. (RFF ¶¶ 388-97). As a result, in 2017, Altria had acquired two

pod-based products, Elite and Cync, which it viewed at the time as the least bad options available to it. (RFF ¶¶ 276-340).

- After launching Elite in February 2018, Altria recognized that, despite aggressive promotions, Elite was not building the sustainable base of repeat customers necessary to become profitable. (RFF ¶¶ 407-59).
- In May 2018, Altria restructured its leadership to begin addressing its innovation failings and the new leaders were elevating previously unappreciated problems to senior leadership, including at a multi-day organizational review in late June. (RFF ¶¶ 579-95, 701-24).
- By June 2018, Altria had identified fundamental device defects with MarkTen cig-a-like and Elite that would disqualify the products from FDA approval, including that the products could not provide the nicotine satisfaction necessary to convert adult smokers and that they lacked dry-puff prevention necessary to avoid elevated formaldehyde levels through the end of the cartridge life. (RFF ¶¶ 351-67, 486-527, 596-700).
- As early as July 12, 2018, Altria had begun drafting a presentation to inform its Board of its determination that Nu Mark's existing e-vapor products could not obtain FDA approval to stay on the market. (RFF ¶¶ 725-36).
- Altria's senior leadership had begun to review a set of evolving proposals from Nu Mark's new CEO—beginning as early as mid-June 2018—about how the company could reorient its e-vapor strategy and overhaul its approach to innovation. (RFF ¶¶ 701-24).

In short, Altria was in the midst of candidly grappling with very serious challenges confronting its e-vapor business and did not suddenly begin "deprecat[ing]" its products for pretextual purposes upon the receipt of the first term sheet from JLI.

In addition, Complaint Counsel's insinuation that Altria employees not involved in the negotiations had a positive view of Nu Mark's e-vapor portfolio is contradicted by the record:

- **Brian Quigley**, then-CEO of Nu Mark, testified that Elite "did not have . . . what it needed to have to actually grow and compete in the marketplace," and "was not an important part of the product portfolio." (Quigley (Altria) Tr. 1961, 2031-32). Meanwhile the cig-a-like segment was "very small and getting smaller relative to the growth in pods. So it was . . . not meaningful in terms of what was driving change in the tobacco landscape." (Quigley (Altria) Tr. 2032). As a result, he had "no confidence" in Nu Mark's existing portfolio. (Quigley (Altria) Tr. 2070-71).
- **Richard Jupe**, Altria's Vice President of Product Development, testified that, by "early in the year," Altria "knew everything that [it] needed to know" about Elite, (Jupe (Altria) Tr. 2323), and concluded that it was not going to convert smokers and "was not the product [Altria] needed in [its] portfolio," (Jupe (Altria) Tr. 2154, 2156).
- **Bill Gardner**, Altria's Senior Principal Scientist, testified that he agreed that "none of the products that Altria had on the market -- so the MarkTen cigalike in regular and Bold and the Elite -- could . . . convert smokers or provide them the satisfaction necessary and ability to get through the FDA." (Gardner (Altria) Tr. 2590).
- **Craig Schwartz**, then-Senior Vice President of Operations at Nu Mark, testified that Altria was "getting [its] butt[] kicked week in and week out," the cig-a-like

market "was declining very quickly." (Schwartz (Altria) Tr. 1866), and Elite was "handicapped" because it lacked formulations that could "satiat[e]" adult smokers and fixing that would have required a PMTA, which meant Altria "would have been waiting for a long time." (Schwartz (Altria) Tr. 1921).

- **Michelle Baculis**, then-Director of Strategy & Brand Development at Nu Mark, testified that "the vast majority of smokers were looking for nicotine satisfaction in a vapor product that would enable them to make that switch more easily from a cigarette to a vapor [product] long term. Elite did not have that." (PX7014 Baculis (Altria) Dep. at 174). None of Nu Mark's products had that. (PX7014 Baculis (Altria) Dep. at 115).
- **Paige Magness**, then-Managing Director of Regulatory Affairs, prepared a presentation identifying key regulatory concerns with each of the e-vapor products in Nu Mark's e-vapor portfolio, including MarkTen cig-a-like and Elite, which both "fell short . . . on risk reduction and conversion," and did so without considering any potential investment in JLI. (PX7017 Magness (Altria) Dep. at 284-85, 290-93).
- **Karl Enters**, then-Senior Director of Product Integrity, wrote Garnick in June 2018 that "no one thinks we can get a PMTA on current Mark Ten product." (PX1890 (Altria) at 001; PX7026 Gardner (Altria) Dep. at 93).
- **Elizabeth Mountjoy**, then-Vice President of Corporate Strategy, wrote that "Nu Mark does not have any products that merit a full-blown PMTA." (RX0199 (Altria) at 001).

Some Altria employees may have had different reactions to some of the changes depending on their institutional interests, (PX7016 Jupe (Altria) Dep. at 261-62), but that is a natural dynamic in a large company, not evidence of pretext.

To the extent Complaint Counsel relies on Proposed Findings in CCFF ¶¶ 1356-78, Respondents incorporate their responses to those Proposed Findings herein.

1356. Garnick testified that he believed that Altria should remove its e-cigarette products from the market as early as June 2018, but that others at Altria did not share his view at the time. (Garnick (Altria) Tr. 1583, 1603). Garnick testified that MarkTen's leadership had no plans to stop selling MarkTen or MarkTen Elite as of June 2018. (Garnick (Altria) Tr. 1584-85).

Response to Proposed Finding No. 1356:

The Proposed Finding is incomplete and misleading without additional context. Garnick explained why he came to this view before others on Altria's leadership team: "Beginning in June, as I took over regulatory sciences and met with the scientists, I came of the view that our products were not converting smokers, were not making money." (PX7036 Garnick (Altria) Dep. at 16). "Every single product on the market was losing money, I was told. . . . And none of the products on the market were competing against JUUL effectively. And I was told that none of the products on the market were effective in converting smokers to nontobacco products. So given all of that, I was of the view that we should get out of that space." (PX7000 Garnick (Altria) IHT at 101-02). "And I think I reached that view [before others] because I came to regulatory science from the outside. These people worked extremely hard day in, day out on trying to fix these products, selling these products, and I came in with a fresh perspective, and that's what I saw." (PX7000 Garnick (Altria) IHT at 102).

Notably, as the Proposed Finding sets forth, Garnick reached this view in June 2018, *before* JLI sent Altria the first proposed term sheet and proposed a noncompete.

1357. In July 2018, a team of Altria employees met to establish a consensus on plans for Altria's e-cigarette portfolio and recommended that Altria continue marketing its MarkTen cigalike

products and MarkTen Elite while preparing PMTAs for improved versions of its cigalikes and MarkTen Elite 2.0. (PX1144 (Altria) at 001, 004).

Response to Proposed Finding No. 1357:

The Proposed Finding is incomplete and misleading without additional context. *First*, Complaint Counsel chose not to discuss the cited exhibit at trial, (CC Exhibit Index at 6), or in any deposition, so there is no testimony explaining the document. From the face of the document alone, it is not clear whether that the cited points about what to do with Nu Mark's e-vapor products were (1) recommendations for going forward, or (2) merely statements about what Nu Mark was doing at the time. In fact, the cover email suggests that these points were not recommendations, because it explains that the "next step [was] to use [the information collected in the slide deck] to help inform the 'portfolio assessment/recommendation'" that would be provided to Altria leadership. (PX1144 (Altria) at 001).

Second, the same group of employees had already assessed the conversion potential of Altria's products as part of their portfolio review, (*compare* PX1144 (Altria) at 001, *with* RX0532 (Altria) at 001), and concluded that each product in Nu Mark's portfolio—including MarkTen cig-a-like, MarkTen Bold, Elite, Cync, and Apex—had limited conversion potential. MarkTen cig-a-like, Elite, Cync, and Apex—which all lacked salts—were each rated as having "low" conversion potential. (RX0532 (Altria) at 005, 008, 010, 011; *see also* Gardner (Altria) Tr. 3092-94 (discussing slides for MarkTen and Elite)). MarkTen Bold, Nu Mark's only product with salts, was deemed to have "Low-Med" conversion potential, with the caveat that it was in a declining product format and did not have the "optimal ratio of nicotine and salts" to "provide expected nicotine satisfaction." (RX0532 (Altria) at 006). This was debilitating from a PMTA perspective because conversion is "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2586).

1358. During a July 2018 meeting between Scott Myers and major e-cigarette retailers, there was no discussion "of Altria exiting the e-vapor market" and no indication that Altria "wasn't willing to pursue PMTAs for e-vapor products." (Myers (Altria) Tr. 3397).

Response to Proposed Finding No. 1358:

The Proposed Finding is incomplete and misleading without additional context. As of July 2018, the Altria leadership, which was newly aware of the serious problems confronting its e-vapor business, (RFF ¶¶ 706-24), was in the midst of preparing a presentation for the board and assessing Nu Mark's portfolio, particularly the conversion potential of its e-vapor products, (RFF ¶¶ 725-47). So there were no updates to share with e-cigarette retailers at that time.

2. Altria Began to Take Steps to Discontinue Its E-Cigarette Business after JLI Indicated It Wanted a Non-Compete

1359. On July 30, JLI sent a term sheet to Altria asking Altria to commit to "divest," "contribute," or "cease to operate" its e-cigarette business as a condition to the transaction. (*See* CCFF ¶ 684, above).

Response to Proposed Finding No. 1359:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The July 30 term sheet did not "ask Altria to commit to 'divest,' 'contribute,' or 'cease to operate' its e-cigarette business as a condition of the transaction." Instead, the "Antitrust Clearance Matters" section of the term sheet proposed steps for the treatment of Altria's existing e-vapor assets following an investment in the context of FTC review of the investment, for the purpose of complying with any FTC requirements and facilitating HSR clearance for the transaction. (PX1300 (Altria) at 004-05; Pritzker (JLI) Tr. 690, 811; *see also* RFF ¶¶ 772-85).

By contrast, the July 30 term sheet included a proposed noncompete, located in the "Richard Support Obligations" section of the term sheet, that expressly contemplated that Nu Mark could continue to sell "MarkTen and MarkTen Elite prior to their divestiture or contribution as

described above" in the Antitrust Clearance section. (PX1300 (Altria) at 005-06; Pritzker (JLI) Tr. 820-23; *see also* RFF ¶¶ 787-91).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 684, Respondents incorporate their response to that Proposed Finding herein.

1360. On August 2, 2018, Quigley wrote to a group of Nu Mark colleagues: "I did tell Howard [Willard] tonight we are going to build the [E]lite business and he agreed we should do that work." (PX1174 (Altria) at 001.

Response to Proposed Finding No. 1360:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. At the time, Quigley was "halfway through [his] kind of strategic assessment process" and was speaking to Willard about his current thinking about the business. (Quigley (Altria) Tr. 1956). Although he knew that Nu Mark had "fundamental business gaps" and that "the products [it] had were not going to be successful," his thinking at the time was that Altria "needed to keep the MarkTen brand alive to build for the future." (Quigley (Altria) Tr. 1959).

Quigley's thinking about whether to keep Nu Mark's existing products on the market subsequently evolved. Following receipt of FDA's September 12, 2018 letter raising concerns about youth usage of e-vapor, he "was fully supportive of pulling Elite off the market" in response to FDA's letter. (Quigley (Altria) Tr. 1993). He thought it was the right decision "[b]ecause [Altria's] legacy as a company was to lead and be the most responsible tobacco company, and [he] believed it was the most responsible thing to do, and it, frankly, would give the FDA the ability to think about . . . its strategy to deal with flavor pod products and youth usage." (Quigley (Altria) Tr. 2078-79; *see also* PX7003 Quigley (Altria) IHT at 179-80 ("Q. Did you agree that this was the right decision to pull Mark Ten Elite off the market? A. At that point in time, given the circumstances, yes.")). And, when Altria ultimately closed Nu Mark in December 2018, Quigley

thought it was "the right business decision" because Nu Mark "didn't have the products . . . [and] was losing money." (PX7041 Quigley (Altria) Dep. at 131).

1361. On August 3, 2018, Quigley met with Willard, Gifford, Garnick, and Crosthwaite to provide a business update on Nu Mark. (PX7003 (Quigley (Altria), IHT at 123)). At that meeting, Gifford suggested the possibility of withdrawing MarkTen Elite from the market. (PX7003 (Quigley (Altria), IHT at 132-34 ("Q. When is the first time that you heard any of these four people [Howard, Gifford, Crosthwaite, Garnick] express that they might be interested in pulling Elite from distribution? A. The meeting that we discussed on the 3rd of August."))).

Response to Proposed Finding No. 1361:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Gifford's question was prompted by the JLI negotiations, much less the provisions in the July 30 term sheet. At the meeting in early August, Quigley explained that "competing in vapor was likely going to be an uphill battle with [Nu Mark's] portfolio" and developing new products would likely take "five to seven years" to bring to market because of the Deeming Rule. (Gifford (Altria) Tr. 2778). At that point, Gifford was "really pushing, even on the cigalike, was it worth investing in a space that was greatly declining." (Gifford (Altria) Tr. 2781). In his view, "[f]rom a financial standpoint, you always want to put your resources, because they are limited, both people resources and financial resources, against those areas where you can have the biggest bang for those dollars and people resources. And what we were seeing here is that we had significant gaps. Certainly we should invest to get ready for the future, but from this standpoint, what we had in the marketplace wasn't appearing to work." (Gifford (Altria) Tr. 2781-82). Given the continued delays in the profitability projections and Nu Mark's "capability gaps," Gifford thought Altria "really needed to assess whether [it] needed to free up those people and financial resources and invest them elsewhere." (Gifford (Altria) Tr. 2782).

Indeed, although Quigley testified that he was "caught . . . off guard" at the time by the question of whether to withdraw Elite, he was clear that he also understood why the question was

being asked. (Quigley (Altria) Tr. 1958-59). He had "told people that nicotine [satisfaction] . . . was the most important thing [Nu Mark] needed in [its] products and [Nu Mark] didn't have it. So [he] knew that -- that [Nu Mark] had these fundamental business gaps" and he "knew the products [Nu Mark] had were not going to be successful." (Quigley (Altria) Tr. 1959).

1362. Quigley testified that he was surprised by Gifford's suggestion at the August 3 meeting to discontinue Elite because "we had just launched it." (PX7003 (Quigley (Altria), IHT at 133-34)).

Response to Proposed Finding No. 1362:

The Proposed Finding is incomplete and misleading without additional context. Quigley testified that he was "caught . . . off guard" to be asked whether Altria should consider pulling Elite in August because he "had been very clear that [he] wanted to go through a three-month process culminating with [Nu Mark's] game plan where [he] could assess the building and bring forward [his] recommendations. And so when [the leadership] started having discussions about pulling Elite off the market, [he] was not done with [his] work . . . ." (Quigley (Altria) Tr. 1958-59). But Quigley also understood why the question was being asked: He had "told people that nicotine [satisfaction] . . . was the most important thing [Nu Mark] needed in [its] products and [Nu Mark] didn't have it. So [he] knew that -- that [Nu Mark] had these fundamental business gaps" and he "knew the products [Nu Mark] had were not going to be successful." (Quigley (Altria) Tr. 1959).

Moreover, when Quigley was asked in August 2018 about whether to pull Elite, Altria had not yet received FDA's September letter raising concerns about youth usage of e-vapor products. Quigley consistently testified that he agreed with the decision to withdraw Elite in light of the FDA letter. (Quigley (Altria) Tr. 1993; PX7003 Quigley (Altria) IHT at 179-80; *see also* RFF ¶ 946).

1363. Willard, Gifford, Garnick, and Crosthwaite were involved in transaction negotiations, while Quigley was not. (*See* CCFF ¶¶ 578-88, above).

Response to Proposed Finding No. 1363:

Respondents have no specific response.

1364. On August 10, 2018, Altria executives Willard, Gifford, Garnick, and Crosthwaite met with Quigley and members of his team. (Quigley (Altria) Tr. 1965-66). At that meeting, Willard, Gifford, Garnick, and Crosthwaite agreed to follow the recommendation of the Nu Mark team and move forward with implementing a new gasket for MarkTen Elite in order to fix issues with leaking pods. (PX1607 (Altria) at 001; PX7003 (Quigley (Altria) IHT at 145); PX1560 (Altria) at 002 (new gasket reduced percentage of pods leaking to less than 1%)).

Response to Proposed Finding No. 1364:

Respondents have no specific response except to note that [redacted]

1365. At the August 10, 2018 meeting between the Nu Mark team and Altria leadership, Willard, Gifford, Garnick and Crosthwaite decided to move forward with plans to submit PMTAs for MarkTen cigalikes. (Quigley (Altria) Tr. 1967-68; PX1607 (Altria) at 001; PX7003 (Quigley (Altria) IHT at 146)).

Response to Proposed Finding No. 1365:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Contrary to the Proposed Finding's characterization, the question up for discussion at the August 10 meeting was not whether to pursue a PMTA for MarkTen cig-a-likes generally. The question was "whether or not it made sense to continue the PMTA *for all 14 SKUs versus a smaller subset of those*." (PX7014 Baculis (Altria) Dep. at 257 (emphasis added); *see also* PX1013 (Altria) at 019 (explaining that the "options" under consideration for the PMTA were (1) "Maintain current plan," (2) "Eliminate 2 SKUs," or (3) "Eliminate multiple SKUs")). According to Michelle Baculis, then-Director of Strategy & Brand Development at Nu Mark, who led the PMTA

presentation, Altria decided at that time to continue with all the SKUs because, based on the way the research was structured, discontinuing SKUs would actually cause "an increase to the resources [Altria] would need to complete the PMTA." (PX7014 Baculis (Altria) Dep. at 254, 257; *see also* Quigley (Altria) Tr. 2051-52). The presentation contained no analysis of the PMTA work that remained to be done and the likelihood that it could be completed successfully. (PX1013 (Altria)). Even so, Altria's decision on August 10, 2018, to carry on with a full suite of PMTAs on August 10, 2018 is evidence that it did not take steps to discontinue its e-vapor business upon receipt of the July 30 term sheet.

1366. On August 11, 2018, Willard called Quigley and said he understood and agreed to Quigley's position that Altria should have an e-vapor platform on the market that Altria can grow from. (PX7003 (Quigley (Altria), IHT at 144-45)).

Response to Proposed Finding No. 1366:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. At the time of this exchange, Quigley was "halfway through [his] kind of strategic assessment process" and was speaking to Willard about his current thinking about the business. (Quigley (Altria) Tr. 1956). Although he knew that Nu Mark had "fundamental business gaps" and that "the products [it] had were not going to be successful," his thinking at the time was that Altria "needed to keep the MarkTen brand alive to build for the future." (Quigley (Altria) Tr. 1959; PX7003 Quigley (Altria) IHT at 145 (explaining that Willard told him on the phone that Willard understood Quigley was "not saying that Elite is going to fix our problems," but that Altria "should have a vapor platform that [it] can grow from")).

But Quigley was clear that his thinking subsequently evolved based on new developments and so did Willard's. Following receipt of FDA's September 12, 2018 letter raising concerns about youth usage of e-vapor, [redacted]

[redacted] And Quigley "was fully supportive of pulling Elite off the market" in response to FDA's letter. (Quigley (Altria) Tr. 1993). He thought it was the right decision "[b]ecause [Altria's] legacy as a company was to lead and be the most responsible tobacco company, and [he] believed it was the most responsible thing to do, and it, frankly, would give the FDA the ability to think about . . . its strategy to deal with flavor pod products and youth usage." (Quigley (Altria) Tr. 2078-79; *see also* PX7003 Quigley (Altria) IHT at 179-80 ("Q. Did you agree that this was the right decision to pull Mark Ten Elite off the market? A. At that point in time, given the circumstances, yes.")). In addition, when Willard announced the discontinuation of Nu Mark's other e-vapor products in December 2018, in light of their financial performance and regulatory restrictions that limited Altria's ability to improve those products, (RFF ¶¶ 1091-92), Quigley thought it was "the right business decision" because Nu Mark "didn't have the products . . . [and] was losing money," (PX7041 Quigley (Altria) Dep. at 131).

1367. On August 14, 2018, Quigley expressed concerns to Crosthwaite regarding a draft presentation for Altria's board of directors concerning Altria's e-cigarette portfolio prepared under Crosthwaite's direction. (Quigley (Altria) Tr. 1970-73 (discussing PX1008 (Altria), at 001)). Quigley informed Crosthwaite that while he understood why Crosthwaite was "telling the story" to the Board of Directors, the presentation was "clearly only the bad news version of the story" and that it contained some points that were "flat out incorrect." (Quigley (Altria) Tr. 1972-73 (discussing PX1008 (Altria), at 001))

Response to Proposed Finding No. 1367:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As Respondents explain in their proposed findings of fact, (RFF ¶ 875), Quigley acknowledges that "ultimately . . . the facts in the deck were accurate," (PX7041 Quigley (Altria) Dep. at 155-56). Quigley's chief complaint in his email was that the deck stated that "mark ten cig a like platform is declining," which he called "incorrect." (Quigley (Altria) Tr. 2061; PX1008 (Altria) at 001). As Quigley has clarified, however, "[r]elative to the overall category, [MarkTen

cig-a-like] was underperforming significantly," and—with respect to the objection in his email—a subsequent draft of the deck made clear that the cig-a-like platform was "growing in absolute terms," even if only marginally. (PX7041 Quigley (Altria) Dep. at 157; *see also* Quigley (Altria) Tr. 2061-62 (similar)). Quigley did not raise any concerns regarding the deck's ultimate conclusion that the product could not get FDA approval. (PX1008 (Altria) at 001). And, although he would have preferred to present the information himself, he too would have told the Board the bad news about the Nu Mark business, just as he shared that information with the Altria leadership in June 2018. (Quigley (Altria) Tr. 2066-67; RFF ¶¶ 701-05, 711-16).

1368. In his August 14, 2018 critique of the draft presentation to the Altria Board of Directors, Mr. Quigley reminded Crosthwaite that the MarkTen cigalike was "growing in volume" and was the "second fastest growing brand in terms of volume behind juul." (Quigley (Altria) Tr. 1973-74 (discussing PX1008 (Altria), at 001)).

Response to Proposed Finding No. 1368:

The Proposed Finding is incomplete and misleading without additional context. Quigley clarified that "[r]elative to the overall category, [MarkTen cig-a-like] was underperforming significantly," and—with respect to the objection in his email—a subsequent draft of the deck made clear that the MarkTen cig-a-like platform was "growing in absolute terms," even if only marginally. (PX7041 Quigley (Altria) Dep. at 157; *see also* Quigley (Altria) Tr. 2061-62 (similar)).

As for brand growth, Nu Mark's growth was driven by cig-a-likes, (RX0432 (Altria) at 004), for which it was expanding distribution, (PX9047 (Altria) at 003); but that product segment was rapidly declining in market share, (RFF ¶ 1325). Critically, in the pod-based category, which now accounts for 95% of the market, (RFF ¶ 1325), Altria lacked a successful product: Elite never achieved more than a 0.9 percent share of cartridge sales in the closed-system market, and its sales

were outperformed by both Reynolds's Vuse Alto and NJOY's Ace in their corresponding post-launch periods, (RFF ¶¶ 1465-68).

And Quigley acknowledges that "ultimately . . . the facts in the deck were accurate." (PX7041 Quigley (Altria) Dep. at 155-56; RFF ¶ 875).

1369. In his August 14, 2018 critique of the draft presentation to the Altria Board of Directors Quigley wrote to Crosthwaite: "I also have a few concerns about what I am hearing from your organization about vapor. What I am hearing sounds very disconnected from the latest discussions we've been having. I am hearing that 'the decision has been made to stop Nu Mark' and I know that decision has not been made." (PX1008 (Altria) at 001)).

Response to Proposed Finding No. 1369:

The Proposed Finding is incomplete and misleading without additional context. When asked about this email in his deposition, Crosthwaite testified that he had not heard that a decision had been made to stop Nu Mark and Quigley was likely "hearing speculation," probably prompted by the fact that "the organization certainly was realizing the challenges that [it] faced with [its] closed pod product both from a regulatory standpoint and, in [Crosthwaite's] opinion, more importantly, from a foundational design flaw." (PX7024 Crosthwaite (Altria/JLI) Dep. at 197).

And, as Quigley explained at trial, the person responsible for that decision was Howard Willard and, at the time, he had not decided to stop Nu Mark. (Quigley (Altria) Tr. 2058-59). To the contrary, as Quigley noted in his email, at the time, Altria was continuing with the Elite PMTA and Willard had recently approved the new gasket. (PX1008 (Altria) at 001).

1370. Quigley explained that he "thought K.C. [Crosthwaite] was playing a political game to advance his agenda [to do a deal with JLI] in the eyes of the board. So what I was pointing to here is, hey, I know that you're trying to kind of one-up me, and -- for your own gain, and I was very unhappy about it." (Quigley (Altria) Tr. 1973).

Response to Proposed Finding No. 1370:

The Proposed Finding is incomplete and misleading without additional context. Quigley explained that he was angry at Crosthwaite because Quigley wanted to be the one to present the

information: He "felt it was [his] responsibility being the CEO of the vapor business to present the facts that [his team] had uncovered, the challenge[d] situation of the business." (Quigley (Altria) Tr. 1971-72). "My business," he explained, "had a significant number of issues around it, around product design, around ability to get through PMTAs. . . . And I was concerned at this point that if someone is presenting your business to the board of directors[,] . . . talking [to the board] about what a disaster your business is, that's not going to be good for your career." (PX7003 Quigley (Altria) Dep. at 143-44). But, although Quigley would have preferred to present the information himself, he too would have told the Board the bad news about the Nu Mark business, just as he shared that information with the Altria leadership in June 2018. (Quigley (Altria) Tr. 2066-67; RFF ¶¶ 701-05, 711-16).

1371. On August 14, 2018, Murillo provided comments to Garnick on a draft presentation to the Altria Board of Directors, and included, with respect to Elite, the comment that "in fairness to Nu Mark, the "x" for conversion potential is an opinion based on current performance and comparison to Juul. It would be fair to have an x with a ?, especially if this encompasses possible Elite 2.0." (PX1600 (Altria) at 001-02 (email from Joe Murillo to Murray Garnick, Aug. 14, 2018)).

Response to Proposed Finding No. 1371:

The Proposed Finding is incomplete and misleading without additional context. Murillo's comment only confirms that the regulatory team at Altria believed that the *on-market* version of Elite lacked conversion potential. As for Elite 2.0, as Murillo explained at trial, "it didn't exist"; it was simply a "notionally upgraded version" but Altria did not yet know what it would look like because it was "still assessing Elite." (Murillo (Altria/JLI) Tr. 3050; *see also* Jupe (Altria) Tr. 2156 (explaining that, assuming all went well, Elite 2.0 was five to six years away from being introduced into the market)).

1372. On [redacted], Altria senior leadership held meetings with the Altria board at Altria's [redacted] (PX1344 (Altria) at 001, 003-04). Quigley and other Altria executives were at the Ranch during these meetings, but only Willard, Gifford, Garnick, and Crosthwaite were allowed into the meetings with the board, which was unusual.

(Quigley (Altria) Tr. 1974; PX7003 (Quigley (Altria), IHT at 150-51)). Even though he was at the Ranch, Quigley was not permitted to participate in the board meeting in which Nu Mark was discussed. (PX7003 (Quigley (Altria), IHT at 150)).

Response to Proposed Finding No. 1372:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the meeting to which Complaint Counsel is referring was not just about Nu Mark. The general topic was e-vapor, and the relevant topics were (1) the status of the e-vapor industry as a whole, the performance of JUUL, and the status of the negotiations with JLI, (PX4149 (Altria) at 005-026, 045-058), and (2) the regulatory prospects of Altria's e-vapor products, (PX4149 (Altria) at 027-44).

Second, there was nothing unusual about the set of attendees. Willard was the chair of the board and facilitated the discussions. (PX7024 Crosthwaite (Altria/JLI) Dep. at 202-03). Gifford, Garnick, and Crosthwaite were all responsible for portions of the presentation. (PX7024 Crosthwaite (Altria/JLI) Dep. at 202-03 (explaining that he presented "some of the materials at the August board meeting"); PX7036 Garnick (Altria) Dep. at 121-24 (explaining that he presented on "Regulatory Success Factors and Perspectives"); [redacted]). Quigley had been asked to review the presentation in advance, (RFF ¶ 876), but he was not one of the presenters. Instead, he presented Nu Mark's latest business strategy at the following meeting, in September. (RX1176 (Altria) at 001, 003). And Quigley was not singled out; although the entire leadership team was at the Ranch, none of the other Altria executives were in the meeting either. (PX7003 Quigley (Altria) IHT at 150).

1373. On September 11, 2018, Garnick requested a complete review and summary of all ongoing Nu Mark scientific activity as part of a broad review of Nu Mark's operations. PX1645 (Altria), at 1 (email from Bill Gardner, Sept. 11, 2018) ("I have been tasked with compiling all current work in the Regulation organization (specifically SS&A and RS) associated with reduced risk product efforts like e-vapor and heat not burn products. At a high level,

[Garnick] et. al. want to understand how our resources are being utilized across the many reduced risk product projects, for example e-vapor, oral tobacco, due diligence, commercial product support (e.g. PPCMS), foundational science, etc."); PX1646 (Altria) at 001-02 (email from Murray Garnick, Sept. 12, 2018)).

Response to Proposed Finding No. 1373:

The Proposed Finding is incomplete and misleading without additional context. As the email explains, the purpose of the review as to "understand how [Altria's] resources [were] being utilized across the many reduced risk projects," not just e-vapor products. (PX1645 (Altria) at 001). Going back as early as March 2018, Garnick had been particularly concerned about "prioritization" and "creat[ing] a realistic schedule that addressed business plans." (Garnick (Altria) Tr. 1704). As he explained, "people wanted to work on, you know, all these things at the same time, and as a result, things were not getting done." (Garnick (Altria) Tr. 1704). This became a particular concern in early September, when Altria's leadership began to plan for the Growth Teams, which would be tasked with developing a leapfrog product and would require a substantial commitment of resources. (RFF ¶¶ 898-903, 906-08). To launch the Growth Teams, Altria needed to "to take [its] best talent, move them to these teams, which means [it had] to stop additional work, and [it] would hit bottlenecks downstream if [it] were continuing to do all this work. So [Altria] had to focus [its] work and start putting [its] resources on the projects that made the most sense." (Jupe (Altria) Tr. 2308).

1374. On September 22, 2018, Crosthwaite sent Quigley a draft "RHP [Reduced Harm Product] Ranch Presentation" for Altria's board of directors, which had a slide titled "Nu Mark – 2019 work realignment" which included a column "Continues" with entries for "Optimized MarkTen Support," "MarkTen cig-a-like PMTA," and "Elite 2.0 HUT [Home Use Test]," and a column titled "Stops/Changes" with entries for "Apex," "VIM," "Cync," and "Hudson" development, but made no mention of ceasing commercialization or PMTA development for MarkTen's cigalike products or MarkTen Elite. (PX1316 (Altria) at 001, 042).

Response to Proposed Finding No. 1374:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In early September, the regulatory team was in agreement that work on Elite 1.0 and 2.0, including PMTA work, as well as the MarkTen Bold line extensions, should be discontinued. (RX0701 (Altria) at 001; *see also* PX7015 Gogova (Altria) Dep. at 100-01; RFF ¶¶ 910-13). The reason for this was to give the soon-to-be-announced Growth Teams "full autonomy" over what research work to pursue. (PX1951 (Altria) at 001; RFF ¶ 967). Quigley was fully supportive of the decision to stop work on the Elite PMTA; he agreed on September 14 that the work should stop. (RFF ¶ 912; RX0319 (Altria) at 001). And Willard officially signed off on stopping the work on September 17. (RFF ¶ 913).

1375. In October 2018, Dr. Gardner testified that Altria's leadership team developed growth teams "to focus on the development of long-term e-vapor products that would be more successful in converting adult smokers" and also announced "that all current efforts on e-vapor products development were to stop, excluding the MarkTen PMTA program, which included the BVR 2.8, and that was to free up resources, so that the resources available could react quickly to the growth team requests." (PX7026 (Gardner (Altria), Dep. at 164-65)).

Response to Proposed Finding No. 1375:

Respondents have no specific response except to note that the transition to the Growth Teams is a reflection of Altria's determination that Nu Mark's existing products were failures. (RFF ¶ 900).

1376. Richard Jupe testified that Altria's creation of growth teams prompted mixed reactions among its employees, with some Altria employees expressing surprise that years' worth of work was being discarded. (PX7016 Jupe (Altria), Dep. at 261-62) ("I would say it was mixed. I think any change is going to bring mixed reviews. There were some folks that I recall that were happy about the fact that we were changing our approach to PD [product development] . . . And there were those that were immensely disappointed as far as this is the work I've been doing for the last X number of years. I thought we were doing well. What the heck is going on.")).

Response to Proposed Finding No. 1376:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. There is no support in the cited testimony that Altria employees felt that years' worth of work was being discarded. As Jupe explained in testimony that Complaint Counsel omitted with an ellipses, the reason some employees were "immensely disappointed" was that, in reorganizing for the Growth Teams, Altria was "taking away some of the responsibilities" of certain employees and shifting them to the Growth Teams. (PX7016 Jupe (Altria) Dep. at 262; *see also* PX7014 Baculis (Altria) Dep. at 290-92 (discussing the difficulty of learning that although it was previously her job to "help provide the right pipeline [of] products," following the creation of the Growth Teams, she "no longer had a job" and her team no longer had jobs)).

1377. On October 5, 2018, Murray Garnick stopped an attempt by Altria employees to resume MarkTen Elite 2.0 high nicotine research and expand MarkTen Bold flavors. (PX1951 (Altria) at 001 ("We just killed it. Brian [Quigley] said ok. Lets [sic] not resurrect it."); PX1954 (Altria) at 001-03 ("We are not expanding MarkTen Bold flavors. That should stop. And it should stop forever.")).

Response to Proposed Finding No. 1377:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Garnick did not stop an attempt by Altria employees to resume research. As part of prioritizing ongoing research to free up resources for the Growth Teams, Quigley asked Jupe and Garnick for their thoughts on whether to carry on with research scheduled for the following week on e-liquid formulas. (PX1951 (Altria) at 002). Garnick did not take a position one way or another because it "depend[ed]" on what the research entailed. (PX1951 (Altria) at 001). As he explained, "We just promised the [Growth] [T]eams full autonomy and I don't want to violate that first thing out of the box. So if it is at all possible, I would stop it. However, we need to be reasonable -- if a substantial amount of money would be wasted, and if the research is almost done, I would agree to finishing it up." (PX1951 (Altria) at 001; *see also* PX7016 Jupe (Altria) Dep. at 259). Jupe

agreed with that assessment, as did Quigley. (PX1951 (Altria) at 001). The same day Garnick wrote to Dr. Gogova, one of the Growth Team heads, and repeated the view that the Growth Teams should make the decisions about what research to conduct: "[W]hy wouldn't we just stop it and then your team can assess whether you want to do it later? I don't like to arrogate the decision to the four of us. Its not our decision to make. If you think it's the greatest research in the world to conduct ever, I would still stop it and leave it to your committee." (PX1954 (Altria) at 001-02).

1378. Gardner testified that, as of October 10, 2018, Altria was performing stability studies on MarkTen Elite that it viewed as necessary to for the product "to remain in the market" even though Altria "had decided sometime in September to stop working on the PMTA for Elite." (PX7026 (Gardner (Altria), Dep. at 167-70); PX4197 (Altria) at 001-02).

Response to Proposed Finding No. 1378:

The Proposed Finding is incomplete and misleading without additional context. In early September, the regulatory team was in agreement that work on Elite 1.0 and 2.0, including PMTA work, as well as the MarkTen Bold line extensions, should be discontinued. (RX0701 (Altria) at 001; *see also* PX7015 Gogova (Altria) Dep. at 100-01; RFF ¶¶ 910-13). The cited testimony from Gardner confirms that PMTA work for Elite had stopped. (PX7026 Gardner (Altria) Dep. at 169). But, at that time, Altria still intended to keep Elite 1.0 on the market, and as "a product stewardship requirement," "need[ed] to understand what the consumer [was] getting." (PX7026 Gardner (Altria) Dep. at 169).

Following the receipt of the September 12 letter from FDA, Altria leadership made a tentative decision to withdraw Elite from the market in light of its lack of conversion potential and FDA's concerns about youth issues. (RFF ¶¶ 917-51). But, because this decision might be upsetting to the Altria employees who were affected by it and was of potential importance to investors, Altria did not announce that decision internally or externally until October 25, as part of its regularly scheduled earnings call. (RFF ¶¶ 949, 1005-06).

3. Altria's Decision to Suspend MarkTen Elite Was Announced after Transaction Negotiations Were Well Advanced

1379. Altria and JLI's transaction negotiations were well advanced on October 25, 2018, when Altria announced its decision to suspend MarkTen Elite. (*See* CCFF ¶¶ 788-824, above).

Response to Proposed Finding No. 1379:

Respondents have no specific response except to note that negotiations were not completed in October, and the parties had not reached a final agreement. To the contrary, the companies had not even begun conducting due diligence or drafting definitive deal documents, (RFF ¶¶ 1103-06), and among other issues, the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 788-824, Respondents incorporate their responses to those Proposed Findings herein.

1380. In October 2018, Altria and JLI executives had several in-person meetings to discuss the proposed transaction. (*See* CCFF ¶¶ 788-824, above).

Response to Proposed Finding No. 1380:

The Proposed Finding is incomplete and misleading without additional context. The cited Proposed Findings discuss in-person meetings that occurred on October 20, October 28, and October 29. (CCFF ¶¶ 805, 817-24). But, beyond noting that the parties reached alignment on terms on October 29, Complaint Counsel offers no evidence of what was discussed. (CCFF ¶¶ 805, 817-24).

Further, as Valani explained at trial, negotiations were not complete and the parties did not have a final agreement after the October 29 meeting: "Of course, you know, there was . . . a term sheet, and following that there still needed to be due diligence and documentation, et cetera, but I think it was a rare event that we actually had a productive meeting where there was alignment." (Valani (JLI) Tr. 949).

In addition to the need to conduct due diligence and draft definitive deal documents, (RFF ¶¶ 1103-06), the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what

> that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 788-824, Respondents incorporate their responses to those Proposed Findings herein.

1381. On October 25, 2018, Willard stated to investors on an earnings call that even though Altria had suspended MarkTen Elite and Apex, "we fully intend to offer a compelling portfolio of e-vapor products for adult smokers and vapors, through the FDA's product review pathways or when under age use of vapor is addressed" and emphasized that approximately 80% of Altria's e-cigarette volume would remain on the market. (PX9082 (Altria) at 003 (Altria 3Q 2018 Earnings Call Transcript)).

Response to Proposed Finding No. 1381:

Respondents have no specific response except to note that the Proposed Finding confirms that, as of October 25, Altria had not decided to discontinue Nu Mark's remaining MarkTen cig-a-likes or discontinue the Growth Teams. (RFF ¶¶ 1007, 1074-90).

1382. Days later, on October 29, 2018, Altria and JLI exchanged a final transaction term sheet and substantially agreed on transaction terms. (*See* CCFF ¶¶ 820-25, above).

Response to Proposed Finding No. 1382:

The Proposed Finding is incomplete and misleading without additional context. As Valani explained at trial, negotiations were not complete and the parties did not have a final agreement

after the October 29 meeting: "Of course, you know, there was . . . a term sheet, and following that there still needed to be due diligence and documentation, et cetera, but I think it was a rare event that we actually had a productive meeting where there was alignment." (Valani (JLI) Tr. 949).

In addition to the need to conduct due diligence and draft definitive deal documents, (RFF ¶¶ 1103-06), the most fundamental term of any purchase—price—had not yet been resolved. As Pritzker testified at trial, settling on an approximate deal structure was the precursor to negotiating on price:

> We were trying to . . . develop a structure that would work, hoping that we would be able to narrow the valuation of the pricing at some point, but the question is what's the most difficult to do, you know, what's the chicken or what's the egg, and at this point we didn't have a price that we had agreed upon. We were moving towards what might be . . . a mutually agreeable structure.
>
> So perhaps we should have been trying harder to agree on price, but we were definitely not there. I think that Altria's view and ours probably was that if we could agree on price, then this structure would approximately work, no matter what that valuation was, and if we couldn't agree on price, then none of this was relevant anyway.

(Pritzker (JLI) Tr. 833-34; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until December 2018. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 820-25, Respondents incorporate their responses to those Proposed Findings herein.

4. Altria's Announcement That It Would Discontinue Commercialization of MarkTen Came Only Days before the Parties Announced the Transaction

1383. A December 1, 2018, draft Altria presentation prepared by Altria management for Altria's board indicates that "management recommends ceasing support for all MarkTen and Green Smoke cig-a-like products," and also informed the board that Altria was continuing negotiations with JLI on a potential acquisition and that the parties had agreed to "selected transaction terms," including "Altria commits to conduct e-vapor operations exclusively through Tree [JLI]." (PX4234 (Altria) at 004, 016, 017).

Response to Proposed Finding No. 1383:

The Proposed Finding is incomplete and misleading without additional context. In a section of the presentation entitled "Nu Mark Update," Altria noted that it had pulled its pod-based products on October 25 while keeping its cig-a-like products on the market but, "[u]pon further consideration, management [was] recommend[ing] ceasing support for all MarkTen and Green Smoke cig-a-like products." (PX4234 (Altria) at 004). As the slide explained, Nu Mark's three-year plan "forecast[ed] aggregate losses of ~[230] million; [and the] products [were] not forecasted to break even in [the] current [three-year plan] cycle." (PX4234 (Altria) at 004). In addition, the products had "[l]ow adult smoker and vaper conversion rates." (PX4234 (Altria) at 004). As a result, the slide noted, "[f]inancial and other resources can be more effectively used to invest in 'leap-frog'/next generation products and technologies." (PX4234 (Altria) at 004).

A separate portion of the presentation, entitled "Tree Update," (PX4234 (Altria) at 015), summarized the status of the negotiations: The parties had "agreed to non-binding terms on October 29th" but, as the slide emphasized, "[d]ue diligence [was] currently underway" and "a potential deal with Tree [was] still highly uncertain and subject to many factors." (PX4234 (Altria) at 016).

1384. As early as December 4, 2018, Altria and JLI were working on a joint press release to announce the transaction. (PX7011 (Valani (JLI), IHT at 133 (discussing PX2130 (JLI), at 002); *see also* CCFF ¶ 841, above).

Response to Proposed Finding No. 1384:

The Proposed Finding is incomplete and misleading without additional context. Negotiations were not complete in early December, and thus there was no agreement between the parties at that time. (*See* PX7021 Pritzker (JLI) Dep. at 158-59; PX7025 Burns (JLI) Dep. at 178-81; *see also* RFF ¶¶ 1111-25). As late as December 15, disputes over drafting the press release cited by Complaint Counsel threatened to derail the deal: Garnick advised his colleagues that the "deal may not survive the day" in light of a dispute over how to present the companies' posture toward cigarettes in the draft press release, which was a "walk away point" for Altria. (RX0910 (Altria) at 001-02; *see also* PX4167 (Altria) at 010 (Dec. 15 text message from Willard to Devitre mentioning the press release and other disputes and stating, "[i]f they do not give . . . the deal will not proceed")).

Other issues also remained unsettled. In fact, the most fundamental term of any purchase—price—had not yet been resolved. Valuation was "an eleventh-hour issue" that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; PX4167 (Altria) at 010 (Dec. 16 text message from Willard to Devitre: "We reached an impasse tonight on value[.]"); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on valuation")). Further, as Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130).

1385. Altria announced that it would discontinue its e-cigarette business on December 7, 2018. (*See* CCFF ¶ 848, above).

Response to Proposed Finding No. 1385:

The Proposed Finding is incomplete and misleading without additional context. Altria announced the discontinuation of not just its e-vapor products, but also its oral nicotine-containing

product, Verve, which would not have been included in the noncompete under discussion between the parties. (PX9080 (Altria) at 001; RFF ¶ 1094; *see also* PX7036 Garnick (Altria) Dep. at 221).

As the press release explained, Altria's decision was "based upon the current and expected financial performance of these products, coupled with regulatory restrictions that burden Altria's ability to quickly improve these products. The company will refocus its resources on more compelling reduced-risk tobacco product opportunities." (PX9080 (Altria) at 001). Altria decided to stop making these products due to poor market performance and a need for cost savings to fund either the Growth Teams or, if the parties came to an agreement, the JLI investment. (*See* RFF ¶¶ 1074-98).

But Altria did not make this decision in response to any demand from or agreement with JLI, (*see* Gifford (Altria) Tr. 2774, 2843-44)—to the contrary, it was done for "[s]eparate, independent business reasons," (Gifford (Altria) Tr. 2850). As Willard explained, Altria was "making hard decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products" because "[it was] not in the business of losing money; [it was] in the business of making money." (Willard (Altria) Tr. 1460; *see also* Gifford (Altria) Tr. 2841 ("[L]et's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space."); PX7024 Crosthwaite (Altria/JLI) Dep. at 283 (recalling Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform"); PX7031 Willard (Altria) Dep. at 280-81; [redacted]).

1386. On December 18, 2018, 2018 at 11:59 p.m. Altria stopped selling its MarkTen e-vapor products online, though they remained in stores while supplies were available. PX2459

(JLI) at 001 (email from markten@mktg.markten.com, Dec. 13, 2018); PX7033 (O'Hara (JLI), Dep. at 177-178) (authenticating PX2459); *see also* CCFF ¶ 858, above).

Response to Proposed Finding No. 1386:

Respondents have no specific response.

1387. [redacted] (PX1347 (Altria) at 001-17 (*in camera*) (Minutes of Meeting of the Board of Directors of Altria Group, Inc., Dec. 19, 2018); PX2604 (JLI) at 001-8 (Minutes of a Meeting of the Board of Directors of JUUL Labs, Inc., Dec. 19, 2018); *see also* CCFF ¶ 859, above).

Response to Proposed Finding No. 1387:

Respondents have no specific response.

1388. [redacted] (PX1347 (Altria) at 017-18) (Minutes of Meeting of the Board of Directors of Altria Group, Inc., Dec. 19, 2018); *see also* CCFF ¶ 860, above).

Response to Proposed Finding No. 1388:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted] The products had already been discontinued by the time of the meeting in two separate public announcements: first in October and then in early December 2018. (RFF ¶¶ 1001-05, 1091). On December 5, Altria leadership told the Board that it was preparing a cost reduction program. (PX1348 (Altria) at 002). Gifford explained that Altria was seeking annual savings in the range of $300-600 million and observed that the savings would "include, in part, the termination of *MarkTen*, *Green Smoke* and *Verve* commercialization efforts and existing low-return projects across the Company and its subsidiaries as well as headcount reductions." (PX1348 (Altria) at 002). At that same meeting, Altria's leadership informed the board of "the decision to terminate the commercialization of *MarkTen*, *Green Smoke* and *Verve*, including the expected financial performance of these products and FDA-related regulatory considerations."

(PX1348 (Altria) at 002). [redacted]

1389. Altria and JLI announced their transaction on December 20, 2018. (PX2134 (JLI) at 001 (email from Kevin Burns, Dec. 20, 2018) ("Today, we have been joined by an unlikely - and seemingly counterintuitive - investor in our journey. Altria today announced a minority investment of $12.8 billion into JUUL for a 35% ownership in the company along with services to accelerate our mission."); *see also* CCFF ¶ 861, above).

Response to Proposed Finding No. 1389:

Respondents have no specific response.

5. Altria Executives Explicitly Linked the Discontinuation of MarkTen's Products to the Transaction

1390. Altria's and JLI's ordinary course documents and their executives' testimony confirm the relationship between Altria's decision to withdraw its products and the JLI deal. (*See* CCFF ¶¶ 1391-407, below).

Response to Proposed Finding No. 1390:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Throughout the second half of 2018, Altria was pursuing "two pathways" to try to achieve success in the e-vapor industry: internal development of leapfrog products or a potential investment in JLI. (RFF ¶ 1074). Altria pursued these two paths because it realized in the summer of 2018 that Nu Mark could not achieve commercial or regulatory success with its existing portfolio of products. (RFF ¶¶ 701-24, 839-51). Either path would require additional money, and Altria's leadership decided to discontinue products that were losing money and had no path to profitability, to create cost savings that could be used to fund either the Growth Teams or the JLI deal. (RFF ¶¶ 1074-92). But Altria discontinued its products not knowing whether a transaction with JLI would succeed and knowing full well that it might simply be "out" of the e-vapor industry for "five to seven years." (Gifford (Altria) Tr. 2799; *see also* Gifford (Altria) Tr. 2841-42). But

there is no evidence that Altria discontinued its e-vapor products as part of an agreement with JLI. (RFF ¶¶ 1151-214).

1391. On June 9, 2018, Jupe wrote an email to Crosthwaite in which he stated: "I know you raised the question as to the role of [MarkTen] Elite going forward. I too question its role in the portfolio especially considering a successful outcome with project Tree." (PX1086 (Altria) at 001 (email from Richard Jupe to K.C. Crosthwaite, June 9, 2018)).

Response to Proposed Finding No. 1391:

The Proposed Finding is incomplete and misleading without additional context. *First*, the email confirms that well before the exchange of term sheets with JLI, which began on July 30, Altria was questioning whether to continue investing in Elite. As Jupe explained when asked why he questioned the role of Elite in Nu Mark's portfolio, the "Elite product was not a product that we found to be satisfying, and in our opinion -- my opinion, especially -- we didn't think this was going to be a product that was going to convert or switch smokers, because it lacked that nicotine satisfaction that really you can only ascertain through the introduction of salts. And, of course, Elite didn't have that." (Jupe (Altria) Tr. 2154; *see also* PX7016 Jupe (Altria) Dep. at 245-47).

Second, Jupe was not involved in or kept informed about the JLI negotiations. (Jupe (Altria) Tr. 2152). His working assumption up until the transaction announcement on December 20, 2018, was that Altria would buy JLI outright, instead of merely making a minority investment. (Jupe (Altria) Tr. 2160; PX7016 Jupe (Altria) Dep. at 247-48). Accordingly, he assumed that "acquisition and ownership of the JUUL product . . . wouldn't require additional work on [Altria's] end to modify Elite" because "[i]f you've already got the best product, there's no reason to continue in development." (Jupe (Altria) Tr. 2154; *see also* PX7016 Jupe (Altria) Dep. at 247). But the fact that Altria was simultaneously planning for two possible scenarios in no way evidences that there was a conspiracy between Altria and JLI for Altria to withdraw its existing e-vapor

products as a condition of the transaction. The evidence overwhelmingly shows that there was no such agreement. (RFF ¶¶ 1151-214).

1392. Jupe testified that he assumed as of June 2018 that if Altria acquired JLI, Elite would not be "a necessary product" and that he viewed Elite as having a "role as a contingency plan for Project Tree." (PX7016 Jupe (Altria), Dep. at 247-49 (discussing PX1086 (Altria) at 001)).

Response to Proposed Finding No. 1392:

The Proposed Finding is incomplete and misleading without additional context. Jupe was not involved in or kept informed about the JLI negotiations. (Jupe (Altria) Tr. 2152). His working assumption up until the transaction announcement on December 20, 2018, was that Altria would buy JLI outright, instead of merely making a minority investment. (Jupe (Altria) Tr. 2160; PX7016 Jupe (Altria) Dep. at 247-48). Accordingly, he assumed that "acquisition and ownership of the JUUL product . . . wouldn't require additional work on [Altria's] end to modify Elite" because "[i]f you've already got the best product, there's no reason to continue in development." (Jupe (Altria) Tr. 2154; *see also* PX7016 Jupe (Altria) Dep. at 247). But the fact that Altria was simultaneously planning for two possible scenarios in no way evidences that there was a conspiracy between Altria and JLI for Altria to withdraw its existing e-vapor products as a condition of the transaction. The evidence overwhelmingly shows that there was no such agreement. (RFF ¶¶ 1151-214).

1393. On July 27, 2018, in an email exchange between Gross and Pritzker, Gross indicated that he "was under the impression that [Altria] would just shut down Mark 10." (PX2330 (JLI) at 001 (email from Nicholas Pritzker to Peter Gross, July 27, 2018)).

Response to Proposed Finding No. 1393:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, despite Complaint Counsel's repeated reliance on this isolated line from Gross's email, it declined to call Gross as a witness at trial so that the Court could hear from Gross directly.

Second, Complaint Counsel ignores Gross's deposition testimony explaining that he had not heard from anyone, either at Altria or JLI, that Altria was planning to "shut down" MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, as Pritzker explained at trial, he did not know where Gross had "got[ten] any of these ideas"; no one, including Gross, had ever told Pritzker that he or she had heard Altria would discontinue any products. (Pritzker (JLI) Tr. 796).

Third, Complaint Counsel takes this single line of Gross's email out of context. Gross's email continued: "We don't want them thinking that they will receive any consideration for co[n]tributing it to newco." (PX2330 (JLI) at 001). Gross's focus was on whether Altria would contribute its e-vapor products to JLI in exchange for payment or other consideration from JLI. Gross explained in his deposition that as an investment banker, his focus in the negotiations "was on just the valuation"—not on unrelated aspects of the deal, such as the noncompete agreement. (PX7043 Gross (Goldman Sachs) Dep. at 32). As Gross testified, "My job was to get the highest number, the highest valuation for JLI as possible, that valuation being in U.S. dollars." (PX7043 Gross (Goldman Sachs) Dep. at 38). Because Gross had "heard . . . that [Altria's e-vapor] products, including MarkTen, were inferior products that had no traction in the market," "[w]hat [he] wanted to avoid was Altria believing that [it] could" pay a lower price in exchange for contributing its "inferior products" to JLI. (PX7043 Gross (Goldman Sachs) Dep. at 36, 38). Gross "assumed [Altria] attributed no value to MarkTen" based on the "considerable sum" it was willing to pay for JUUL. (PX7043 Gross (Goldman Sachs) Dep. at 34).

Finally, Gross's email must be read in context with Pritzker's response: "I think they may need to sell it." (PX2330 (JLI) at 001). As Pritzker explained at trial, "by 'sell it,' what [he] was referring to was divestiture, . . . selling the product to another company so that those products would remain in the market." (Pritzker (JLI) Tr. 680). This is consistent with Pritzker's

expectation that "the FTC would require a divestiture and that the product would then stay in the market with a different ownership," and that Altria should be obligated to cooperate with the FTC in that regard. (Pritzker (JLI) Tr. 681; *see also* Pritzker (JLI) Tr. 797 ("I didn't understand where [Gross] was coming from with this notion of receiving consideration for contributing, because, as I testified, the company didn't want them. . . . [M]y response was, as I testified, I assumed from the beginning that divestiture was going to be the appropriate thing and that which the FTC would be likely to require or be the right thing in any event."); *see also* RFF ¶¶ 1208-14).

1394. [redacted] PX1491 (Altria) at 001-03) (*in camera*) (Summary of Potential Options and Recommendations, Sept. 25, 2018); (Garnick (Altria) Tr. 1820-21) (*in camera*); *see also* PX1062 (Altria) at 001-02 (*in camera*) [redacted]

Response to Proposed Finding No. 1394:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted], the reason cited in the FDA letter, (PX1071 (Altria) at 002).

Second, Greg Wilson, the person who authored this document and who Complaint Counsel chose not to depose or call as a witness at trial, was not involved in the JLI negotiations. (Garnick (Altria) Tr. 1761). [redacted]

[redacted]; PX1491 (Altria) at 001). [redacted]; *see also* Garnick (Altria) Tr. 1757-59 (discussing PX1227 (Altria) at 001)). [redacted]

1395. On October 2, 2018, Garnick sent to Crosthwaite and Gifford a series of proposed discussion points for a meeting with FDA Commissioner Gottlieb, including a commitment to discontinue MarkTen Elite, but he stated that the discussion points were predicated on the assumption the JLI deal would not go forward: "In light of our discussion today, I thought you should see what we propose to be our talking points for the Gottlieb meeting. Obviously, this assumes we do not receive a satisfactory response from Tree [JLI]." (PX4274 (Altria) at 001).

Response to Proposed Finding No. 1395:

The Proposed Findings are incomplete and misleading without additional context. *First*, the fact that Altria was considering the prospects for a JLI transaction in no way evidences that there was a conspiracy between Altria and JLI for Altria to withdraw its existing e-vapor products as a condition of the transaction. The evidence overwhelmingly shows that there was no such agreement. (RFF ¶¶ 1151-214).

Second, the cited document refutes Complaint Counsel's theory that Altria withdrew its pod-based products as a result of an agreement with JLI. To the contrary, the draft talking points

were predicated on the assumption that Altria would "not receive a satisfactory response from [JLI]," (PX4274 (Altria) at 001), [redacted].

1396. On November 15, Garnick sent an email to Willard, Gifford and Crosthwaite concerning the transaction in which he stated: "[I]f [the transaction] goes forward, we need to consider canceling Mark Ten now. . ." (PX4353 (Altria) at (Email from Murray Garnick to Howard Willard, Nov. 15, 2018).

Response to Proposed Finding No. 1396:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As Garnick noted when asked about that language at trial, "the sentence continues." (Garnick (Altria) Tr. 1672). Read in full, it states: "Also, if Tree goes forward, we need to consider canceling Mark Ten now *(and saving money by not doing the HPHC analysis)*." (PX4353 (Altria) at 001 (language omitted by Complaint Counsel emphasized)). HPHC stands for "harmful or potentially harmful constituent." (RFF ¶ 1728(v)). Garnick explained, "It was a requirement in order to keep the MarkTen cigalike on the market, we had to do this chemical analysis, HPHC analysis, and submit that . . . to the FDA, and it was an expensive analysis to be done, and so the idea would be to cancel MarkTen now to save -- to save money." (Garnick (Altria) Tr. 1672).

This email in no way suggests that MarkTen was discontinued as part of a conspiracy with JLI. Instead, as Garnick explained in his deposition, it shows that Altria was mindful of the costs of the potential JLI transaction, just as it was mindful of the costs "to pay for the growth teams," and during November and December, Altria was considering where to find the "cost savings" to pay for either of these two potential futures. (PX7036 Garnick (Altria) Dep. at 214; *see also* RFF ¶¶ 1074-84). But Garnick's email, which observed, "The sooner we reach an amended agreement with Tree – or decide that no such agreement is possible – the better off we will be," confirms that a potential investment in JLI was still highly uncertain. (PX4353 (Altria) at 001).

1397. Murray Garnick testified that Altria "had to have cost savings in the alternative to pay for the growth teams, but certainly for the Tree [JLI] deal, in order to pay for it" and proposed that Altria should consider canceling MarkTen as a cost saving measure. (PX7036 (Garnick (Altria), Dep. at 212-214)).

Response to Proposed Finding No. 1397:

The Proposed Finding is incomplete and misleading without additional context. The cited testimony, which was part of Garnick's explanation for the email cited in CCFF ¶ 1396, in no way suggests that MarkTen was discontinued as part of a conspiracy with JLI. Instead, as Garnick explained in his deposition, it shows that Altria was mindful of the costs of the potential JLI transaction, just as it was mindful of the costs "to pay for the growth teams." (PX7036 Garnick (Altria) Dep. at 214). The decision to pursue the Growth Teams reflected Altria's determination, made in September 2018, that Nu Mark's existing products were commercial failures, with no prospect of profitability or receiving PMTA approval. (RFF ¶ 900). The Growth Teams were tasked with starting from scratch and trying to develop a leapfrog e-vapor product, a long-term effort that was expected to take at least five years. (RFF ¶¶ 898-916, 962-70; PX7016 Jupe (Altria) Dep. at 341; *see also* Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction)). Thus,

during November and December, Altria was considering where to find the "cost savings" to pay for either of two potential futures—Growth Teams or a JLI transaction. (PX7036 Garnick (Altria) Dep. at 214; *see also* RFF ¶¶ 1074-84). But Garnick's email, which observed, "The sooner we reach an amended agreement with Tree – or decide that no such agreement is possible – the better off we will be," confirms that a potential investment in JLI was still highly uncertain. (PX4353 (Altria) at 001).

1398. On November 18, 2018, Elizabeth Mountjoy sent an email to Crosthwaite in which she indicated that Altria's internal product development efforts would depend on getting "more clarity on Tree." (PX4242 (Altria) at 001) ("The over-arching voiceover I would give is that the deck assumes we are going with Plan B, to continue to drive innovation engine internally. If we decide that's an unlikely path, there may be pieces of this system we want to keep, depending the size of the potential shift. . . Anyhow, until we get more clarity on Tree, we will continue to push ahead with this work- unless you advise otherwise.").

Response to Proposed Finding No. 1398:

The Proposed Finding is incomplete and misleading without additional information. *First*, the fact that Altria was considering the prospects for a JLI transaction in no way evidences that there was a conspiracy between Altria and JLI for Altria to withdraw its existing e-vapor products as a condition of the transaction. The evidence overwhelmingly shows that there was not. (RFF ¶¶ 1151-214).

Second, Mountjoy's email confirms that the prospects of a deal with JLI remained highly uncertain and Altria was continuing to make decisions about its internal e-vapor strategy on the assumption that a deal would not occur, (PX4242 (Altria) at 001), undercutting Complaint Counsel's suggestion that Altria pulled its pod-based products on October 25 to facilitate a deal. As of November 2018, Altria's internal e-vapor strategy was the Growth Teams, which Altria created after realizing that Nu Mark's existing products were commercial failures, with no prospect of profitability or receiving PMTA approval. (RFF ¶ 900). The Growth Teams were tasked with starting from scratch and trying to develop a leapfrog e-vapor product, a long-term effort that was

expected to take at least five years. (RFF ¶¶ 898-916, 962-70; PX7016 Jupe (Altria) Dep. at 341; *see also* Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction)).

1399. On December 1, 2018, Garnick stated in an email, "I do think that the larger LT [Leadership Team] still does not understand that we are recasting the company as a core products [traditional cigarette] company after tree." (PX4275 (Altria) at 001).

Response to Proposed Finding No. 1399:

Respondents have no specific response except to note that this email in no way suggests that MarkTen was discontinued as part of a conspiracy with JLI. Garnick was simply describing what Altria's focus would be if it entered into a transaction with JLI and signed the written noncompete proposed in the November 15 draft of the deal documents, which included a carve-out for Altria's existing products pending HSR approval. (RFF ¶ 1107).

1400. On December 1, 2018, Garnick sent an email to Murillo telling him that Altria would announce that it would stop making e-cigarettes later that week and that Gifford would want Altria's leadership "to start preparing for the post Tree Altria." (PX4277 (Altria) at 001 ("Howard/Billy have decided to announce the decision to stop making all evapor products. . . . Billy [Gifford] is going to want the LT [Leadership Team] to start preparing for the post Tree Altria.")).

Response to Proposed Finding No. 1400:

Respondents have no specific response except to note that this email in no way suggests that MarkTen was discontinued as part of a conspiracy with JLI. Garnick was simply summarizing that Willard and Gifford had decided to discontinue Nu Mark's remaining e-vapor products at the end of November and Gifford wanted the organization to plan in the event that Altria consummated its potential investment in JLI. (PX7036 Garnick (Altria) Dep. at 218-20). In addition, although Complaint Counsel presents it otherwise in its brief, (CC Opening Br. 78), Garnick was making two separate (and numbered) observations: "Howard/Billy have decided to announce the decision to stop making all e-vapor products" (Point 2 in Garnick's email) and "Billy is going to want the

LT to start preparing for the post Tree Altria" (Point 3 in Garnick's email), (PX4277 (Altria) at 001). Garnick did not write, as Complaint Counsel claims in its opening brief, that the decision to discontinue Altria's remaining e-vapor products was made "in order to" prepare for the post-transaction environment. (CC Opening Br. 78).

1401. On December 4, 2018, Garnick commented on a draft presentation to Altria's board and emphasized the need to restructure the order of the presentation in order to give the Board the impression that Altria's MarkTen discontinuation was not linked to the transaction. (PX1169 (Altria) at 001 ("Important point: my understanding is that our cease selling MarkTen and Verve has nothing to do with Tree [the transaction]. Thus, we should discuss this in a separate section and not under the 'Tree' section. Can we please make this fix BEFORE we send anything to any director?"); PX7000 (Garnick (Altria), IHT at 144-45)).

Response to Proposed Finding No. 1401:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, although Complaint Counsel asserts that Garnick merely wanted to "give the Board the impression" that Altria's discontinuation of its cig-a-like products was independent of the transaction, implying that it was pretextual, there is no evidence for that assertion. Garnick testified that he "wanted to make it clear to the board that we were going to stop selling Mark Ten and Verve regardless of whether the Tree deal materializes. As of Decembers [sic] 4th, I believe we were in the middle of due diligence, and it was not yet clear that we would actually do the deal." (PX7000 Garnick (Altria) IHT at 144-45).

Second, Garnick's email and his testimony are consistent with contemporaneous evidence about how uncertain the deal remained in early December. As Pritzker testified at trial, "if [the parties] couldn't agree on price, then none of [the proposed terms the parties coalesced on in late October were] relevant anyway." (Pritzker (JLI) Tr. 834; *see also* RFF ¶¶ 1103-25). The parties did not come to a consensus on valuation until well after December 4. (*See, e.g.*, PX4167 (Altria) at 010 (Dec. 16, 2018 text message from Willard to Devitre: "We reached an impasse tonight on value . . . ."); RX1417 (JLI) at 001 (Dec. 17 email noting the parties hit an "impasse on

valuation")). As Devitre testified, even as late as mid-December, the two sides had not yet "hammered" out all of the terms; negotiations "went on until the very last moment." (PX7001 Devitre (Altria) IHT at 130). As a result, Willard did not have "any faith that th[e] deal would go through until the documents were signed on December 20." (Willard (Altria) Tr. 1461).

1402. Maria Gogova, Altria's Vice President of Regulatory Sciences, was asked when she heard that MarkTen would be discontinued and responded that "it was when we finalized the deal with JUUL because we had to remove our own activity in the e-vapor category." (PX7015 (Gogova (Altria), Dep. at 269)).

Response to Proposed Finding No. 1402:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Dr. Gogova, who Complaint Counsel elected not to call at trial, stated in her deposition that she had misinterpreted the question upon which Complaint Counsel now relies. On the page after the cited deposition testimony, Complaint Counsel asked, "Did you ever hear from anybody that the MarkTen product was removed from the market because of the JUUL transaction?" (PX7015 Gogova (Altria) Dep. at 270). Dr. Gogova answered, "No. As I said, in the December time frame I was on the growth team, and . . . wasn't really interacting with the folks outside of the growth team. So I wasn't really keeping touch on what was happening in the regulatory affairs or anywhere else." (PX7015 Gogova (Altria) Dep. at 270-71). Complaint Counsel then asked, "What gave you the impression that the discontinuation of MarkTen was related to the JUUL transaction?" (PX7015 Gogova (Altria) Dep. at 271). Dr. Gogova explained, "I think I was only reacting to you asking me, and maybe I just misinterpreted, but I was only trying to go back to [Willard]'s e-mail where he was announcing to entire Altria about the JUUL transactions and there was basically also mentioning of not working in the e-vapor space with our own product development and innovation." (PX7015 Gogova (Altria) Dep. at 271). She had no knowledge that a transaction with JLI was happening until she saw the announcement on December 20, 2018,

which was nearly two weeks after Altria had announced the discontinuation of MarkTen Elite. (PX7015 Gogova (Altria) Dep. at 305-08). But the December 20 announcement was significant to her because it is when she learned that her work on e-vapor product development would cease. (PX7015 Gogova (Altria) Dep. at 308).

1403. Pascal Fernandez, a Managing Director for Altria Client Services, was asked what rationale was given to him for discontinuing Altria's e-vapor products and stated, "I forgot what was said that day, so, you know, I forgot what was said. But as you stated before, if we made an agreement to no longer compete, that might be the extent of the rationale." (PX7023 (Fernandez (Altria), Dep. at 192)).

Response to Proposed Finding No. 1403:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, Fernandez, who Complaint Counsel elected not to call at trial, stated in his deposition that he "forgot what was said that day" so the remainder of his answer should be disregarded as conjecture based on what he thought Complaint Counsel had "stated before." (PX7023 Fernandez (Altria) Dep. at 192).

Second, Fernandez was not involved in negotiations about the noncompete and has no knowledge of its specific terms. (PX7023 Fernandez (Altria) Dep. at 222).

Third, he later recalled that Altria discontinued its cig-a-like products on December 7, and he agreed that, "[i]f there was no deal signed with JUUL at that time," and there was none until December 20, "the JUUL deal [could not] have been the reason for what's described in the press release dated December 7, 2018." (PX7023 Fernandez (Altria) Dep. at 223-25).

1404. [redacted] (PX1067 (Altria) at 011) (*in camera*).

Response to Proposed Finding No. 1404:

Respondents have no specific response.

1405. On December 8, 2018, at 1:50AM, David Moore (then a corporate associate at Cleary, Gottlieb, Steen & Hamilton, LLP ("Cleary"), representing JLI in connection with the transaction) sent an email to Zachary Podolsky (a corporate partner at WLRK representing Altria in connection with the transaction) that referenced the discontinuation announcement along with an "expedited schedule for obtaining antitrust clearance." (PX2605 (JLI) at 008-09) ("[G]iven Richard's [Altria's] press release this morning and the expedited schedule for obtaining antitrust clearance, we would suggest that the period in which Richard [Altria] can commence making confidential buyout offers to Jack's [JLI's] board begin 4 years following the closing (instead of the earlier of 5 years following the closing or 2 years after obtaining antitrust clearance))."

Response to Proposed Finding No. 1405:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to ask any witnesses about PX2605, either in a deposition or at trial. (CC Exhibit Index at 50). As a result, there is no testimony in the record to put it in context.

There is also no evidence that the quoted statement, written in an email between outside counsel, reflected the understanding of the parties as opposed to an assumption from a lawyer. In fact, Garnick's December 9 email suggesting to Masoudi that Altria could file for HSR within 90 days of closing (quoted by Complaint Counsel in CCFF ¶ 851), suggests that the parties had not reached an understanding about accelerating the timeline to file for HSR clearance by the time of the December 8 email in PX2605. (*See* PX1734 (Altria) at 001).

Finally, Complaint Counsel has offered no evidence that the timeline for filing for HSR played any role in Altria's decision to discontinue its remaining e-vapor products, much less any evidence that JLI knew about it in advance. *First*, the parties developed the HSR filing workaround specifically to avoid any potential complication with Altria divesting its existing products while the PMI agreement was in effect, which was an acceptable solution to both parties. (Garnick (Altria) Tr. 1671, 1677-78; *see also* RFF ¶¶ 1050-61). The record reflects that neither party was

concerned about delaying the HSR filing generally, or the start of enhanced services specifically. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13; *see also* RFF ¶¶ 1068-73). Complaint Counsel offers nothing to the contrary. *Second*, JLI did not have any prior notice of Altria's December 7 withdrawal, nor had anyone at JLI requested that it take that action. (Pritzker (JLI) Tr. 884-85; Valani (JLI) Tr. 957; *see also* PX7021 Pritzker (JLI) Dep. at 164, 169; PX7032 Valani (JLI) Dep. at 151-52; PX7025 Burns (JLI) Dep. at 217-18; PX7035 Masoudi (JLI) Dep. at 89, 128-29). Indeed, neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. (Pritzker (JLI) Tr. 877-78; Valani (JLI) Tr. 951-52, 957; PX7021 Pritzker (JLI) Dep. at 163-64 ("[The announcement] was of no consequence because [Pritzker] didn't think that [the products] were particularly competitive to Juul."); PX7011 Valani (JLI) IHT at 134 (calling the decision "irrelevant")).

1406. On December 9, 2018, Garnick emailed Masoudi in response to Masoudi's inquiry about whether Altria would agree to a non-compete that would go into effect prior to antitrust clearance, and Mr. Garnick reassured him that "[t]his is of course a nonissue, since we are not in the market anymore." (PX1162 (Altria) at 001 ("Pre antitrust do not compete – How about if we agree to file within 90 days (we intend to file within 30 days, but I would like a cushion for unforeseen events). Would that resolve this? Alternatively, if the businesses want to start enhanced services right way, the do not compete provision could start running based on when providing enhanced services begins and tied to that. This is of course a nonsissue, since we are not in the market anymore and we can't get back into the market without getting a PMTA. But do not compete cannot start simply with closing for antitrust reasons -- section 1 issue.")).

Response to Proposed Finding No. 1406:

The Proposed Finding is incomplete and misleading without additional context. As Garnick explained at trial and in his deposition, after Altria unilaterally withdrew MarkTen cig-a-like from the market for budgetary reasons, Altria and JLI were no longer competing in the e-vapor market. (Garnick (Altria) Tr. 1678; PX7036 Garnick (Altria) Dep. at 222-23). This complicated some of the terms the parties had otherwise resolved—namely, when Altria should make the HSR

filing the parties had previously decided to delay until July 15, 2020, and the technical questions of (1) what event should trigger the noncompete and (2) when Altria could provide enhanced services now that the parties were not competing. (Garnick (Altria) Tr. 1677-79; PX7036 Garnick (Altria) Dep. at 222-23; PX1162 (Altria) at 001; *see also* RFF ¶¶ 1050-73).

These discussions were not caused by JLI pushing for a shorter deadline for the HSR filing or pushing to begin enhanced services sooner—as Garnick explained, he did not "recall any desire or concern from JLI about reducing the time period before filing HSR." (Garnick (Altria) Tr. 1677; *see also* Pritzker (JLI) Tr. 871-72 (timing of enhanced services was not "consequential"); Willard (Altria) Tr. 1213 (recalling both Altria and JLI were "flexible" on timing for enhanced services)). Instead, in the context of the cited document, the parties were trying to address the reality created by Altria's unilateral withdrawal:

> [W]e had made the announcement already by this time that we were pulling our MarkTen cigalike from the market. And so the term sheet assumed that we would still be in the market, but we had pulled, unilaterally, the MarkTen from the market.
>
> And so the idea would be, let's take into account the reality of the current situation and make sure that the deal documents address the reality.
>
> And so there was discussion about, where does that leave us with the enhanced services, and when can the enhanced services start. And this was part of that discussion.

(PX7036 Garnick (Altria) Dep. at 223).

1407. [redacted] (PX1268 (Altria) at 005 (Draft Altria 2018 Incentive Compensation Memo); *see also* Willard (Altria) Tr. 1255-56 (discussing PX1274 (Altria) at 005 (Altria Remarks at 2019 CAGNY Conference))).

Response to Proposed Finding No. 1407:

The Proposed Finding is incomplete and misleading without additional context. The cited materials, which highlights Altria's [redacted], confirm that throughout the second half of 2018 Altria was pursuing "two pathways" to

success in the e-vapor industry: internal development of leapfrog products or a potential investment in JLI, (RFF ¶ 1074). Altria pursued these two paths because it realized in the summer of 2018 that Nu Mark could not achieve commercial or regulatory success with its existing portfolio of products. (RFF ¶¶ 701-24, 839-51). And, throughout the negotiations with JLI, Altria was mindful of how a transaction with JLI might mitigate or eliminate the need for an internally developed product. (PX4353 (Altria) at 001). But the fact that Altria was simultaneously planning for two possible scenarios in no way evidences that there was a conspiracy between Altria and JLI for Altria to withdraw its existing e-vapor products as a condition of the transaction. The evidence overwhelmingly shows that there was no such agreement. (RFF ¶¶ 1151-214).

Respondents further note that the cited language appears on page 003 of PX1268, not page 005.

X. THE TRANSACTION HAS CAUSED HARM

1408. Based on his review of the documents, data, and testimony, Dr. Rothman concluded that: "The transaction has harmed and will harm consumers. Altria exited due to the transaction. Altria had strong incentives to compete, and it had the ability to compete. Altria's exit eliminates products that were and would have been attractive to consumers. This harms consumers. Altria's exit also eliminates a competitive constraint on all other competitors, which reduces their incentives to offer lower prices and invest in developing better products. This also harms consumers." (PX5000 at 043 (¶ 91) (Rothman Expert Report); see also PX5000 at 075-83 (¶¶ 130-45) (Rothman Expert Report); PX5001 at 016 (¶ 24), 030-31 (¶¶ 45-48) (Rothman Rebuttal Report); PX7048 (Rothman, Trial Dep. at 9-11, 29-30, 51, 91-92)).

Response to Proposed Finding No. 1408:

Dr. Rothman's opinion that the transaction "has harmed and will harm consumers" for all the reasons listed in the Proposed Finding is based on his "significant competitor" opinion, (PX5001 Rothman Rebuttal ¶ 57), which is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

1409. Dr. Rothman calibrated an economic model of e-cigarette competition to estimate the loss of consumer surplus from Altria's exit. Dr. Rothman also estimated the efficiencies that would be required to offset the harm caused by Altria's exit. (PX5000 at 043-44 (¶ 92) (Rothman Expert Report)).

Response to Proposed Finding No. 1409:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman purported to calibrate such a model. That model does not accurately estimate the loss of consumer surplus from Altria's discontinuation of its products because it is based on a number of unsupported factual and economic assumptions including, but not limited to, assessing harm in the incorrect market, using unrealistic market shares and profit margins, and assuming proportional diversion. (RFF ¶¶ 1670-708).

In addition, while Dr. Rothman purported to estimate certain efficiencies that would be required to offset the amount of harm he calculated, he did not consider all possible efficiencies. For example, Dr. Rothman "fail[ed] to consider efficiencies that could derive from Altria's experience and expertise in seeking and securing regulatory approval yielding an *increased probability* of JLI obtaining regulatory approval for its products." (RFF ¶ 1717 (quoting RX1217 Murphy Report ¶ 203 (emphasis in original)); *see also* RFF ¶¶ 1718-27).

1410. Dr. Rothman evaluated Altria's incentive and ability to compete absent the transaction in order to determine whether Altria would have been a significant competitor if it had not entered into the transaction with JLI. (PX5000 at 044-57 (¶¶ 93-107) (Rothman Expert Report)).

Response to Proposed Finding No. 1410:

Dr. Rothman purported to undertake such an evaluation. However, his "significant competitor" opinion is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

1411. Dr. Rothman concluded that Altria had a strong incentive to compete absent the transaction, as reflected in industry trends, testimony of Altria executives, internal financial analyses, and the long-run strategies and investment decisions of Altria and its competitors. (PX5000 at 044-53 (¶¶ 93-102) (Rothman Expert Report); *see also* PX7048 (Rothman, Trial Dep. at 31)).

Response to Proposed Finding No. 1411:

Dr. Rothman purported to make such a conclusion as part of his "significant competitor" opinion. However, this opinion is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

1412. Based on his review of the documents, data, and testimony, Dr. Rothman concluded that Altria had the ability to compete in closed-system e-cigarettes absent the transaction. (PX5000 at 053-57 (¶¶ 103-07) (Rothman Expert Report)). In order to compete in closed-system e-cigarettes, Altria needed to develop or acquire products; regulatory approval; distribution; shelf space; manufacturing; and marketing. (PX7048 (Rothman, Trial Dep. at 31-32)). Altria had the ability—and was well-situated—to compete in all of those respects. Altria has significant experience, distribution, infrastructure, a large sales team, valuable shelf space in retail stores, and, prior to exiting, had multiple products in the market and product development initiatives in the pipeline. (PX5000 at 053-57 (¶¶ 103-07) (Rothman Expert Report); *see also* PX7048 (Rothman, Trial Dep. at 31-32)).

Response to Proposed Finding No. 1412:

Dr. Rothman purported to make such a conclusion. However, his conclusion ignores the testimony and evidence that (1) Altria's experience with conventional tobacco products, (2) its distribution, infrastructure, and sales team, and (3) its ability to acquire shelf space were all meaningless without a product that appealed to consumers. (RFF ¶¶ 431-59; *see also* PX7014 Baculis (Altria) Dep. at 63 ("[N]othing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs.")). The evidence shows that Nu Mark's products were weak competitors that were not successful commercially and were unlikely to obtain regulatory approval. (RFF ¶¶ 1501-636). The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design,

it would have been years before such a design could have reached the market. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process), 184-91 (describing Nu Mark's failed efforts at internal product development)).

Dr. Rothman ignored this evidence. He admitted that he could not say *how* Altria would have been a significant competitor in the e-vapor category. (RFF ¶¶ 1489-500). At bottom, his opinion amounted to this: Because Altria had incentives to be successful in e-vapor and is a large company, it would have been a significant competitor. (PX7048 Rothman Trial Dep. at 74 ("[W]hat made [Altria] a competitive threat, was its ability to make significant up-front investments to compete for the long run, the long run payoff.")). But incentives and size are not enough to make a company a significant competitor. To the contrary, Altria's long history of failed innovation, both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-202), demonstrates that size and incentives are alone not sufficient to make a company a significant competitor.

1413. Dr. Rothman evaluated the effects of the transaction on competition by comparing the actual world before Altria and JLI entered into the transaction with the but-for world if the transaction had not happened. (PX7048 (Rothman, Trial Dep. at 30-31)).

Response to Proposed Finding No. 1413:

Dr. Rothman purported to evaluate the effects of the transaction by using a but-for world analysis. However, Dr. Rothman is unable to say, *inter alia*, how Altria would have been a significant competitor in the but-for world, what products it would have had on the market at any point in time, or what Altria could have done differently to be successful had it kept its e-vapor products on the market. (RFF ¶¶ 1489-500). As a result, Dr. Rothman's but-for analysis is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

1414. Based on his review of the documents and testimony, Dr. Rothman concluded that Altria would have been a significant competitor in e-cigarettes if it had not entered into the transaction. (PX5000 at 075-77 (¶¶ 131-33) (Rothman Expert Report)). Altria was already a significant competitor in 2018 with the third largest share behind JLI and Reynolds. (PX5000 at 067 (¶ 118) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 33)). In response to JLI's rapid growth, Altria introduced MarkTen Elite in 2018, and in July 2018, Altria's CEO stated that Elite was gaining traction with consumers. (Begley (Altria) Tr. 985, 990-81; PX9047 (Altria) at 009-10 (Altria's Q2 2018 Earnings Call); *see also* PX7048 (Rothman, Trial Dep. at 33-34)). Altria was actively working to improve Elite, introducing the gasket fix in 2018 to prevent leaking and working on incorporating nicotine salts and other improvements in Elite 2.0. (*See* CCFF ¶¶ 1206-34, 1281-94, above; *see also* PX7048 (Rothman, Trial Dep. at 34)). Altria was also collaborating with PMI to introduce VEEV in the United States, and had introduced an earlier version of VEEV called Apex in September 2018. (*See* CCFF ¶¶ 1620-93, below; *see also* PX7048 (Rothman, Trial Dep. at 34)). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (PX7048 (Rothman, Trial Dep. at 34)).

Response to Proposed Finding No. 1414:

The Proposed Finding is inaccurate and incomplete. Dr. Rothman purported to conclude that Altria would have been a significant competitor in the but-for world. However, this "significant competitor" opinion is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have been years before such a design could have reached the market. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process), 184-91 (describing Nu Mark's failed efforts at internal product development)).

Dr. Rothman ignored this evidence. He admitted that he could not say *how* Altria would have been a significant competitor in the e-vapor category. (RFF ¶¶ 1489-500). At bottom, his opinion amounted to this: Because Altria had incentives to be successful in e-vapor and is a large company, it would have been a significant competitor. (PX7048 Rothman Trial Dep. at 74 ("[W]hat made [Altria] a competitive threat, was its ability to make significant up-front

investments to compete for the long run, the long run payoff.")). But incentives and size are not enough to make a company a significant competitor. To the contrary, Altria's long history of failed innovation, both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-91), demonstrates that size and incentives are alone not sufficient to make a company a significant competitor.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1206-34, 1281-94, and 1620-93, Respondents incorporate their responses to those Proposed Findings herein.

1415. Because Altria would have been a significant competitor if it had not entered into the transaction, Dr. Rothman concluded that the transaction harmed competition. (PX5000 at 043 (¶ 91), 075-83 (¶¶ 130-45) (Rothman Expert Report); PX5001 at 016 (¶ 24), 030-31 (¶¶ 45-48) (Rothman Rebuttal Report); PX7048 (Rothman, Trial Dep. at 34-35)).

Response to Proposed Finding No. 1415:

Dr. Rothman purported to make such a conclusion as part of his "significant competitor" opinion. However, this opinion is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636). As a result, the evidence shows that the transaction did not harm competition. (RFF ¶¶ 1637-64). JLI did not change any pricing as a result of the introduction or removal of Nu Mark products. (RFF ¶¶ 1639-46). And since the transaction, prices have gone down, output has increased, and market concentration has decreased. (RFF ¶¶ 1338-76).

1416. Dr. Rothman analyzed two sources of harm from the transaction—higher prices and loss of consumer choice—by applying the Antitrust Logit Model ("ALM") and Compensating Marginal Cost Reduction ("CMCR"). (PX5000 at 081-83 (¶¶ 141-45) (Rothman Expert Report)). One harm is not more important than the other, and the ALM takes into account both sources of harm. (PX7048 (Rothman, Trial Dep. at 210-11)).

Response to Proposed Finding No. 1416:

Dr. Rothman purported to undertake such an analysis. However, it is widely recognized in the economic literature that the ALM is a poor choice for estimating the cost to consumers of

removing a product from the marketplace. (RFF ¶ 1672 (citing Murphy Tr. 3158-59; RX1217 Murphy Report ¶ 168); *see also* RFF ¶¶ 1673-79). In addition, Dr. Rothman's model is based on unsupported factual and economic assumptions that render its findings unreliable. (RFF ¶¶ 1680-708).

Notably, even if it were reliable, Dr. Rothman's model would predict only a miniscule impact on consumers that could easily be offset by competitor expansion. (RFF ¶¶ 1711-13). The harm created by "loss of consumer choice" constitutes approximately 80 percent of Dr. Rothman's estimated harm. (RFF ¶ 1666-67). In the context of Dr. Rothman's $33.6 million harm calculation, this means that just $7.6 million is attributable to price impact—or just 0.3 percent of overall e-vapor revenue. (RFF ¶¶ 1667-68).

A. RESPONDENTS ENGAGED IN HEAD-TO-HEAD COMPETITION

1417. Altria competed with JLI and other closed-system e-cigarette producers on price and non-price dimensions. (PX5000 at 077-81 (¶¶ 134-40) (Rothman Expert Report)).

Response to Proposed Finding No. 1417:

The Proposed Finding is inaccurate and incomplete. Altria did attempt to compete for a period of time in the e-vapor category through its subsidiary Nu Mark. But JLI did not change any pricing as a result of the introduction or removal of Nu Mark products. (RFF ¶¶ 1639-46). Nor is there any evidence that Nu Mark's presence impacted JLI's product development. (RFF ¶¶ 1647-50). And since Altria has exited the e-vapor category, competition has increased: Prices have gone down, output has increased, and market concentration has decreased. (RFF ¶¶ 1338-76).

1. Respondents Engaged in Head-to-Head Price Competition

1418. Altria and JLI directly competed with each other and other e-cigarette producers on price. (PX5000 at 077-78 (¶¶ 134-36) (Rothman Expert Report)).

Response to Proposed Finding No. 1418:

The Proposed Finding is inaccurate, incomplete, and misleading. There is no evidence that JLI ever changed its prices because of Nu Mark's products, (RFF ¶¶ 1639-46), whereas [redacted].

a) Altria

1419. Prior to the transaction, Altria had been heavily promoting its e-cigarettes with retailers to compete with the dominant supplier, JLI. (PX1013 (Altria) at 013 ("Nu Mark Brand Update, MarkTen Elite" dated August 10, 2018) (Elite's launch plan envisioned significant price promotions from April through October 2018); PX8000 at 004 (¶ 22) [redacted]

Response to Proposed Finding No. 1419:

The Proposed Finding is incomplete and misleading without additional context. While Altria heavily promoted Nu Mark's e-cigarettes, (RFF ¶¶ 407-30), the cited evidence provides no support for the suggestion that the promotions were run specifically to compete with JLI as opposed to e-vapor manufacturers more generally. Moreover, these promotions did not lead to any reaction on JLI's part, (RFF ¶ 1640-45), or to commercial success for Altria, (RFF ¶¶ 431-59).

1420. Altria closely tracked pricing and promotions by JLI. (*See, e.g.*, PX1321 (Altria) at 095, 280-81 ("NuMark Business Update")).

Response to Proposed Finding No. 1420:

Respondents have no specific response except to note that the cited source shows Altria tracked pricing and promotions for other manufacturers as well. (PX1321 (Altria) at 104-13 (Vuse), 114-141 (blu)).

1421. Jody Begley, the former President and General Manager of Nu Mark, testified that Nu Mark took into account the price of JUUL in setting MarkTen Elite's launch price. (Begley (Altria) Tr. 991; *see also* PX7022 (Begley (Altria), Dep. at 210) (testifying that JUUL "certainly influenced how [Nu Mark] priced [MarkTen Elite] in the marketplace")).

Response to Proposed Finding No. 1421:

Respondents have no particular response other than to note that Begley also testified in both instances that Elite was priced to incentivize trial. (Begley (Altria) Tr. 991; PX7022 Begley (Altria) Dep. at 209-10). Moreover, the evidence shows that Elite did not constrain the price of JUUL products, while JLI changed its prices later in response to competitors' offerings. (RFF ¶¶ 1308-14, 1639-46).

1422. When Altria was preparing to launch MarkTen Elite in early 2018, Altria's CEO Howard Willard congratulated the team and wrote that "This is a big step forward for our plan to compete vigorously for closed tank volume." (PX1647 (Altria) at 003).

Response to Proposed Finding No. 1422:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, January 2018, Nu Mark had not even launched Elite yet and thus did not yet know how that product would perform on the market. (Schwartz (Altria) Tr. 1871; *see also* RFF ¶¶ 373-87). Once Elite was launched, the market evidence demonstrated that Elite would not be successful. (RFF ¶¶ 431-485; *see also* RFF ¶¶ 1512-16).

1423. When MarkTen Elite launched, JUUL's kit was priced at approximately $45. Nu Mark thought that pricing Elite at $19.99 would incentivize trial of the product on an ongoing basis. (Begley (Altria) Tr. 991; *see also* PX4012 (Altria) at 029 ("Nu Mark 2018 Three Year Strategic Plan") ("e-vapor pricing ladder" comparing Elite's device and cartridge pricing at launch with JUUL, Vuse Solo, and MarkTen cigalikes)).

Response to Proposed Finding No. 1423:

Respondents have no specific response except to note that despite this pricing, Elite had dismal sales. (RFF ¶¶ 431-59).

1424. Shortly after the launch of Elite, Altria observed an increase in "competitive value spending" by its competitors. (PX4035 (Altria) at 012 ("Nu Mark E-Vapor Update to the ELT" dated April 24, 2018)). JLI began to offer $20 off a JUUL starter kit or $15 off of a device, while *my*blu offered a $1 starter kit or $25 off a device/pod bundle. At the time, Elite was offering a free pod pack with a battery purchase. (PX4035 (Altria) at 013).

Response to Proposed Finding No. 1424:

The Proposed Finding is misleading to the extent it implies that JLI or *my*blu changed their prices *in response to* Elite, which is not supported by the cited document or record evidence. (RFF ¶ 1354 (explaining that the trial evidence shows that JLI never changed its prices in response to the entry or exit of any Altria e-vapor product)).

1425. In June 2018, Altria launched additional promotional enhancements for Elite, including a new $8.99 trial offer bundle. (PX7022 (Begley (Altria), Dep. at 252; PX1229 (Altria) at 021 (Board of Directors Presentation, May 2018); *see also* PX1617 (Altria) at 006 ("Demand Review Meeting, October 3, 2018")).

Response to Proposed Finding No. 1425:

Respondents have no specific response except to note that despite these promotional enhancements, Elite had dismal sales. (RFF ¶¶ 431-59).

1426. Altria offered the $8.99 Elite bundle to compete with JLI's $20 starter kit discount as well as *my*blu's $1 starter kit promotion. (PX1820 (Altria) at 002 (draft "expansion update story" dated July 30, 2018); PX1070 (Altria) at 003 (revised draft "expansion update story" dated August 2, 2018)). Altria concluded that "The move worked. Following the [$8.99] bundle offer, the team saw an uptick in retail sales" of MarkTen Elite. (PX1820 (Altria) at 002; PX1070 (Altria) at 003).

Response to Proposed Finding No. 1426:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. *First*, Altria offered the $8.99 Elite bundle not only to compete with other manufacturers' discounts, but also to incentivize trial generally. (RFF ¶¶ 422-30; *see also* Begley (Altria) Tr. 991; PX7022 Begley (Altria) Dep. at 209-10). *Second*, even the cited document stating that "[t]he move worked" recognized that "[i]t's one thing to get an [adult tobacco consumer] to try *MarkTen Elite* . . . but getting them to convert, that's another." (PX1820 (Altria) at 002; *see also* PX1070 (Altria) at 003). And the data show that Altria was not successful in driving that conversion or otherwise generating sales beyond the one-time trial purchase. (RFF ¶¶ 431-59, 601-747).

1427. During the expansion of Elite in the months after its launch, Altria provided "additional support and promotional offers to make [Elite] competitive against competitors like JUUL and MyBlu." (PX1820 (Altria) at 002; PX1070 (Altria) at 003; *see also* PX7013 (Brace (Altria), Dep. at 102-03)).

Response to Proposed Finding No. 1427:

Respondents have no specific response except to note that despite this additional support and promotional spending, Elite had dismal sales. (RFF ¶¶ 431-59).

1428. Altria's Senior Director for Vapor Products, Michael Brace, testified that Altria purposely priced MarkTen Elite at a discount to its largest competitor, JUUL. (PX7013 (Brace (Altria), Dep. at 44-45)). Altria also started a "30 days of pods for $30" offer in an effort to improve smoker conversion and get more adult tobacco consumers to stick with Elite. (PX1820 (Altria) at 002; PX1070 (Altria) at 003).

Response to Proposed Finding No. 1428:

The Proposed Finding is incomplete and misleading without additional context. Elite was priced not only to compete with other manufacturers' discounts, but also to incentivize trial generally. (RFF ¶¶ 422-30; *see also* Begley (Altria) Tr. 991; PX7022 Begley (Altria) Dep. at 209-10). Moreover, these efforts to improve smoker conversion were unsuccessful despite heavy promotional spending, (RFF ¶¶ 431-59 (describing Elite's lagging sales), 601-37 (explaining that lack of salts meant Elite was unable to convert smokers)).

1429. [redacted] (PX3004 (ITG) at 058 [redacted] (*in camera*)).

Response to Proposed Finding No. 1429:

The Proposed Finding is misleading in that it implies JLI changed its pricing in response to Altria, when the record evidence demonstrates JLI never reacted to Altria's entry or exit with pricing changes. (RFF ¶ 1354). The cited document is an [redacted]

[redacted]

[redacted].

1430. An Altria "Demand Review Meeting" presentation from October 2018 summarized the promotions that Altria implemented on its e-cigarette products. (PX1617 (Altria) at 006, 011, 020, 026, 027). For MarkTen Elite, Altria had a number of active promotions, including $8.99 battery and pod packs, $8 off coupons, a casino program, and retail intercepts. (PX1617 (Altria) at 006). Altria had additional website promotions and direct mail offers planned for Elite. (PX1617 (Altria) at 011). For MarkTen cigalikes, Altria had additional retail, website, and direct mail promotions. (PX1617 (Altria) at 020, 026).

Response to Proposed Finding No. 1430:

Respondents have no specific response except to note that despite the heavy promotional spending throughout 2018, Elite had dismal sales. (RFF ¶¶ 431-59). As for MarkTen cig-a-likes, the category as a whole was declining, a trend that continues today. (RFF ¶¶ 1324-29). As a result, notwithstanding promotional efforts, Altria was never able to turn Nu Mark, including its cig-a-like products, into a profitable business. (RFF ¶¶ 1077-84).

1431. Altria continued promoting its e-cigarette products right up until they were discontinued. On October 15, 2018, an Altria sales representative received approval to distribute additional coupons for $8 off a pod pack as part of "an aggressive plan to connect . . . two big accounts . . . with MarkTen Elite," just 10 days before Altria pulled Elite from sale. (PX1060 (Altria) at 001); *see also* PX2022 (Altria) at 002).

Response to Proposed Finding No. 1431:

Respondents have no specific response except to note that despite the continued support and promotional spending, Elite had dismal sales. (RFF ¶¶ 431-59).

b) JLI

1432. JLI's Joseph O'Hara testified that Altria competed aggressively on price in the e-vapor space in 2018, and that he expected them to continue to do so in the future. (PX7033 (O'Hara (JLI), Dep. at 134-35); PX2450 (JLI) at 002 (email from O'Hara reacting to an IRI "convenience report" for the four weeks ending April 22, 2018) ("*At risk of stating the obvious, we should continue to expect our competitors with large balance sheets, high-margin legacy businesses, and large/existing distribution networks to continue discounting their product even further.*") (emphasis in original)).

Response to Proposed Finding No. 1432:

The Proposed Finding is incomplete and misleading without additional context. In the cited portion of the deposition transcript, O'Hara is just confirming that the cited document (PX2450 (JLI)), says what it says. (PX7033 O'Hara (JLI) Dep. at 134.) And in the same email cited in the Proposed Finding, O'Hara also said that MarkTen Elite was "struggling to get off the ground" and was a "lackluster product," contradicting the Proposed Finding's implication regarding Altria's competitiveness in the e-vapor space. (PX2450 (JLI) at 002; *see also* RFF ¶¶ 748-61 (describing JLI's dim view of Altria's e-vapor products)). Notably, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354).

1433. In February 2018, soon after MarkTen Elite launched, JLI's Bob Robbins wrote to his colleagues that Elite was priced "for share-gain mode." (PX2269 (JLI) at 003; *see also* PX7039 (Robbins (JLI), Dep. at 20-21) (explaining Elite was "priced pretty aggressively")). JLI's Joseph O'Hara added that Elite was "shockingly cheap." (PX2269 (JLI) at 002).

Response to Proposed Finding No. 1433:

The Proposed Finding is incomplete and misleading without additional context. In addition to the cited material, PX2269 also includes a statement by Adam Bowen, founder of JLI, that because Elite did not have salts, it was "an absolute nonstarter." (PX2269 at 001; *see also* RFF ¶ 204 (describing Bowen as a co-founder of JLI)). And both Robbins and O'Hara testified at trial that Elite was a bad product with underwhelming sales. (Robbins (JLI) Tr. 3250-51; O'Hara (JLI) Tr. 548, 556; *see also* RFF ¶¶ 748-54 (describing JLI's dim view of Elite)). Notably, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354).

1434. In March 2018, JLI launched its first device promotion by dropping JUUL starter kit price by $20 (57% off from its previous price). (PX2599 (JLI) at 014-15; PX2062 (JLI) at 016). Altria personnel perceived that JLI had launched its own promotion shortly after its

MarkTen Elite launch. (PX1098 (Altria) at 042 (slide entitled "Price Discounts for Juul" discussing a Juul "starter kit" promotion that started in March 2018); PX7002 (Schwartz (Altria), IHT at 89-90) ("Q. And these sales incentives were, to your knowledge, something that not only Nu Mark was doing with their Mark Ten and Mark Ten Elite products, but what their competitors in the market were doing with theirs as well? A. [. . .] JUUL, as soon as we came out, they knocked 20 bucks off their price. [. . .] Q. As soon as you came out with the Mark Ten Elite product. A. Um-hum, yep.")).

(PX1098 (Altria) at 042).

Response to Proposed Finding No. 1434:

The Proposed Finding is incomplete and misleading without additional context. JLI's device promotion in March 2018 was pre-planned by the fall of 2017 at the latest and was not a response to Elite's launch. (RFF ¶¶ 1641-42). Notably, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). Any perception by a single Altria employee was not grounded in any personal knowledge as to why JLI ran its promotions.

1435. [redacted] (PX2252

(JLI) at 006 (*in camera*); *see also* PX2252 (JLI) at 048-49 [redacted]

Response to Proposed Finding No. 1435:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 42), or in any deposition. There is thus no evidence that JLI relied upon or responded to the information about MarkTen in this document. To the contrary, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). [redacted]

1436. [redacted] (PX2252 (JLI) at 012 (*in camera*)).

Response to Proposed Finding No. 1436:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to show the cited document at trial, (CC Exhibit Index at 42), or in any deposition. There is thus no evidence that JLI relied upon or responded to the information about MarkTen in this document. To the contrary, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). [redacted]

1437. [redacted]

[redacted] (PX2252 (JLI) at 048-49 (*in camera*)).

Response to Proposed Finding No. 1437:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to show the cited document at trial, (CC Exhibit Index at 42), or in any deposition. There is thus no evidence that JLI relied upon or responded to the information about MarkTen in this document. To the contrary, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). [redacted]

1438. JLI closely tracked pricing and promotions by Altria. For example, in June 2018, JLI's Bob Robbins shared pricing and retail margin information about MarkTen Elite with JLI's "Competition" listserv, which he obtained from Altria at a trade show. (PX2477 (JLI) at 001 ("M10 Elite is running a 'buy a pack of pods for $8.99, get the device kit ($19.99 msrp) for free'. Plus, they are including an escalating retail clerk incentive of $100-$500 based on number of battery kits sold, which is a significant amount of $$ for a retail clerk. The trade flyer has retail margin expectations of 34% on pod packs and 28% on devices.")).

Response to Proposed Finding No. 1438:

The Proposed Finding is incomplete and misleading without additional context. Robbins testified at trial with respect to the cited document that it "would be common for [JLI] to collect information at a trade show and share that on a form like this," but that JLI did not change its prices or promotions as a result of it. (Robbins (JLI) Tr. 3253-54). Indeed, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). Robbins also did not recall the cited promotions resulting in any increased sales for Altria. (Robbins (JLI) Tr. 3254).

1439. In 2017, JLI noted that Altria was able to grow MarkTen's share in part by utilizing its smoker database to mail coupons. (PX2109 (JLI) at 001-02).

Response to Proposed Finding No. 1439:

The Proposed Finding is incomplete and misleading without additional context. The statement is from 2017, at a time when the e-vapor category was stagnant, (RFF ¶¶ 286-91), and before Nu Mark even had a pod-based product on the market, (Schwartz (Altria) Tr. 1871). Regardless of whether Altria had a smoker database that it could utilize to mail coupons for e-cigarettes, "nothing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis (Altria) Dep. at 63). As a result, notwithstanding Altria's database, Nu Mark's e-vapor products were not commercially successful, (RFF ¶¶ 431-59 (Elite), 1100 (cig-a-likes)), had never been profitable, (RFF ¶¶ 1077-79), and were not forecasted to be profitable in the future, (RFF ¶¶ 1080-84).

1440. JLI regularly provided updates to its board regarding the pricing of competitive e-cigarette products, including MarkTen. (*See, e.g.*, PX2588 (JLI) at 019 ("Board Dashboard, September 2017") ("competitive analysis" comparing JUUL's starter kit and refill kit pricing to MarkTen, Vuse, blu, and Logic)).

Response to Proposed Finding No. 1440:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to show the cited document at trial, (CC Exhibit Index at 50), or in any deposition. There is thus no evidence that JLI relied upon or responded to the information about MarkTen, which was listed alongside many other brands, in this document. To the contrary, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354).

2. Respondents Engaged in Head-to-Head Non-Price Competition

1441. Altria and JLI competed head-to-head along many non-price dimensions to innovate and improve products, including shelf space, product features, and other aspects of non-price competition. (PX5000 at 078-81 (¶¶ 137-40) (Rothman Expert Report)).

Response to Proposed Finding No. 1441:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that Nu Mark's presence impacted JLI's product development or that JLI competed against Altria with respect to product features. (RFF ¶¶ 1647-50). To the extent that Altria competed with JLI and other e-vapor manufacturers along certain non-price dimensions, the evidence does not demonstrate any lessening of competition due to the discontinuation of its e-vapor products, and competition actually intensified after Altria's exit. (RFF ¶¶ 1647-64). For example, as the MarkTen products left the market, that shelf space was reallocated, and other manufacturers were incentivized to compete for that space. (RFF ¶ 1659). Moreover, [redacted]

a) Shelf Space Competition

1442. E-vapor companies compete for shelf space behind the counter at convenience stores and other retail outlets. (Begley (Altria) Tr. 1007).

Response to Proposed Finding No. 1442:

Respondents have no specific response except to note that Complaint Counsel has the burden to prove the relevant market for shelf space competition, (RCoL ¶ 55), and has not done so, (RFF ¶¶ 1383-426).

1443. Altria's Jody Begley testified that it is "certainly beneficial" for e-vapor companies "to have the best space you can at retail stores to communicate your brand messaging." (Begley (Altria) Tr. 1007).

Response to Proposed Finding No. 1443:

The Proposed Finding is incomplete and misleading without additional context. Although better shelf space may give a product increased visibility, that alone is not sufficient to make a

product competitive if the product is not appealing to consumers. (RFF ¶ 420). By contrast, products—such as JUUL—that are appealing to consumers have grown sales without access to premium shelf space. (RFF ¶ 415).

1444. Andrew Farrell, NJOY's Chief Revenue Officer, testified that Altria, JLI, and Reynolds were the e-cigarette competitors who most often occupied the top shelf space at retail stores in 2018. (Farrell (NJOY) Tr. 257).

Response to Proposed Finding No. 1444:

Respondents have no specific response except to note that Altria's Nu Mark products had dismal sales, (RFF ¶¶ 421, 431-59), notwithstanding access to this shelf space.

1445. In 2018, Altria established an Innovative Tobacco Products ("ITP") program with its retail partners. (Begley (Altria) Tr. 1005-07; PX7013 (Brace (Altria), Dep. at 81-82); *see also* PX4304 (Altria) at 002-25 (April 2018 presentation to 7-Eleven on ITP program); PX4331 (Altria) at 003-17 (August 2018 presentation to Toot'n Totum on ITP program)).

Response to Proposed Finding No. 1445:

Respondents have no specific response except to note that the ITP program was not enough to make Nu Mark's e-vapor products successful. (RFF ¶ 421).

1446. Prior to the creation of the ITP program, Nu Mark had received feedback from its retailer partners that they were interested in establishing an innovative products category. Given the growth of e-vapor, retailers were looking for solutions to merchandise the category in a more consistent manner. (Begley (Altria) Tr. 1006).

Response to Proposed Finding No. 1446:

Respondents have no specific response.

1447. Altria launched the ITP program with its retailer partners because it wanted shelf space to display its e-vapor products to generate both trial awareness and repeat purchase. (Begley (Altria) Tr. 1006). Though the ITP program, Nu Mark hoped to gain better visibility for its brands and the promotions they were offering. (PX7022 (Begley (Altria), Dep. at 216); *see also* PX7013 (Brace (Altria), Dep. at 82 ("ITP was an investment that we made with trade partners to upgrade their merchandising infrastructure, essentially their back bar where they merchandise products, to establish visibility for innovative tobacco products in their stores.")).

Response to Proposed Finding No. 1447:

Respondents have no specific response except to note that Nu Mark's hope for the ITP program was not realized, as better visibility was not able to compensate for the fact that consumers did not like its products. (RFF ¶ 420-21).

1448. Altria dedicated approximately $100 million in 2018 to its ITP program over a three-year period to obtain premier shelf space for e-cigarettes at retailers. (Begley (Altria) Tr. 1007; *see also* Quigley (Altria) Tr. 1951).

Response to Proposed Finding No. 1448:

Respondents have no specific response.

1449. At the same time that Altria was entering into ITP contracts with retailers, JLI was also competing aggressively for shelf space at convenience stores. In April 2018, for example, JLI considered it "a huge opportunity for JUUL to replace VUSE/MarkTen shelf space with a higher-selling/higher-margin product that is far easier for a retailer to understand." (PX2450 (JLI) at 002 (email from Joseph O'Hara reacting to an IRI "convenience report" for the four weeks ending April 22, 2018) (emphasis in original)).

Response to Proposed Finding No. 1449:

Respondents have no specific response except to note that the cited document also includes statements by O'Hara that Elite was at this time "struggling to get off the ground" and "a lackluster product." (PX2450 (JLI) at 002).

1450. JLI considered Altria's efforts to secure e-cigarette shelf space via the ITP program to be an "urgent" threat. (PX2001 (JLI)). In a May 2018 email to JLI's CEO, Kevin Burns, and JLI's CFO, Tim Danaher, with the subject line "Altria shelf set competitive response," Bob Robbins expressed "urgent" concern regarding Altria's three-year ITP shelf space contracts. (PX2001 (JLI)). According to Robbins, "If [JLI] can't find a strategy around this, we will be severely restricted on shelf in a considerable part of the c-store universe for the next 3 years." (PX2001 (JLI); *see also* PX2475 (JLI) at 001 (Email from Bob Robbins, May 14, 2018) ("Top 5 on the commercial agenda right now: . . . 5. Altria counter-strategy (to address shelf space issues")).

Response to Proposed Finding No. 1450:

The Proposed Finding is incomplete and misleading to the extent it suggests that the ITP program inhibited JLI from getting space on shelves or prevented JLI from achieving competitive

success. As Complaint Counsel's expert, Dr. Rothman, explained, "[r]etailers . . . have an incentive to give products with growing demand premier shelf space." (PX5000 Rothman Report ¶ 185). That was true for JUUL, which grew sales without a connection to Altria or any other legacy tobacco company. (RFF ¶¶ 1662-64). By contrast, notwithstanding access to premium shelf space, Nu Mark's e-vapor products were commercial failures. (RFF ¶¶ 420-21).

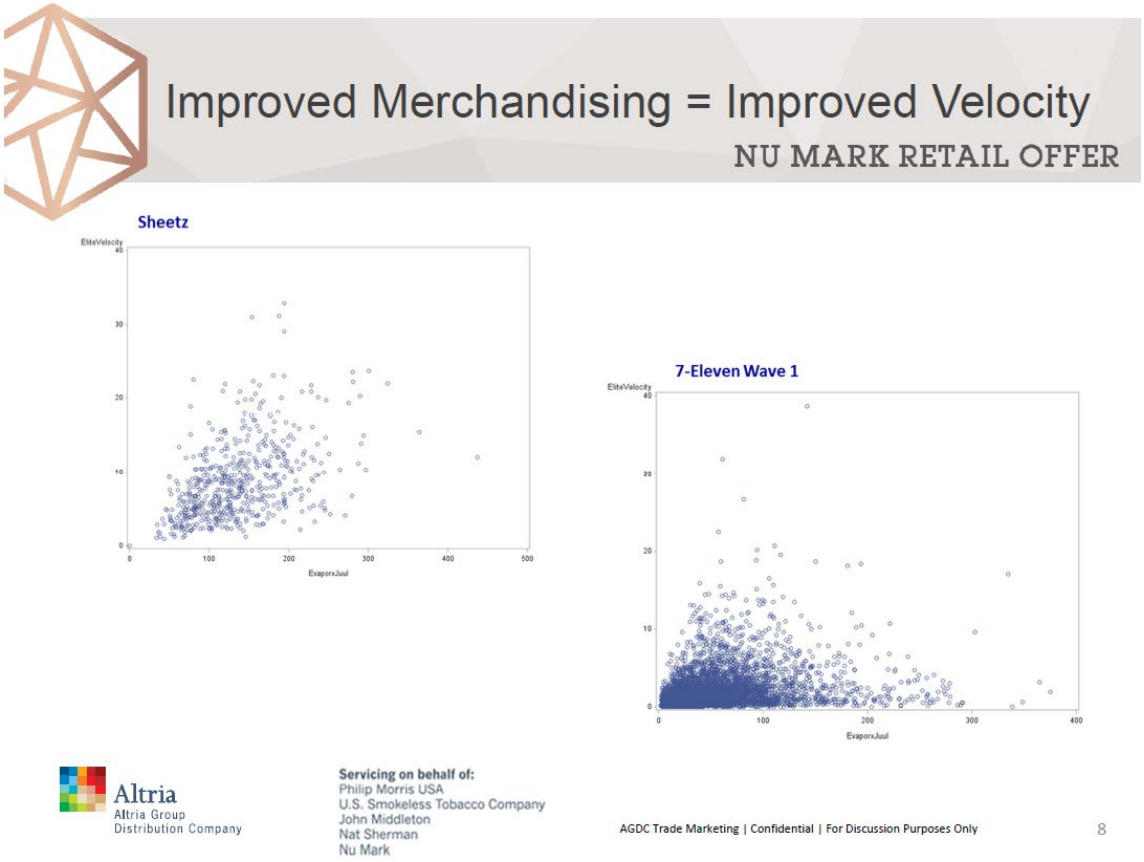
Furthermore, as Robbins explained in his deposition while testifying about the cited exhibit, "it did not turn out that [Altria's three-year contracts were] a threat," as JLI was successful at getting distribution and the contracts were renegotiated at certain intervals, rather than being a "three-year lock-in." (PX7039 Robbins (JLI) Dep. at 89-90).

1451. A May 2018 JLI presentation entitled "Altria Threat Competitive Response" and sent to JLI's CEO, Kevin Burns, and JLI's CFO, Tim Danaher, explained that "Altria has entered into [a] contract with ampm and is in discussions with Kum & Go to invest $8,000 per door for preferential shelf placement (50% of the vapor category) over the next three years. As part of the contract, Altria has also increased their retailer rebate across all products by 150% ($5,400k per door per year). This is likely the first bid to foreclose shelf-space for their vapor products at the expense of JUUL." (PX2005 (JLI) at 003). In response to Altria's retail contracts, JLI proposed "immediately committing to a 2019 $2M investment in ampm and Kum & Go for incremental shelf-space." (PX2005 (JLI) at 003).

Response to Proposed Finding No. 1451:

Respondents have no specific response except to note that JUUL grew sales without a connection to Altria or any other legacy tobacco company, (RFF ¶¶ 1662-64), in part because, as Complaint Counsel's expert Dr. Rothman observed in his report, "JLI had leverage with retailers that would have enabled it to . . . increase shelf space and prominence without Altria," (PX5000 Rothman Report ¶ 169).

1452. In September 2018, Altria concluded that its ITP program had in fact resulted in "Improved Velocity" when comparing sales of MarkTen Elite at 7-Eleven and Sheetz to sales of JUUL. (PX1618 (Altria) at 010 ("Nu Mark Retail Offer, Update 9/12/18")).



(PX1618 (Altria) at 010).

Response to Proposed Finding No. 1452:

The Proposed Finding is incomplete and misleading without additional context. Notwithstanding the ITP program and heavy promotional spending, (RFF ¶¶ 408-30), Elite was a commercial failure with dismal sales, (RFF ¶¶ 431-59). Notably, even in the "[i]mproved [v]elocity" situation at Sheetz, Elite was still usually selling less than one product for every 10 that JUUL sold. (PX1618 (Altria) at 010; *see also* PX7019 Crozier (Sheetz) Dep. at 92 (observing that Elite's subsequent discontinuation had "a pretty small impact to the category as a whole"); PX7038 Myers (Altria) Dep. at 476 (explaining that retailers were unconcerned by the discontinuation of Elite as its sales were "immaterial" to their business)).

1453. By September 2018, Altria had signed ITP shelf space contracts with 60 retailers representing 50% of its e-cigarette volume and 41,000 stores. (PX1618 (Altria) at 005); *see*

also PX1056 (Altria) at 024 ("Nu Mark Brand Update, MarkTen Elite, 8/10/18") (reflecting that Altria had signed or was in the process of signing ITP contracts with retailers comprising 19,000 locations to go into effect between September 2018 and January 2019)). Altria secured the #1 shelf position for three years at each of those retailers, with space for current and future e-cigarette products. (PX1618 (Altria) at 005).

Response to Proposed Finding No. 1453:

Respondents have no specific response except to note that notwithstanding the ITP program, Nu Mark' e-vapor products were commercial failures. (RFF ¶¶ 420-21, 431-59).

1454. [redacted] (PX1618 (Altria) at 009 (*in camera*); Begley (Altria) Tr. 1007).

[redacted]

(PX1618 (Altria) at 009 (*in camera*)).

Response to Proposed Finding No. 1454:

Respondents have no specific response except to note that the cited document itself demonstrates that the ITP space was created to display all innovative tobacco products, not just e-vapor. (PX1618 (Altria) at 004 (showing oral and heat-not-burn products next to e-vapor products); *see also* PX7019 Crozier (Sheetz) Dep. at 172-73 (agreeing that "the category that Altria initially set up was for more than just e-vapor products")).

1455. [redacted] (Crozier (Sheetz) Tr. 1507 (*in camera*); *see also* PX3116 (Sheetz) at 001 [redacted] (Crozier (Sheetz) Tr. 1507 (*in camera*); PX3116 (Sheetz) at 001 [redacted]

Response to Proposed Finding No. 1455:

Respondents have no specific response except to note that notwithstanding the ITP program, Nu Mark's e-vapor products were commercial failures. (RFF ¶¶ 420-21, 431-59). As a result, Crozier testified during his deposition that it was "a pretty small impact to the category" when Elite was discontinued—that product had not "res[o]nate[d] with consumers." (PX7019 Crozier (Sheetz) Dep. at 75, 92).

1456. [redacted]

Response to Proposed Finding No. 1456:

Respondents have no specific response.

1457. [redacted] (PX8000 at 004 (¶ 22) (Crozier (Sheetz), Decl.) (*in camera*)).

Response to Proposed Finding No. 1457:

Respondents have no specific response.

1458. [redacted]

Response to Proposed Finding No. 1458:

Respondents have no specific response except to note that Reynolds has subsequently offered a "similar" amount to Sheetz to acquire top shelf space. (PX7019 Crozier (Sheetz) Dep. at 172).

1459. [redacted] (PX8000 at 004 (¶ 22) (Crozier (Sheetz), Decl.) (*in camera*)).

Response to Proposed Finding No. 1459:

Respondents have no specific response except to note that notwithstanding the ITP program, Nu Mark's e-vapor products were commercial failures. (RFF ¶¶ 420-21, 431-59). As a result, Crozier agreed at trial that Altria ran "very aggressive promotions" but "did not make a dent in JUUL's share in 2018," (Crozier (Sheetz) Tr. 1553), as "JUUL was a superior product," (Crozier (Sheetz) Tr. 1555).

1460. Jack Stout, Senior Vice President for Merchandising and Demand Chain at 7-Eleven, stated in a declaration that Altria paid 7-Eleven to construct new displays for e-cigarettes. (PX8001 at 003 (¶ 15) (Stout (7-Eleven), Decl.)). The agreement that Altria signed with 7-Eleven allocated premium placement for Altria's e-cigarettes. (PX8001 at 003 (¶ 15) (Stout (7-Eleven), Decl.)).

Response to Proposed Finding No. 1460:

Respondents have no specific response except to note that the cited document states that Altria's agreement with 7-Eleven "allocated premium placement for Altria's innovative tobacco products," not just e-cigarettes. (PX8001 Stout (7-Eleven) Decl. at 003 ¶ 15).

1461. Bill Kloss, Category Manager for Tobacco and Alcohol products at Wawa, stated in a declaration that, as with combustible cigarettes, display position is important for e-cigarettes, and Altria competed and paid for "premier placement" for its MarkTen e-cigarettes through 2021 before they were discontinued. (PX8006 at 004 (¶ 16) (Kloss (Wawa), Decl.)). [redacted] (PX8006 at 004 (¶ 17) (Kloss (Wawa), Decl.) (*in camera*)).

Response to Proposed Finding No. 1461:

Respondents have no specific response except to note that premium shelf space is neither necessary, (RFF ¶ 415), nor sufficient, (RFF ¶ 420), to make a product commercially successful.

1462. After Altria discontinued the MarkTen brand and exited the sale of e-cigarettes, Altria required Wawa to display JUUL products in the space that Altria had previously contracted for MarkTen. (PX8006 at 005 (¶ 19) (Kloss (Wawa), Decl.)). Wawa was reticent to display JUUL products because of their association with youth vaping, but, after Altria and JLI insisted, Wawa agreed to display empty packs of JUUL in order to deter underage theft. (PX8006 at 005 (¶ 19) (Kloss (Wawa), Decl.)).

Response to Proposed Finding No. 1462:

The Proposed Finding is incomplete and misleading without additional context. Indeed, the situation at Wawa illustrates the current vibrant competition for shelf space after Altria discontinued Nu Mark's e-vapor products: According to Kloss, when Altria and JLI amended their Services Agreement, Altria asked Wawa to stop displaying JUUL products on its shelves and instead display On! pouches. (PX8006 Kloss (Wawa) Decl. at 005 ¶ 21). Instead of acceding to Altria's request, "Wawa reached out to the leading tobacco companies to renegotiate the allocation of space" at Wawa, and now will be putting Vuse products in the top display position. (PX8006 Kloss (Wawa) Decl. at 005 ¶ 22).

b) Product Features

1463. Prior to the transaction with JLI, Altria engaged in product development efforts that benefited consumers. Altria released new products, including MarkTen Bold, which included 4% nicotine by weight and used a "proprietary recipe" for nicotine salts, and MarkTen Elite, a pod-based e-cigarette. (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks); Begley (Altria) Tr. 984, 990).

Response to Proposed Finding No. 1463:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The evidence demonstrates that Altria did not engage in any product development efforts that resulted in a commercialized e-vapor product. (RFF ¶¶ 184-91, 1553-611 (describing Altria's inability to develop e-vapor products internally)). Although MarkTen Bold—unlike Nu Mark's other products—did use some nicotine salts, it did not have the correct ratio of salts to nicotine, meaning it could not provide nicotine satisfaction to convert smokers. (RFF ¶¶ 638-51). Moreover, MarkTen Bold was a cig-a-like, which was a dying format. (RFF ¶¶ 568, 1324-29). Elite was not an internal product development effort by Altria; it was purchased from a Chinese manufacturer. (RFF ¶¶ 314, 328). Elite also suffered from numerous problems—such as lack of any nicotine salts, no dry puff prevention, and initial extensive leaking—that made it an unattractive product to consumers. (RFF ¶¶ 431-85, 513-18). Elite was a commercial failure and unlikely to obtain FDA approval. (RFF ¶¶ 1512-16).

1464. In a presentation sent to Howard Willard in May 2017, Altria sought "To explore the relative performance of . . . potential 'JUUL Fighters,'" and conducted "research to look at potential products to compete with Juul and potentially hamper their momentum." (PX1171 (Altria) at 003 ("JUUL Fighter" summary slides)). After conducting a trial among adult smokers, Altria observed that "Elite was consistently preferred over . . . other devices, including JUUL." (PX1171 (Altria) at 004).

Response to Proposed Finding No. 1464:

The Proposed Finding is incomplete and misleading without additional context. The cited presentation did not recommend that Altria purchase Elite; to the contrary, it identified JUUL and

Von Erl as the "potentially attractive options" for Altria to consider acquiring. (RX1103 (Altria) at 007). Altria only considered acquiring rights to Elite when its efforts at that time to acquire JUUL or Von Erl failed. (RFF ¶¶ 310-14, 324-31). And Complaint Counsel ignores later evidence suggesting that Elite was only preferred by consumers looking for a vaping experience, while JUUL provided a "more 'familiar cigarette-like experience,'" (RX2015 (Altria) at 007); but if a product was only providing a "vaping experience," it would not convert smokers and thus could not get FDA approval. (RFF ¶¶ 596-600; 609-15).

1465. In June 2018, Altria's Richard Jupe wrote that "as a contingency" in case the JLI transaction did not come to fruition, Altria would continue "to invest in [the Elite] platform going forward." (PX1086 (Altria) at 001). Jupe planned to incorporate work performed on prior R&D projects into the Elite platform. (PX1086 (Altria) at 001).

Response to Proposed Finding No. 1465:

The Proposed Finding is incomplete and misleading without additional context. At trial, Jupe testified regarding the cited document that he "questioned [Elite's] role as far as the Elite product was not a product that we found to be satisfying, and . . . we didn't think this was going to be a product that was going to convert or switch smokers." (Jupe (Altria) Tr. 2154). As a result, he "questioned [Elite's] role in the portfolio independent of" any transaction with JLI. (Jupe (Altria) Tr. 2155).

To the extent Jupe contemplated in the cited document attempting to make changes to Elite, *i.e.*, Elite 2.0 or 3.0, (PX1086 (Altria) at 001), (1) any new design of Elite was never finalized (RFF ¶¶ 1597-603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF ¶¶ 45-71); and (3) even if successful, that process would take years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26, 1602).

(1) Flavors

1466. Altria and JLI competed head-to-head by offering closed-system e-cigarettes in different flavors to consumers. (*See* CCFF ¶¶ 1467-71, below).

Response to Proposed Finding No. 1466:

The Proposed Finding is inaccurate and not supported by the paragraphs that follow or the record evidence. While at various points Nu Mark and JLI offered different flavors, there is no evidence that Altria, as opposed to other e-vapor manufacturers, prompted JLI to prioritize improving or expanding its flavor offerings. Moreover, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products or cig-a-likes.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1467-71, Respondents incorporate their responses to those Proposed Findings herein.

1467. Altria was developing a number of different flavors to reach a wide range of consumers and to better compete with JLI and other e-cigarette competitors. (*See, e.g.*, PX1704 (Altria) at 007 ("RD&S Innovation Progress" presentation dated February 2018) (noting that Altria was working on "Flavor development incorporating Sensomics, sensory science, and artisan flavor creation"); PX1686 (Altria) at 001 (Project Panama meeting minutes dated September 27, 2017) (asking "What are JUUL's best-selling flavors?" and noting that Altria wanted to develop flavors "better than JUUL"); PX8000 at 004 (¶¶ 23-24) (Crozier (Sheetz), Decl.); *see also* PX9000 (Altria) at 016 (Nov. 2017 Investor Day remarks) ("Our product development is informed by a deep understanding of adult smokers and vapers. We know that different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes.")).

Response to Proposed Finding No. 1467:

The Proposed Finding is incomplete and misleading without additional context. While Altria was working to develop different flavors, it had run into numerous obstacles. (PX7014 Baculis (Altria) Dep. at 107-09; *see also* RFF ¶ 688). Moreover, even if Altria had successfully

developed a new flavor, that would have required premarket authorization from FDA prior to being sold. (RFF ¶¶ 45-71, 692). Even if Altria could obtain regulatory approval to launch a new flavor, that process would have taken years. (RFF ¶¶ 86-93, 122-26). The evidence at trial was consistent that the most important feature of an e-vapor product was not its flavors but the ability of the product to mimic the nicotine experience of a cigarette. (RFF ¶¶ 403-04, 484, 704; *see also* PX7014 Baculis (Altria) Dep. at 156-57). None of Nu Mark's products had the salts formula that could provide this nicotine experience. (RFF ¶¶ 601-51).

Finally, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products or cig-a-likes.

1468. Paul Crozier, Category Manager for Cigarettes and Tobacco at Sheetz, stated in a declaration that, before Altria's investment in JLI, Altria tested new and semi-exclusive flavors for MarkTen at Sheetz stores before they were made more widely available at other retailers. (PX8000 at 004 (¶ 23) (Crozier (Sheetz), Decl.); *see also* PX8000 at 004 (¶ 24) (Crozier (Sheetz), Decl. (noting the wide variety of MarkTen flavors offered at Sheetz)).

Response to Proposed Finding No. 1468:

Respondents have no specific response except to note that, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products or cig-a-likes.

1469. In an email to JLI's CEO dated January 2018, JLI's Bob Robbins characterized the development of new flavors as "a super-priority" for JLI. (PX2350 (JLI) at 001) ("It is imperative for us to get better fruit and dessert flavors on market.")).

Response to Proposed Finding No. 1469:

The Proposed Finding is misleading to the extent it suggests the cited document supports the idea of "head-to-head competition" on flavors between Altria and JLI. Complaint Counsel chose not to ask Robbins about this document at trial, (CC Exhibit Index at 45), or in his deposition, (PX7039 Robbins (JLI) Dep.), and thus there is no evidence that he was contemplating Nu Mark products at this time. Moreover, on its face, the cited statement does not even reference Nu Mark, (PX2350 (JLI) at 001); that JLI was not threatened by MarkTen's flavors is evidenced later in the document, which notes that MarkTen "over-index[es] on 'smoker flavors,'" (PX2350 (JLI) at 024). And the document was written before Nu Mark's pod-based product Elite was even launched. (Schwartz (Altria) Tr. 1871).

Finally, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products or cig-a-likes.

1470. An April 2018 JLI presentation sent to JLI's CEO and entitled "Competitive Flavor & Nicotine Benchmarking" compared the flavors offered by JUUL with other closed-system e-cigarette competitors, including MarkTen Elite and the MarkTen cigalikes. (PX2344 (JLI) at 004 (listing the number of "flavors available" for various closed-system competitors and identifying JUUL's "coverage" percentage for each); *see also* PX2344 (JLI) at 007 (slide entitled "Flavors with No Coverage" and identifying four flavors offered by Elite and the MarkTen cigalikes but not by JLI)).

Response to Proposed Finding No. 1470:

The Proposed Finding is misleading to the extent it suggests the cited document supports the idea of "head-to-head competition" on flavors between Altria and JLI. MarkTen is only one of a number of e-vapor brands listed in this presentation. (PX2344 (JLI) at 004, 007). Despite being copied on the email, Robbins was not asked about the cited document during trial, (CC

Exhibit Index at 44), or in his deposition, (PX7039 Robbins (JLI) Dep.). While Burns was shown the cited document during his deposition, Complaint Counsel elicited no testimony that JLI was focused on Nu Mark's flavor offerings. (PX7025 Burns (JLI) Dep. at 50-61). As a result, there is no evidence that JLI focused on, or ever reacted in any way to, Nu Mark's flavor offerings listed in this presentation.

Finally, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products or cig-a-likes.

1471. A May 2018 JLI presentation stated that "JUUL offers fewer flavors than many top competitors," including the MarkTen cigalike, thus providing JLI with an "opportunity to expand our portfolio." (PX2090 (JLI) at 009 ("Flavor Competitive Landscape"); *see also* PX2090 (JLI) at 005 ("JUUL dominates both the flavor and mint categories in terms of sales, but has opportunity to expand reach with better indulgent and tobacco flavors")). That same JLI flavor presentation highlighted the wide variety of e-cigarette flavors that Altria had developed and sold. (PX2090 (JLI) at 009, 014).

Response to Proposed Finding No. 1471:

The Proposed Finding is misleading to the extent it suggests the cited document supports the idea of "head-to-head competition" on flavors between Altria and JLI. The MarkTen cig-a-like is only one of a number of e-vapor products listed in this presentation. (PX2090 (JLI) at 009). Moreover, Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 35), or in any deposition, so there is no evidence that JLI focused on MarkTen cig-a-likes or even reacted in any way to that brand's flavor offerings listed in this presentation. Indeed, the evidence was consistent that JLI did not view MarkTen cig-a-likes to be a competitive threat to JLI's pod-based product, JUUL. (RFF ¶¶ 755-61).

Finally, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products or cig-a-likes.

(2) Nicotine Strength

1472. Altria and JLI competed head-to-head by offering closed-system e-cigarettes in different nicotine strengths in response to different consumer preferences. (*See* CCFF ¶¶ 1473-76, below; *see also* Huckabee (Reynolds) Tr. 395 (testifying that Vuse Alto comes in three different nicotine strengths because Reynolds has found that there are a range of consumers who prefer different nicotine strengths)).

Response to Proposed Finding No. 1472:

The Proposed Finding is not supported by the paragraphs that follow or the record evidence. While Altria and JLI offered different nicotine strengths, there is no evidence that Altria, as opposed to other e-vapor manufacturers, prompted JLI to prioritize expanding its nicotine strength offerings. Moreover, the evidence shows that, regardless of nicotine strength, nicotine salts were necessary to achieve the nicotine satisfaction needed to convert smokers. (RFF ¶¶ 596-627).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1473-76, Respondents incorporate their responses to those Proposed Findings herein.

1473. Altria offered e-vapor products with different levels of nicotine to meet consumer needs and preferences. (*See, e.g.*, PX2344 (JLI) at 004 (JLI presentation dated April 2018 noting that MarkTen cigalikes came in four different nicotine strengths with a range of 2.4% to 4%); *see also* PX9000 (Altria) at 016 (Nov. 2017 Investor Day remarks) ("Our product development is informed by a deep understanding of adult smokers and vapers. We know that different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes.")).

Response to Proposed Finding No. 1473:

The Proposed Finding is incomplete and misleading without additional context. Although Nu Mark offered products with different levels of nicotine, the evidence shows that none of Nu Mark's products were capable of mimicking the nicotine experience of cigarettes, as is necessary to convert adult smokers. (RFF ¶¶ 601-51).

Moreover, the MarkTen cig-a-like is only one of a number of e-vapor products listed in the cited presentation. (PX2344 (JLI) at 004, 007). And despite being copied on the email, Robbins was not asked about the cited document during trial, (CC Exhibit Index at 44), or in his deposition, (PX7039 Robbins (JLI) Dep.), so there is no evidence that JLI focused on MarkTen cig-a-likes or ever reacted in any way to that brand's nicotine strength offerings listed in this presentation. Indeed, the evidence was consistent that JLI did not view MarkTen cig-a-likes to be a competitive threat to JLI's pod-based product, JUUL. (RFF ¶¶ 755-61).

1474. In January 2018, Bob Robbins observed to JLI's CEO that "All viable competitors . . . offer variable Nic Strengths . . . . We should too." (PX2350 (JLI) at 001).

Response to Proposed Finding No. 1474:

The Proposed Finding is misleading to the extent it suggests the cited document supports the idea of "head-to-head competition" on nicotine strengths between Altria and JLI. On its face, the cited statement does not reference Nu Mark. (PX2350 (JLI) at 001). Robbins was not asked about the document at trial, (CC Exhibit Index at 45), or in his deposition, (PX7039 Robbins (JLI) Dep.). Nor was Burns (the recipient of the e-mail) asked about this document at either of his depositions. (PX7009 Burns (JLI) IHT; PX7025 Burns (JLI) Dep.). As a result, there is no evidence that Robbins was referencing Nu Mark products here.

1475. An April 2018 JLI presentation sent to JLI's CEO and entitled "Competitive Flavor & Nicotine Benchmarking" compared the nicotine content of JUUL with other closed-system e-cigarette competitors, including MarkTen Elite and the MarkTen cigalikes. (PX2344

(JLI) at 004 (comparing the minimum nicotine content, maximum nicotine content, and number of nicotine "percentages available" across closed-system competitors)).

Response to Proposed Finding No. 1475:

The Proposed Finding is misleading to the extent it suggests the cited document supports the idea of "head-to-head competition" on nicotine strength offerings between Altria and JLI. MarkTen is only one of a number of e-vapor brands listed in this presentation. (PX2344 (JLI) at 004, 005). Moreover, despite being copied on the email, Robbins was not asked about the cited document during trial, (CC Exhibit Index at 44), or in his deposition, (PX7039 Robbins (JLI) Dep.). While Burns was shown the cited document during his deposition, Complaint Counsel elicited no testimony that JLI was focused on Nu Mark's nicotine content offerings. (PX7025 Burns (JLI) Dep. at 50-61). As a result, there is no evidence that JLI focused on MarkTen or ever reacted in any way to MarkTen's nicotine strength offerings listed in this presentation.

1476. JLI ultimately released its JUUL product in 5%, 3%, and 1.5% nicotine strengths in order to respond to consumers who wanted a lower nicotine strength or to taper down their usage level. (PX7025 (Burns (JLI), Dep. at 39-41, 43-44)).

Response to Proposed Finding No. 1476:

Respondents have no specific response except to note that there is no evidence that JLI's release of different nicotine strengths was influenced in any way by Nu Mark products and, according to JLI's internal documents, while JLI did plan to launch a 1.5% strength JUULpod in Canada, (PX2098 (JLI) at 006), [redacted], both of which are substantially higher than the nicotine strength of Elite, which was 1.8 percent, (PX4109 (Altria) at 006).

(3) Other Product Features

1477. Altria and JLI also competed closely on other product design features, including pod insertion technology. (*See* CCFF ¶¶ 1478-81, below; *see also* PX1657 (Altria) at 001

(internal Altria email discussing a JLI patent application for Bluetooth-enabled technology that JLI was releasing internationally)).

Response to Proposed Finding No. 1477:

The Proposed Finding is not supported by the paragraphs that follow or the record evidence. There is no evidence that Altria, as opposed to other e-vapor manufacturers, prompted JLI to focus on any particular design feature that it would not have otherwise. In particular, as explained below, there is no evidence that JLI competed against Altria on pod insertion technology. (*See* RRFF ¶¶ 1478-81).

1478. MarkTen Elite offered an innovative magnetic pod insertion, as compared to JUUL, which required customers to push pods into the device. (PX4012 (Altria) at 022 ("Nu Mark 2018 Three Year Strategic Plan") (comparing Elite and JUUL across several dimensions, including pod insertion)).

Response to Proposed Finding No. 1478:

The Proposed Finding is incomplete and misleading without additional context. Elite and JUUL employed different methods of inserting the pod into the device, but there is no evidence that this feature was critical to consumers. Indeed, Baculis, who was responsible for brand management and new product development at Nu Mark, (PX7014 Baculis (Altria) Dep. at 12-13), dismissed the significance of additional e-vapor product features like magnetic pod insertion, explaining that even if that feature were a "nice-to-have[]," "if [a product] didn't have nicotine satisfaction, [it was] not appealing to the broadest group of consumers," (PX7014 Baculis (Altria) Dep. at 157; *see also* RFF ¶¶ 628-37). Lastly, Elite was not the only pod-based product with magnetic pod insertion—Vuse Alto and NJOY Ace had the same feature. (RFF ¶¶ 243(d), 249(a)).

1479. Altria's Jody Begley characterized Elite's magnetic pods as "clearly a differentiator" vis-a-vis JUUL. (PX7022 (Begley (Altria), Dep. at 190-92)).

Response to Proposed Finding No. 1479:

The Proposed Finding is incomplete and misleading without additional context. In the same cited testimony, Begley explained that he didn't "recall viewing [magnetic pod insertion] as a significant benefit," just as a "different attribute from a pod insertion standpoint." (PX7022 Begley (Altria) Dep. at 191-92).

1480. Altria's Howard Willard highlighted many of the innovative features of MarkTen Elite at the CAGNY investor conference in February 2018, including its "magnetic click pods," as well as its "premium sleek battery design" and "large vapor volume" that contains "over twice the liquid volumes of JUUL's." (PX2253 (Altria) at 008 (transcript of Altria presentation)).

Response to Proposed Finding No. 1480:

The Proposed Finding is incomplete and misleading without additional context. Willard made these comments prior to Elite's launch, which proved to be a commercial failure. (RFF ¶¶ 431-59; PX2086 (JLI) at 001). Regardless of these features, Elite was missing the "number one thing" consumers were looking for, *i.e.*, nicotine satisfaction. (PX7014 Baculis (Altria) Dep. at 157; *see also* RFF ¶¶ 601-13, 628-37).

1481. One of the product improvements and new features that JLI was considering for its next generation devices were magnetic pods, similar to those in MarkTen Elite. (PX2012 (JLI) at 024 ("Executive Offsite: Product" presentation dated January 2018) ("Significantly improve pod connection - magnetic?")).

Response to Proposed Finding No. 1481:

The Proposed Finding is incomplete and misleading without additional context. This presentation was created before Elite was launched in February 2018, which refutes any supposition that JLI was considering a magnetic pod connection based on its view of Elite. (PX2012 (JLI) at 002 (dated January 2018); Schwartz (Altria) Tr. 1871 (discussing Elite's launch on February 26, 2018)). And the cited page says nothing about Elite and virtually nothing about

a magnetic pod connection. (PX2012 (JLI) at 024). In fact, nowhere does the presentation even observe that Elite employed a magnetic pod mechanism.

Moreover, the cited document was not discussed at trial, (CC Exhibit List at 33), nor was it used in any depositions of JLI employees. As a result, there is no evidence that JLI ultimately decided to pursue a magnetic pod connection or, if it did, that this decision was in response to Elite.

c) Competition to Improve Products

1482. Altria and JLI competed head-to-head to improve their closed-system e-cigarette products in other ways. (*See* CCFF ¶¶ 1483-92, below).

Response to Proposed Finding No. 1482:

The Proposed Finding is not supported by the paragraphs that follow or the record evidence. There is no evidence that Altria was a source of innovation pressure on JLI or any other e-vapor manufacturer. (RFF ¶¶ 1647-50).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1483-92, Respondents incorporate their responses to those Proposed Findings herein.

1483. A JLI presentation dated December 2017 included survey results of former JUUL users that listed their "reasons for churn," including the fact that "JUUL pods leaked." (PX2356 (JLI) at 006 (presentation entitled "What Keeps Us Up at Night") (stating that 10 percent of survey respondents no longer used JUUL because its pods leaked)). The same presentation included a customer complaint from "JUUL Reddit" that raised "leaking issues (and spitting for the first few puffs)" with JUUL's "v1 pods." (PX2356 (JLI) at 007)).

Response to Proposed Finding No. 1483:

The Proposed Finding is misleading and irrelevant to the extent it purports to show head-to-head competition between Altria and JLI to improve their products. Neither of the cited pages mentions Altria or Nu Mark products. (PX2356 (JLI) at 006, 007). Indeed, the presentation was prepared before Nu Mark launched its pod product, Elite. (Schwartz (Altria) Tr. 1871). And JLI

employee O'Hara testified at trial that Elite pods "were uniquely leaky, unlike just about any other product [he] had ever seen." (O'Hara (JLI) Tr. 548).

1484. In an email to JLI's CEO in January 2018, Bob Robbins characterized "stopping leaky pods" as "a super-priority" for JLI. (PX2350 (JLI) at 001).

Response to Proposed Finding No. 1484:

The Proposed Finding is misleading and irrelevant to the extent it purports to show head-to-head competition between Altria and JLI to improve their products. The cited statement does not reference Altria or Nu Mark. (PX2350 (JLI) at 001). The email was written before Altria launched its pod product, Elite. (Schwartz (Altria) Tr. 1871). Robbins was not asked about the document at trial, (CC Exhibit Index at 45), or in his deposition, (PX7039 Robbins (JLI) Dep.). Nor was Burns (the recipient of the e-mail) asked about this document in either of his depositions. (PX7009 Burns (JLI) IHT; PX7025 Burns (JLI) Dep.). As a result, there is no evidence that this document, or JLI's response to reports of leaky pods more generally, was influenced by Nu Mark products.

1485. JLI's Bob Robbins testified in his deposition that leaking pods is a problem, and that he was aware of leaking and spitting issues with JUUL products. (PX7039 (Robbins (JLI), Dep. at 71-72, 74)).

Response to Proposed Finding No. 1485:

The Proposed Finding is misleading and irrelevant to the extent it purports to show head-to-head competition between Altria and JLI to improve their products. The cited statement does not reference Nu Mark products.

Moreover, although all pod-based products leak to some extent, the evidence at trial demonstrated that, at launch, Elite pods "were uniquely leaky." (O'Hara (JLI) Tr. 548; *see also* RFF ¶¶ 460-70).

1486. In an email to the "JUUL community," JLI acknowledged that some customers "have experienced leaky pods," but touted the fact that it had recently invested "millions of

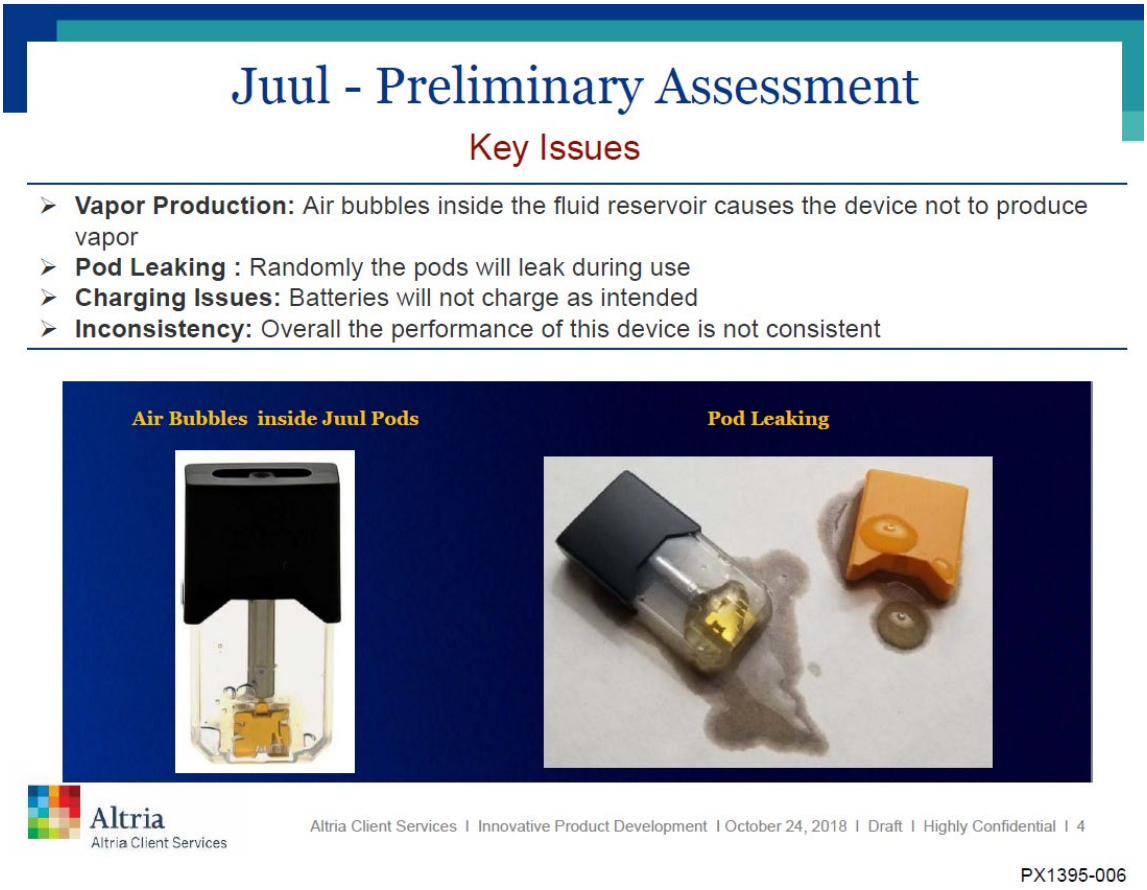
dollars" to address the issue. (PX1198 (Altria) at 003 (Altria presentation dated July 2018 including a direct email from JLI's CEO, Kevin Burns, to JLI's customers) ("To those who have had to send in devices for service or have experienced leaky pods; hopefully you are noticing a difference in recent months, as we have invested millions of dollars in manufacturing scaling and quality this year alone.")).

Response to Proposed Finding No. 1486:

The Proposed Finding is misleading and irrelevant to the extent it purports to show "head-to-head" competition between Altria and JLI to improve their products. The cited document does not reference Nu Mark products.

Moreover, although all pod-based products leak to some extent, the evidence at trial demonstrated that, at launch, Elite pods "were uniquely leaky." (O'Hara (JLI) Tr. 548; *see also* RFF ¶¶ 460-70).

1487. Despite JLI's claims that it had fixed its leaking pods, an Altria assessment of JUUL pods dated October 2018 found that "Randomly the [JUUL] pods will leak during use." (PX1395 (Altria) at 006 (presentation entitled "E-Vapor Products Analytical Assessments") (including a picture of a leaking JUUL pods)).



(PX1395 (Altria) at 006).

Response to Proposed Finding No. 1487:

The Proposed Finding is misleading and irrelevant to the extent it purports to show "head-to-head" competition between Altria and JLI to improve their products. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 14), or in any deposition. As a result, there is no evidence that this document was used to suggest priorities for Nu Mark to improve its products and better compete with JLI specifically.

1488. A JLI presentation dated December 2018 compared JUUL and competing products on the basis of how much each leaked. (PX2087 (JLI) at 013 ("Competitor Product Performance Evaluation")). Of the products evaluated, the mean leakage percentage was about 35 percent. (PX2087 (JLI) at 013 (showing total leakage based on the percent of pod liquid leaking); *see also* O'Hara (JLI) Tr. 567-68). JUUL's leakage percentage was between 20 and 30 percent. (PX2087 (JLI) at 013; O'Hara (JLI) Tr. 568).

Response to Proposed Finding No. 1488:

The Proposed Finding is misleading and irrelevant to the extent it purports to show "head-to-head" competition between Altria and JLI to improve their products. The cited document does not contain a "Competitor Product Performance Evaluation" presentation.

Respondents believe that Complaint Counsel meant to cite PX2084 (JLI). However, that presentation shows that JUUL leaked less than Elite. (PX2084 (JLI) at 013). Moreover, MarkTen Elite is just one of numerous e-vapor products included in this presentation, (PX2084 (JLI) at 013), and there is no evidence that JLI focused on Elite's leaking specifically or ever reacted in any way to that product's leakage rates listed in this presentation.

1489. Like JLI, Altria also had to address leaking issues with its pod product, MarkTen Elite. (*See* CCFF ¶¶ 1206-34, above).

Response to Proposed Finding No. 1489:

Respondents have no specific response except to note that the evidence at trial demonstrated that, at launch, Elite pods "were uniquely leaky." (O'Hara (JLI) Tr. 548; *see also* RFF ¶¶ 460-70).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1206-34, Respondents incorporate their responses to those Proposed Findings herein.

1490. Altria told customers that "it's relatively normal in the pod-based space for leakage in pods. We are looking in to ways to resolve this issue." (PX1822 (Altria) at 002).

Response to Proposed Finding No. 1490:

The Proposed Finding is incomplete and misleading without additional context. The cited document, including the quoted language, is a proposed talking point for speaking with dissatisfied customers, (PX1822 (Altria)), not an analysis of leaking in Nu Mark or competitor products. Moreover, Nu Mark viewed Elite's leaking as "worse than any other pod product" and a "real

impediment." (Begley (Altria) Tr. 1103; *see also* RFF ¶¶ 460-77 (describing how excessive leaking damaged the Elite brand)).

1491. In March 2018, Altria's Craig Schwartz wrote to his Nu Mark colleagues that "now that MarkTen Elite is in the Market - we want to ensure that its Quality is unrivaled, especially as we embark on upending Juul. With this stated Objective, we are concerned with MarkTen Elite Pods leaking." (PX1590 (Altria) at 001).

Response to Proposed Finding No. 1491:

Respondents have no specific response.

1492. In the months following the launch of MarkTen Elite in February 2018, Nu Mark developed and implemented a new gasket to address the leaking issue with Elite's pods. (*See* CCFF ¶¶ 1206-34, above).

Response to Proposed Finding No. 1492:

The Proposed Finding is incomplete and misleading without additional context. Nu Mark undertook numerous changes to mitigate the leaking issue. (RFF ¶¶ 655-58). Nu Mark developed the gasket, which had to go through the change management process before it was approved in August 2018. (RFF ¶¶ 659-69). This approval was subsequently rescinded, but due to communication issues the change was still implemented. (RFF ¶¶ 670-72). The gasket was an important step toward resolving Elite's leaking problem. (RFF ¶ 674). But the gasket could not transform Elite into a successful product because it did not remedy Elite's lack of nicotine satisfaction. (RFF ¶ 674).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1206-34, Respondents incorporate their responses to those Proposed Findings herein.

3. The Transaction Eliminated Products That Appealed to Consumers

1493. The transaction eliminated products that consumers valued and would have valued, which harms consumers. (PX5000 at 075-83 (¶¶ 130-45) (Rothman Expert Report); PX5001 at 016 (¶ 24), 030-31 (¶¶ 45-48) (Rothman Rebuttal Report); PX7048 (Rothman, Trial Dep. at 34-35, 49-50)).

Response to Proposed Finding No. 1493:

The Proposed Finding is incorrect and unsupported by the cited documents. Dr. Rothman concluded that the transaction has harmed and will harm consumers based on his "significant competitor" finding, (PX5001 Rothman Rebuttal ¶ 57), which is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

Moreover, products exiting the market is "normal"; indeed, it is just "part of the process by which products that are relatively unsuccessful are replaced by more successful products." (Murphy Tr. 3129-30). The evidence shows that consumers did not and would not value Nu Mark's products—despite aggressive promotions, Elite never reached more than a 0.9 percent market share of closed-system cartridge sales, (RFF ¶ 1467), and MarkTen was in a declining segment, (RFF ¶¶ 1324-29).

1494. Because closed-system e-cigarettes are differentiated products, removal of Altria's e-cigarette products will harm consumers that preferred Altria's e-cigarettes and purchased those products prior to their removal. (PX7048 (Rothman, Trial Dep. at 210); *see also* PX5000 at 082 (¶ 142) (Rothman Expert Report)).

Response to Proposed Finding No. 1494:

The Proposed Finding is incorrect and misleading without additional context. Consumer harm from product removal is a recognized flaw of the Antitrust Logit Model used by Dr. Rothman, which necessarily assumes that if any product leaves the market—regardless of its size or the ability of consumers to purchase other, similar products—consumers are harmed. (RFF ¶ 1673 (citing Murphy Tr. 3129)). There is no evidence that Nu Mark products were unique or irreplaceable. (RFF ¶¶ 1677-79). Indeed, the evidence shows that they were inferior products. (RFF ¶¶ 478-85, 1501-31).

1495. Based on his review of the documents and testimony, Dr. Rothman concluded that it would not have made business sense for Altria to shut Nu Mark down when it did, or to stop

selling MarkTen Elite, MarkTen, or Apex absent the transaction. (PX5000 at 057-74 (¶¶ 108-29) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 35-36)).

Response to Proposed Finding No. 1495:

Dr. Rothman's conclusion is incorrect and misleading without additional context. *First*, Dr. Rothman engaged in inappropriate cherry-picking of evidence and strayed outside the proper arena for an expert witness. (RFF ¶¶ 1482-88; RCoL ¶¶ 122-23). *Second*, the evidence in the record and shown at trial demonstrates that Altria discontinued Elite and non-traditional flavored cig-a-likes in response to a demand by FDA for action, (RFF ¶¶ 917-51, 1001-07), and discontinued its remaining cig-a-like products in light of dim regulatory and commercial prospects, (RFF ¶¶ 1074-98). Nu Mark's products had always lost money, (RFF ¶¶ 1077-81), and were projected to lose money in the future, (RFF ¶¶ 1082-84). When asked how he would advise Gifford in 2018 on how to both "raise[] [Altria's] margin, and gain[] share," Dr. Rothman concedes he would not know how. (PX7048 Rothman Trial Dep. at 191-92). Had Nu Mark's products remained on the market they would have been unlikely to gain any commercial success or regulatory approval. (RFF ¶¶ 1501-31).

Finally, although Altria shut down Nu Mark, that is not equivalent to exiting the e-vapor space, as it continued with the Growth Teams. (RFF ¶¶ 898-916, 962-77, 1074-75). In fact, one of the reasons to shut down Nu Mark was to free up funding for the Growth Teams. (RFF ¶¶ 1074-75).

1496. Dr. Murphy's claims that MarkTen Elite was a failure are inaccurate. (*See* CCFF ¶¶ 1497-526, below; *see also* PX7048 (Rothman, Trial Dep. at 76-77)).

Response to Proposed Finding No. 1496:

The Proposed Finding is incorrect. The following paragraphs do not support the conclusion that Elite was a success, nor does the cited portion of Dr. Rothman's trial deposition. The evidence in the record and shown at trial demonstrated that Elite had dismal sales, (RFF ¶¶ 431-59), and

several serious regulatory hurdles to overcome, (RFF ¶¶ 510-27), including that it was not converting smokers due to its lack of nicotine salts, (RFF ¶¶ 596-637, 677-92). Given those hurdles, Altria did not believe Elite could receive a PMTA. (RFF ¶¶ 698-99).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1497-526, Respondents incorporate their responses to those Proposed Findings herein.

1497. Altria's Craig Schwartz wrote Michael Brace, Altria's Senior Director for Vapor Products, on July 15, 2018 that "MarkTen Elite is already Margin Positive, setting aside one-time investments" in ITP store fixtures. (PX1194 (Altria) at 001).

Response to Proposed Finding No. 1497:

The Proposed Finding is incomplete and misleading without additional context. "Margin positive" is an accounting term of art that does not mean that a product is profitable or a commercial success. As Quigley testified, marginal contribution is "only half the picture," because "marginal contribution doesn't account for all the sales and marketing spend" given how Altria does its accounting. (Quigley (Altria) Tr. 1952; *see also* Gifford (Altria) Tr. 2785 (describing how he assumes that when someone is presenting him with marginal contribution, "[u]sually they are leaving out part of the story")). And for Elite, sales and marketing spend was substantial. (RFF ¶¶ 407-30). As a result, notwithstanding marginal contribution, it is undisputed that Elite was losing money. (PX5000 Rothman Report ¶ 116 n.294 (acknowledging Elite's -47 percent variable margin and -31 percent gross margin)); RX1217 Murphy Report ¶ 136, Fig. VII.4; *see also* RFF ¶ 430 (explaining that, on top of the approximately $100 million that it spent on the ITP program, Nu Mark spent $76 million in marketing and sales expenditures in 2018)).

1498. [redacted] (PX5000 at 066 (¶ 116) (Rothman Expert Report) (*in camera*); PX7048 (Rothman, Trial Dep. at 76-77)).

(PX5000 at 067 (Table 4) (Rothman Expert Report) (*in camera*)).

Response to Proposed Finding No. 1498:

The Proposed Finding is incomplete and misleading without additional context. These figures are not an assessment of whether Elite was actually profitable. To the contrary, Elite was losing money. As Dr. Rothman admits, Elite's variable margin was -47 percent, and its gross margin was -31 percent. (PX5000 Rothman Report ¶ 116 n.294). And Dr. Rothman cannot explain how or when Altria would improve this margin, particularly in the face of more aggressive discounting by competitors. (RFF ¶ 1702).

1499. Altria's CEO, Howard Willard, told investors on a July 26, 2018 earnings call that MarkTen Bold and Elite were driving growth for Nu Mark and "getting traction with consumers." (PX9047 (Altria) at 009-10 (Altria's Q2 2018 Earnings Call) ("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.")).

Response to Proposed Finding No. 1499:

The Proposed Finding is incomplete and misleading without additional context. In that same call, Willard explained that this volume growth for Bold and Elite was "primarily driven by expanded distribution," (PX9047 (Altria) at 003), which is not sustainable in the long term, (RFF ¶ 432). Around the same time, a cross-functional team at Altria concluded a comprehensive review of Nu Mark's products that concluded that neither Bold nor Elite had high conversion potential and that both also had numerous other "[r]ed [f]lags." (RX0532 (Altria) at 006 (Bold), 008 (Elite);

see also RFF ¶¶ 737-42). And it is undisputed that Nu Mark's products had always lost money, (RFF ¶¶ 1077-81), and were projected to lose money in the future, (RFF ¶¶ 1082-84).

1500. On August 4, 2018, Craig Schwartz wrote to Geoffrey Bible, Altria's former Chairman, that Altria faced a "Tall task against Juul - but MarkTen Elite can hunt . . . so again, best yet to come." (PX1260 (Altria) at 002).

Response to Proposed Finding No. 1500:

The Proposed Finding is incomplete and misleading without additional context. In that same email, Schwartz admitted that "Juul appeals to those seeking a cigarette experience, whereas MarkTen Elite provides a full inhalation, vaping experience," and that "the size of the price currently favors the former." (PX1260 (Altria) at 001). Moreover, Schwartz had a reputation at Altria for taking a "very glass-half-full view." (Quigley (Altria) Tr. 1952). This was particularly true in the case of Elite, as Schwartz led the effort to acquire that product. (Schwartz (Altria) Tr. 1867). But even he admitted at trial to Elite's serious shortcomings. (Schwartz (Altria) Tr. 1920-21 (describing Nu Mark as "handicapped" with the in-market version of Elite)).

1501. Approximately twenty-one weeks after its launch, MarkTen Elite's sales were similar to the sales of its competitors following their introductions to the market. (PX1056 (Altria) at 009 ("Nu Mark Brand Update, MarkTen Elite" dated August 10, 2018) (showing that Elite sold 6.8 pods per store per week on average as compared to 8.8 pods per store per week for JUUL and 4.6 pods per store per week for *my*blu); PX7003 (Quigley (Altria), IHT at 136) (testifying that twenty-one weeks after its launch, Elite was "doing okay"); *see also* PX5000 at 066 (¶ 115) (Rothman Expert Report)).

Response to Proposed Finding No. 1501:

The Proposed Finding is incomplete and misleading without additional context. Any comparison in sales in weeks after launch between Elite and JUUL is spurious given that the two products were launched in different circumstances: When Elite launched "there was an established pod segment in the marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater");

PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")). Moreover, at JUUL's launch, JLI was a start-up with limited reach. (RFF ¶ 415 (noting that JUUL grew without "visibility" or national shelf space)). By contrast, at the launch of Elite, Nu Mark had the benefit of Altria's distribution capabilities and resources (RFF ¶¶ 407-30), yet still had dismal sales, (RFF ¶¶ 431-59).

Finally, Professor Murphy's analysis of weekly dollar sales of devices and cartridges showed that Elite was outperformed by Vuse Alto from launch and was consistently outperformed by *my*blu by 24 weeks after launch. (RX1217 Murphy Report ¶ 133, Fig. VII.2; *see also* RX1217 Murphy Report ¶ 165 (criticizing cherry-picking of metrics, such as sales per store per week, that misleadingly show Elite sales in a positive light)).

1502. MarkTen Elite's dollar sales per store were in a similar range as its competitors: $142 per store per week on average compared to $162 for JUUL, $123 for *my*blu, and $147 for Logic Pro. (PX2517 (JLI) (Excel worksheet "Metrics_Launch"); *see also* PX5000 at 066 (¶ 115) (Rothman Expert Report)).

Response to Proposed Finding No. 1502:

The Proposed Finding is incomplete and misleading without additional context. Any comparison in sales in weeks after launch between Elite and JUUL is spurious given that the two products were launched in different circumstances: When Elite launched "there was an established pod segment in the marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater"); PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")). Moreover, at JUUL's launch, JLI was a

start-up with limited reach. (RFF ¶ 415 (noting that JUUL grew without "visibility" or national shelf space)). By contrast, at the launch of Elite, Nu Mark had the benefit of Altria's distribution capabilities and resources (RFF ¶¶ 407-30), yet still had dismal sales, (RFF ¶¶ 431-59).

Finally, Professor Murphy's analysis of weekly dollar sales of devices and cartridges showed that Elite was outperformed by Vuse Alto from launch and was consistently outperformed by *my*blu by 24 weeks after launch. (RX1217 Murphy Report ¶ 133, Fig. VII.2; *see also* RX1217 Murphy Report ¶ 165 (criticizing cherry-picking of metrics, such as sales per store per week, that misleadingly show Elite sales in a positive light)).

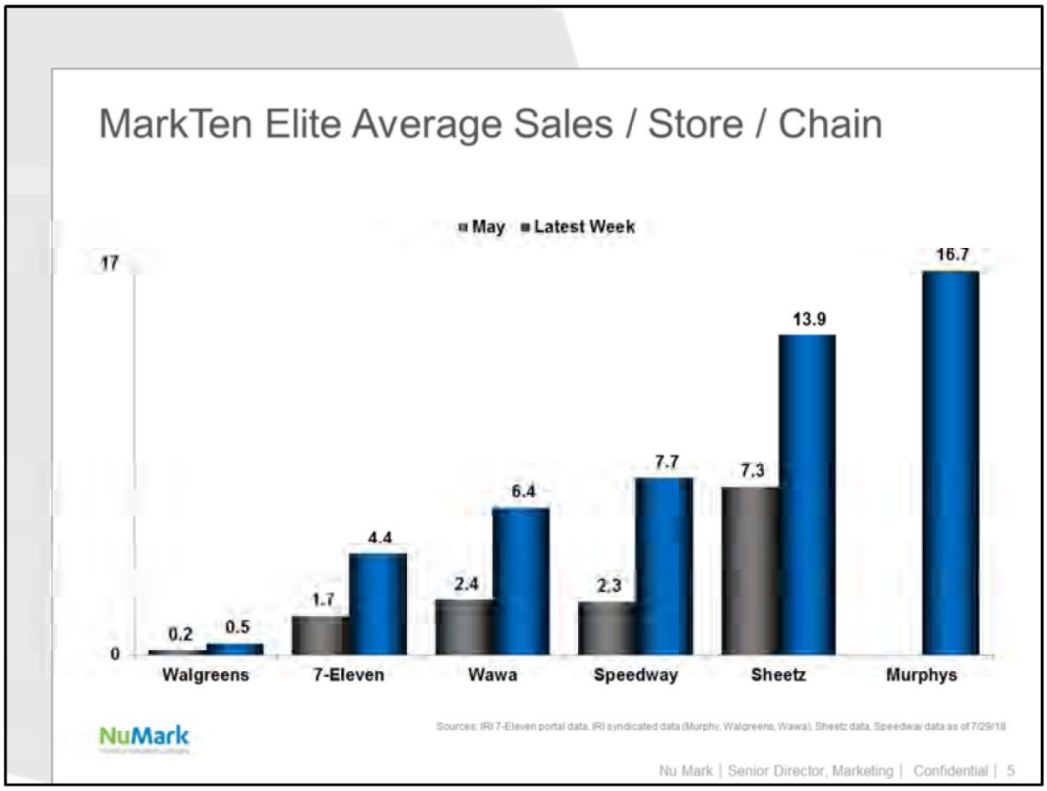
1503. MarkTen Elite's "attach rate" (pod units sold measured in milliliters divided by device units sold) was higher than other competitors: 3.4 milliliters per device on average compared to 2.5 for *my*blu and 1.0 for VUSE Ciro. (PX2517 (JLI) (Excel worksheet "AttachRates_Launch"); *see also* PX5000 at 066 (¶ 115) (Rothman Expert Report)).

Response to Proposed Finding No. 1503:

The Proposed Finding is incomplete and misleading without additional context. At the outset, the cited figures cherry-pick from the Excel worksheet, which also shows that NJOY's average "attach rate" over the same period of time was 42.8 milliliters per device, which is vastly superior to the figures for Elite. (PX2517 (JLI) (using "AttachRates_Launch" tab)). And while Vuse Alto is missing some data, its average "attach rate" for the period during which it has data is 4.9 milliliters per device, with a steady increase over time. (PX2517 (JLI) (using "AttachRates_Launch")). Elite, on the other hand, was already seeing its "attach rate" decline by 20 weeks after launch. (PX2517 (JLI) (using "AttachRates_Launch")). Moreover, numerous individuals testified that while Nu Mark's aggressive promotions incentivized initial trial of Elite, Nu Mark never saw the sustained growth in pod sales that would be necessary for commercial success. (RFF ¶¶ 436-38). By contrast, NJOY Ace and Vuse Alto were successful at "seeding" the market with inexpensive devices that "provide[d] a satisfying experience that prompt[ed] the

customer to want to continue purchasing." (RX1217 Murphy Report ¶ 69). As a result, they saw corresponding leaps in cartridge sales following sales of their discounted devices. (RFF ¶¶ 439, 1287-307).

1504. MarkTen Elite's average sales per store grew from May 2018 to July 2018 in major retail chains including Walgreens, 7-Eleven, Wawa, Speedway, and Sheetz. (PX1056 (Altria) at 007 ("Nu Mark Brand Update, MarkTen Elite" dated August 10, 2018); *see also* PX5000 at 066 (¶ 115) (Rothman Expert Report)).



(PX1056 (Altria) at 007).

Response to Proposed Finding No. 1504:

The Proposed Finding is incomplete and misleading without additional context. Between May and July 29, 2018 (the "latest week" in the above chart), Nu Mark implemented an even more aggressive promotion and offered an Elite battery and pod pack for just $8.99. (PX1056 (Altria) at 007, 012). While such a steep discount incented some initial trial and thus increased device sales, it did not translate into continued purchase of pod packs as would be necessary for consumer

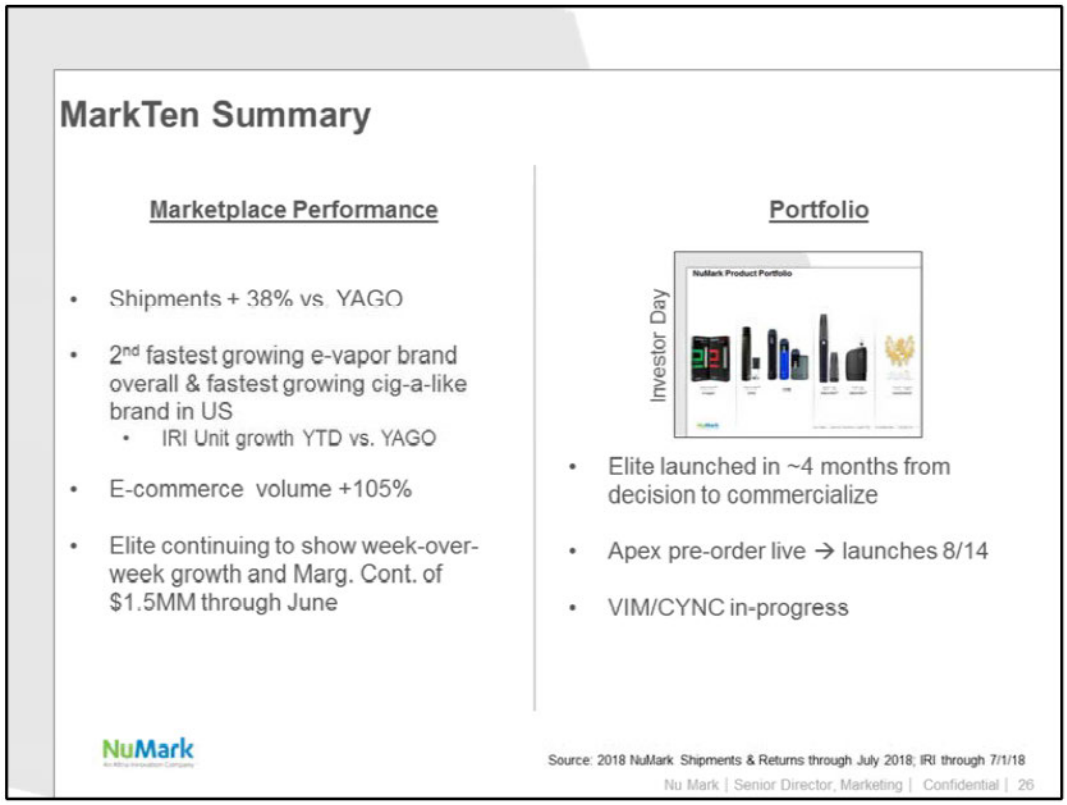
success. (RFF ¶¶ 425-26, 435-38). As Willard put it, "I think once consumers started to try the product, I think we had trouble finding a significant group of consumers that said, I'm going to put down the product I had been using . . . because I really like [Elite]." (PX7031 Willard (Altria) Dep. at 80).

1505. In an August 2018 Nu Mark Brand Update, Altria highlighted the fact that MarkTen (including both cigalikes and Elite) was the "2nd fastest growing e-vapor brand overall & fastest growing cig-a-like brand in US." (PX1056 (Altria) at 028).

Response to Proposed Finding No. 1505:

The Proposed Finding is incomplete and misleading without additional context. At this time, Elite was still a fraction of overall MarkTen sales, and thus this growth rate should be credited almost entirely to MarkTen cig-a-likes. (PX1056 (Altria) at 005). But growth driven by cig-a-likes was not sustainable long-term, given the decline in the cig-a-like segment. (RFF ¶¶ 1324-29; *see also* RFF ¶¶ 394-98 (describing how Nu Mark's plan for success hinged on a successful pod product)).

1506. The August 2018 Nu Mark Brand Update also noted that MarkTen shipments grew 38 percent year-over-year, with e-commerce volume up 105 percent and "Elite continuing to show week-over-week growth" with a positive marginal contribution of $1.5 million through June 2018. (PX1056 (Altria) at 028).



(PX1056 (Altria) at 028).

Response to Proposed Finding No. 1506:

The Proposed Finding is incomplete and misleading without additional context. "Margin positive" is an accounting term of art that does not mean that a product is profitable or a commercial success. At the outset, as Quigley testified, marginal contribution is "only half the picture," because "marginal contribution doesn't account for all the sales and marketing spend." (Quigley (Altria) Tr. 1952; *see also* Gifford (Altria) Tr. 2785 (describing how he assumes that when someone is presenting him with marginal contribution, "[u]sually they are leaving out part of the story")). As a result, notwithstanding marginal contribution, it is undisputed that Elite was losing money. (PX5000 Rothman Report ¶ 116 n.294 (acknowledging Elite's -47 percent variable margin and -31 percent gross margin); RX1217 Murphy Report ¶ 136, Fig. VII.4; *see also* RFF ¶

430 (explaining that on top of the approximately $100 million that it spent on the ITP program, Nu Mark spent $76 million in marketing and sales expenditures in 2018)).

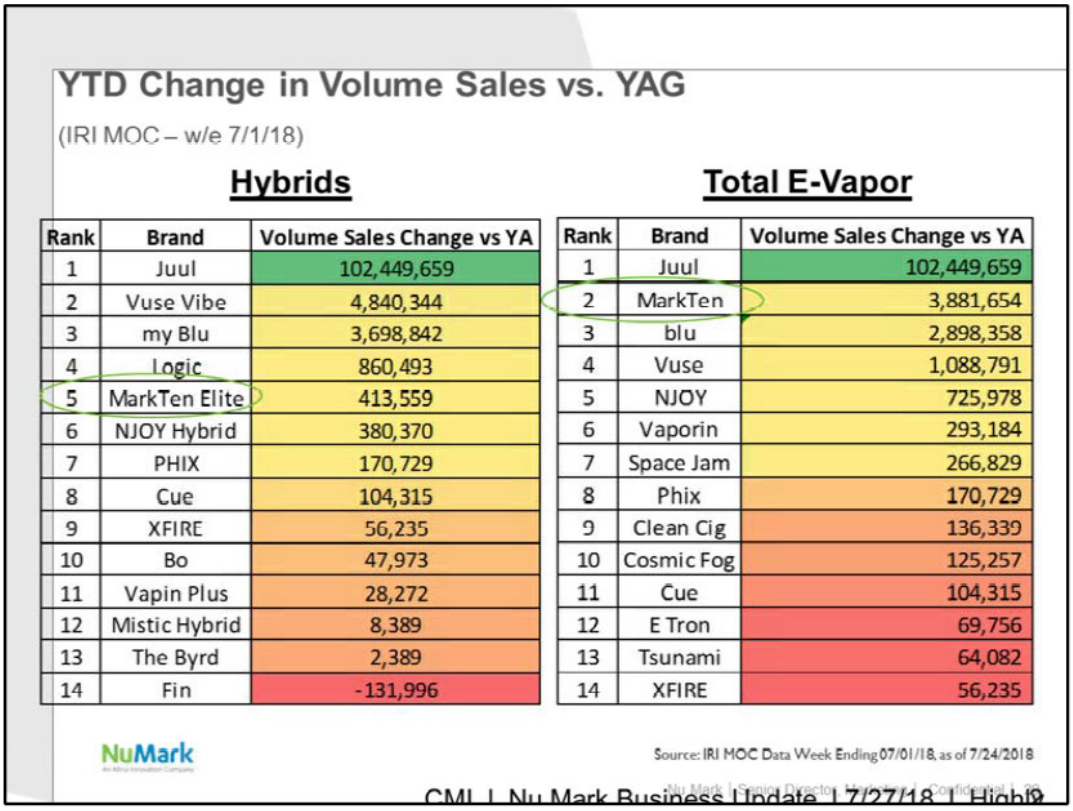
Moreover, at this time, Elite was still a fraction of overall MarkTen sales, and thus this growth rate should be credited almost entirely to MarkTen cig-a-likes. (PX1056 (Altria) at 005). But growth driven by cig-a-likes was not sustainable long-term, given the decline in the cig-a-like segment. (RFF ¶¶ 1324-29; *see also* RFF ¶¶ 394-98 (describing how Nu Mark's plan for success hinged on a successful pod product)).

1507. The August 2018 Nu Mark Brand Update highlighted the fact that MarkTen was the second-fastest growing e-cigarette brand in terms of volume sales from July 1, 2017 to July 1, 2018, second only to JUUL, but ahead of *my*blu, Vuse, NJOY, and all other closed-system e-cigarette competitors. (PX1056 (Altria) at 031; *see also* PX1008 (Altria) at 001 (MarkTen "is growing volume [and] is the second fastest growing brand in terms of volume behind juul.")).

Response to Proposed Finding No. 1507:

The Proposed Finding is incomplete and misleading without additional context. At this time, Elite was still a fraction of overall MarkTen sales, and thus this growth rate should be credited almost entirely to MarkTen cig-a-likes. (PX1056 (Altria) at 005). But growth driven by cig-a-likes was not sustainable long-term, given the decline in the cig-a-like segment. (RFF ¶¶ 1324-29; *see also* RFF ¶¶ 394-98 (describing how Nu Mark's plan for success hinged on a successful pod product)).

1508. The August 2018 Nu Mark Brand Update also noted that MarkTen Elite was the fifth fastest growing pod-based product from July 1, 2017 to July 1, 2018, even though Elite had only been on the market since late February 2018. (PX1056 (Altria) at 031); *see also* Begley (Altria) Tr. 1059).



YTD Change in Volume Sales vs. YAG

(IRI MOC – w/e 7/1/18)

Hybrids

Rank	Brand	Volume Sales Change vs YA
1	Juul	102,449,659
2	Vuse Vibe	4,840,344
3	my Blu	3,698,842
4	Logic	860,493
5	MarkTen Elite	413,559
6	NJOY Hybrid	380,370
7	PHIX	170,729
8	Cue	104,315
9	XFIRE	56,235
10	Bo	47,973
11	Vapin Plus	28,272
12	Mistic Hybrid	8,389
13	The Byrd	2,389
14	Fin	-131,996

Total E-Vapor

Rank	Brand	Volume Sales Change vs YA
1	Juul	102,449,659
2	MarkTen	3,881,654
3	blu	2,898,358
4	Vuse	1,088,791
5	NJOY	725,978
6	Vaporin	293,184
7	Space Jam	266,829
8	Phix	170,729
9	Clean Cig	136,339
10	Cosmic Fog	125,257
11	Cue	104,315
12	E Tron	69,756
13	Tsunami	64,082
14	XFIRE	56,235

NuMark

Source: IRI MOC Data Week Ending 07/01/18, as of 7/24/2018

CML | Nu Mark Business Update | 7/27/18 | Highly

(PX1056 (Altria) at 031).

Response to Proposed Finding No. 1508:

The Proposed Finding is incomplete and misleading without additional context. At the outset, while Elite is fifth in this chart, its sales growth is half of the product in the number four position, and only approximately 0.4 percent of JUUL's sales growth. (PX1056 (Altria) at 031). Moreover, while Elite's aggressive discounts could incentivize trial, it never had a lasting or substantial uptick in pod sales. (RFF ¶¶ 435-38). In fact, a later slide in the cited document providing talking points to Altria trade partners explained that "[c]ompetitors are growing faster" and "[q]uality issues" were generating "negative sentiment." (PX1056 (Altria) at 035).

1509. In the eight months that MarkTen Elite was on the market, its share was about 1 percent, which was greater than JUUL's share in its first year in the market. (PX7048 (Rothman, Trial Dep. at 76-77)).

Response to Proposed Finding No. 1509:

The Proposed Finding is incomplete and misleading without additional context. Any comparison in sales in weeks after launch between Elite and JUUL is spurious given that the two products were launched in different circumstances: When Elite launched "there was an established pod segment in the marketplace," whereas JUUL effectively created the pod category. (Begley (Altria) Tr. 1128; PX7040 Gifford (Altria) Dep. at 102 (explaining that because JUUL "had already established the pod market," he would have expected Elite's sales "to be much greater"); PX7013 Brace (Altria) Dep. at 59 (describing the "significant awareness around this hybrid pod-based segment that didn't exist when . . . JUUL entered the marketplace" compared to the "visibility and retail presence that MarkTen Elite had")). JUUL also increased the size of the entire e-vapor marketplace. (PX1229 (Altria) at 004-05; *see also* RFF ¶ 563).

Moreover, at JUUL's launch, JLI was a start-up with limited reach. (RFF ¶ 415 (noting that JUUL grew without "visibility" or national shelf space)). By contrast, at the launch of Elite, Nu Mark had the benefit of Altria's distribution capabilities and resources (RFF ¶¶ 407-30), yet still had dismal sales, (RFF ¶¶ 431-59).

1510. In the twelve months from October 2017 to September 2018, Altria's share of closed-system e-cigarettes was the third highest after JLI and Reynolds. (PX5000 at 067 (Table 5) (Rothman Expert Report)).

Table 5
Shares of Closed-System E-Cigarettes
October 2017–September 2018

Altria	10.1%
ITG	6.6%
JTI	3.7%
JLI	51.0%
NJOY	1.8%
Reynolds	22.7%
Other	4.1%

Note: Shares are based on units of closed-system consumables, including cartridges, pods, and disposables.

(PX5000 at 067 (Table 5) (Rothman Expert Report)).

Response to Proposed Finding No. 1510:

The Proposed Finding is incomplete and misleading without additional context. Altria's market share during this period was made up almost entirely of cig-a-likes, (Murphy Tr. 2822 (agreeing that "cigalikes products were approximately 90 percent of [Nu Mark] revenue")), which was a declining category, (RFF ¶¶ 1324-29). Moreover, Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

1511. In his investigational hearing, Altria's Brian Quigley testified that he was surprised that Altria was even considering pulling MarkTen Elite given its very recent launch and growth. (PX7003 (Quigley (Altria), IHT at 133-34) ("Q. Were you surprised that this leadership group was even considering the option of pulling Elite? A. Yes. Q. Why did you find that surprising? A. Because we had just launched it. Q. In your business experience, would this be unusual to launch a product, have it grow and then pull it several months later? A. Yes.")).

Response to Proposed Finding No. 1511:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Quigley explained that while he was "caught . . . off guard" by the suggestion of pulling

Elite given the timing, he "wasn't surprised" that the discussion was being had given Elite's fundamental problems. (Quigley (Altria) Tr. 1959). Indeed, he further explained that whether to pull Elite "was asked to [him] continuously," and in fact "was one of the very first questions [he] got asked," due to his assessment in June 2018 that the product lacked nicotine satisfaction. (Quigley (Altria) Tr. 1958). Quigley stated that "what was unusual was we had a product and I had just uncovered that it had fundamental product performance gaps, it did not have the nicotine [satisfaction]." (Quigley (Altria) Tr. 1961, 2032).

1512. Sheetz's Paul Crozier testified that he was "surprised" that Altria was exiting the e-cigarette business because Altria had a leadership position in combustible cigarettes, smokeless tobacco, and other tobacco categories. (Crozier (Sheetz) Tr. 1501-02). Crozier was also surprised at Altria's exit because Altria had the number two e-cigarette brand at Sheetz. (Crozier (Sheetz) Tr. 1501-02).

Response to Proposed Finding No. 1512:

The Proposed Finding is incomplete and misleading without additional context. Crozier acknowledged that he had no personal knowledge of why Altria pulled the Nu Mark products, or of any assessments done by Altria of the products' commercial viability. (Crozier (Sheetz) Tr. 1557-59). Moreover, he agreed that Elite was "not a major part of MarkTen" and that its discontinuation had "a pretty small impact to the [e-vapor] category as a whole." (Crozier (Sheetz) Tr. 1557-58). As for the rest of Nu Mark's products, he agreed that "it's unlikely a business limited to cigalikes would be a competitive threat to JUUL." (Crozier (Sheetz) Tr. 1560).

1513. Paul Crozier testified that MarkTen Elite "was only widely [available] in the market for six months," which "isn't enough time for [an e-cigarette product] to prove itself out." (Crozier (Sheetz) Tr. 1498).

Response to Proposed Finding No. 1513:

The Proposed Finding is incomplete and misleading without additional context. Crozier admitted he had no personal knowledge of "any studies Altria did of its overall assessment of [Elite's] performance and its economics going forward," or of "Altria's assessment of the cost of

the promotional activity it was doing and what that cost would be going forward to sell the product." (Crozier (Sheetz) Tr. 1557). Moreover, he agreed that Elite was "not a major part of MarkTen" and that its discontinuation had "a pretty small impact to the [e-vapor] category as a whole." (Crozier (Sheetz) Tr. 1557-58).

1514. Paul Crozier testified that Sheetz had no plans to stop selling MarkTen Elite in 2019 if Altria had not discontinued the product. (Crozier (Sheetz) Tr. 1497-98). According to Crozier, the sales of MarkTen Elite were good enough that Sheetz would have continued selling the product. (Crozier (Sheetz) Tr. 1497-98).

Response to Proposed Finding No. 1514:

The Proposed Finding is incomplete and misleading without additional context. Crozier also agreed that Elite was "not a major part of MarkTen" and that its discontinuation had "a pretty small impact to the [e-vapor] category as a whole." (Crozier (Sheetz) Tr. 1557-58).

Moreover, the number of e-vapor products carried by Sheetz increased after Altria discontinued Nu Mark's e-vapor products. (RFF ¶ 1365).

1515. Paul Crozier testified that even after Altria discontinued Elite, Sheetz planned to continue to sell Altria's cigalike products, and "had no plans of cutting [those] product[s]." (Crozier (Sheetz) Tr. 1500).

Response to Proposed Finding No. 1515:

The Proposed Finding is incomplete and misleading without additional context. Crozier also agreed at trial that "the [e-vapor] category is now overwhelmingly pods," such that it would be "unlikely [that] a business limited to cigalikes would be a competitive threat to JUUL." (Crozier (Sheetz) Tr. 1560).

Moreover, the number of e-vapor brands carried by Sheetz increased after Altria discontinued Nu Mark's e-vapor products. (RFF ¶ 1365).

1516. JLI's Joseph O'Hara developed a "competitive analysis framework" to evaluate the long-term viability of e-cigarette products. (PX2289 (JLI) at 001 (O'Hara email dated May 2018) (stating that the competitive analysis framework "is essentially the process I use to determine the long-term viability of a brand/product"); O'Hara (JLI) Tr. 527).

Response to Proposed Finding No. 1516:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530). The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

1517. Joseph O'Hara described JLI's "competitive analysis framework" as a funnel with four gates. (O'Hara (JLI) Tr. 537). Those gates are "on market pre-deeming," "demonstrated traction," "current product viability," and "innovation sustainability." (PX2289 (JLI) at 021 ("US Landscape: Competitive Analysis Framework")). JLI considered a product to have "long-term viability" if it bypassed all four of these gates. (PX2289 (JLI) at 021).

Response to Proposed Finding No. 1517:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530). The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

1518. Under JLI's "competitive analysis framework," the "on-market pre-deeming" gate can be bypassed if the company has sufficient access to capital or is likely to be bought by a larger company. (PX2289 (JLI) at 021; O'Hara (JLI) Tr. 537-38).

Response to Proposed Finding No. 1518:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530).

The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

1519. Under JLI's "competitive analysis framework," to determine whether a product has "demonstrated traction," JLI evaluates market data, Google trends and Reddit post volume, and "significant" industry chatter. (PX2289 (JLI) at 021; O'Hara (JLI) Tr. 538-41).

Response to Proposed Finding No. 1519:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530). The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

1520. Under JLI's "competitive analysis framework," a product's current "viability" is assessed "by placement on the 'Innovation Matrix," which takes into account both design quality and nicotine satisfaction. (PX2289 (JLI) at 021; O'Hara (JLI) Tr. 541-42).

Response to Proposed Finding No. 1520:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530). The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never

seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

O'Hara explained that he used the "innovation matrix" as a "proxy" for whether the product had "high-quality nicotine salts" and "was a pod-based product." (O'Hara (JLI) Tr. 541-42). Notably, Nu Mark's pod-based product—Elite—did not have any nicotine salts (RFF ¶ 628).

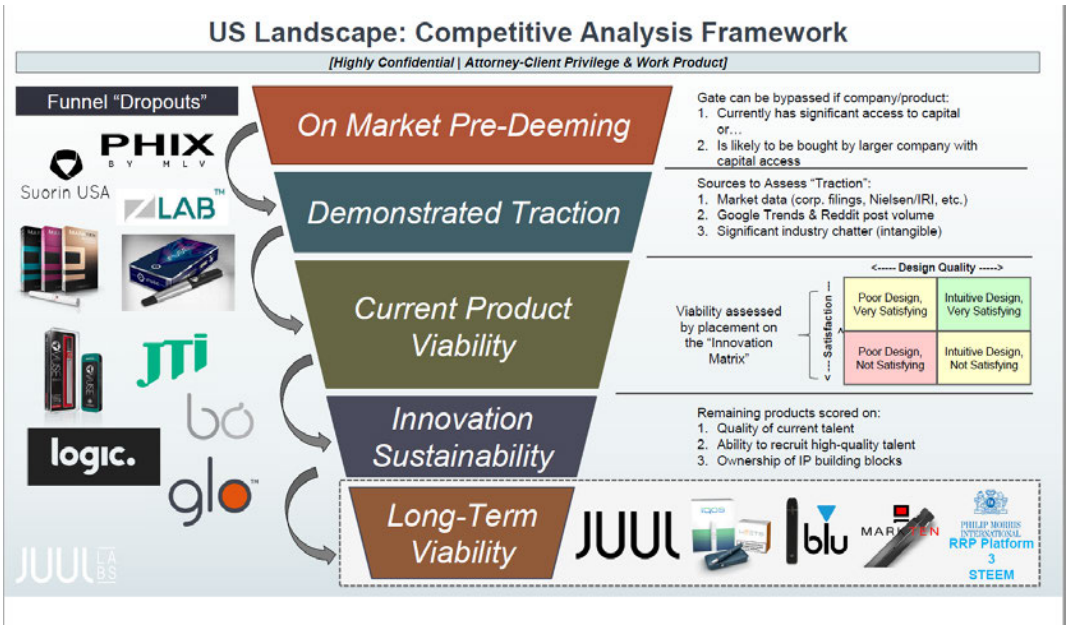
1521. Under JLI's "competitive analysis framework," a product's "innovation sustainability" is assessed by scoring the quality of current talent, the ability to recruit high-quality talent, and ownership of intellectual property building blocks. (PX2289 (JLI) at 021; O'Hara (JLI) Tr. 543-46).

Response to Proposed Finding No. 1521:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530). The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

O'Hara explained he was not "able to do a true qualitative assessment" of another e-vapor company's "engineering or science staff." (O'Hara (JLI) Tr. 544). Instead, he would "look on sites like LinkedIn and see did they have scientists with Ph.D's, for example." (O'Hara (JLI) Tr. 544).

1522. Applying its "competitive analysis framework," JLI concluded in May 2018 that MarkTen Elite was one of only four products besides JUUL with "long-term viability." (PX2289 (JLI) at 021; O'Hara (JLI) Tr. 530-31).



(PX2289 (JLI) at 021).

Response to Proposed Finding No. 1522:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that this framework was merely a "snapshot in time analysis." (O'Hara (JLI) Tr. 530). The chart did not necessarily identify products that were "definitively long-term viable," but instead identified ones that JLI "should stay aware of." (O'Hara (JLI) Tr. 528). Indeed, O'Hara included a product on the list as long-term viable that "was not even launched, and [he] had never seen," simply because he had read about the product in the company's "earning calls and in their investor materials." (O'Hara (JLI) Tr. 528).

O'Hara included MarkTen Elite on the list because it had only been on the market a few weeks and thus "there was really no market evidence at the time, and so [he] felt it would be premature to say no, it was not viable." (O'Hara (JLI) Tr. 530-31). However, upon observing the product's characteristics and sales performance after launch, O'Hara concluded that Elite did not in fact have long-term viability. (O'Hara (JLI) Tr. 640-41 (testifying that if he would have updated

his chart in July 2018, he "would have certainly removed MarkTen [Elite], because at that point it was clear they did not have any demonstrated traction"); *see also* RFF ¶ 750).

Lastly, Complaint Counsel does not mention that the cited slide lists MarkTen cig-a-likes as a funnel drop-out. (PX2289 (JLI) at 021).

1523. An Altria presentation from July 2018 identified Elite (low and high nicotine) and other Altria e-cigarette products as having "Long-Term Conversion Potential." (PX4563 (Altria) at 022 (Nu Mark "Product Innovation" slides); *see also* CCFF ¶¶ 1310-22, above).

Response to Proposed Finding No. 1523:

The Proposed Finding is incomplete and misleading without additional context, and is unsupported by the paragraphs cited. The cited document identifies the conversion potential of "Elite (low nicotine)" as high only in the "Flavor Exploration" segment. (PX4563 (Altria) at 019). But as Dr. Gardner explained at trial, the "Flavor Exploration" segment was premised on the assumption that such users "do[] not use the product for nicotine satisfaction[,] . . . which is not what the adult smokers are actually looking for." (Gardner (Altria) Tr. 3089 (internal quotation marks omitted)).

After the cited document, a cross-functional team within Altria ultimately concluded that Elite had "low" conversion potential. (RFF ¶¶ 737, 741). Brand representatives from Nu Mark and Altria scientists all agreed with this assessment. (RFF ¶ 742). And every Altria witness who was asked in the proceeding about the conversion potential of Nu Mark's products—including Elite—also agreed with this assessment. (RFF ¶ 743).

The other products in the "Long-Term Conversion Potential" category in the cited document include VIM, "Elite (high nicotine)," "Bold Flavors," and "Hudson (with modifications)." (PX4563 (Altria) at 022). With the exception of VIM, none of these were products that had been on the market before August 8, 2016, (*see* PX1644 (Altria) at 018 (separating products into what Altria "Ha[s] to Compete Today" and "Long-Term Potential

Concepts")), thus none could be marketed without first obtaining FDA approval, a process that would take years. (RFF ¶¶ 56-104). And none of these products were likely to have long-term commercial or regulatory success. (RFF ¶¶ 1528-31 (VIM), 1585-96 (Hudson); *see also* RFF ¶¶ 1324-29).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1310-22, Respondents incorporate their responses to those Proposed Findings herein.

1524. Given that e-cigarettes are differentiated products, the elimination of Altria's e-cigarette products necessarily results in consumer harm. (PX7048 (Rothman, Trial Dep. at 125) ("In a market with differentiated products, the removal of a product from the market will be harmful. It will reduce consumer choice, and it will eliminate competitive constraint on the other products that remain in the market.")).

Response to Proposed Finding No. 1524:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Consumer harm from product removal is a recognized flaw of the Antitrust Logit Model used by Dr. Rothman, which necessarily assumes that if any product leaves the market—regardless of its size or the ability of consumers to purchase other, similar products—consumers are harmed. (Murphy Tr. 3129). There is no evidence that Nu Mark products were unique or irreplaceable. (RFF ¶ 1677-79).

1525. Dr. Rothman uses an ALM to estimate the loss of consumer surplus from Altria's exit. (PX5000 at 082 (¶ 143) (Rothman Expert Report)). Assuming Altria would have maintained a 10 percent share, the loss of consumer surplus from Altria's exit is approximately $33.6 million per year. (PX5000 at 082 (¶ 144) (Rothman Expert Report)). For the sake of completeness, Dr. Rothman also estimated the loss of consumer surplus from the partial acquisition alone, absent the non-compete, and concluded that even in that situation, both Altria and JLI's incentives would be changed and the companies would compete less vigorously by, among other things, increasing their prices. (PX5000 at 082 (¶ 143 n.358) (Rothman Expert Report)).

Response to Proposed Finding No. 1525:

The Proposed Finding is incomplete and misleading without additional context. At the outset, Dr. Rothman's assumption of a 10 percent market share is unreasonable: His market shares

are based on a one-year average, which obscures the fact that Nu Mark's share was declining over the entire period. (RFF ¶ 1440). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1443).

Moreover, Dr. Rothman's model does not accurately estimate the loss of consumer surplus from Altria's discontinuation of its products because it is based on a number of other unsupported factual and economic assumptions including, *inter alia*, faulty assumptions about diversion, an incorrect market definition, and an inflated "hypothetical" profit margin for Altria. (RFF ¶¶ 1670-1708).

Notably, even if it were reliable, Dr. Rothman's model would predict only a miniscule impact on consumers that could easily be offset by competitor expansion. (RFF ¶¶ 1711-13). The harm created by "loss of consumer choice" constitutes approximately 80 percent of Dr. Rothman's estimated harm. (RFF ¶ 1666). In the context of Dr. Rothman's $33.6 million harm calculation, this means that just $7.6 million is attributable to price impact—or just 0.3 percent of overall e-vapor revenue. (RFF ¶¶ 1667-68).

Finally, Dr. Rothman's loss calculation from a potential partial acquisition suffers from the same issues as his primary ALM model. (RX1217 Murphy Report ¶ 206).

1526. When Dr. Murphy estimates harm in a hypothetical pod-only product market, he ignores the harm from Altria's withdrawal of its cigalike products. (*See* PX5001 at 030 (¶ 48), 047-48 (¶ 87) (Rothman Rebuttal Report); PX7048 (Rothman, Trial Dep. at 23)). Dr. Rothman estimates that the harm associated with Altria's withdrawal of its cigalike products is about $25.5 million. (PX5001 at 030 (¶ 48), 047-48 (¶ 87) (Rothman Rebuttal Report); PX7048 (Rothman, Trial Dep. at 23)).

Response to Proposed Finding No. 1526:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman's calculation of harm in the cig-a-like market does not take into account the drastic

decline in cig-a-like sales since the transaction. (RFF ¶¶ 1324-29). Moreover, such a calculation ignores Professor Murphy's regression analysis demonstrating that discontinuation of Nu Mark's cig-a-like products did not change the (downward) trajectory of the cig-a-like market. (RX1217 Murphy Report ¶ 115, Fig. VI.3).

B. THE TRANSACTION FORECLOSED FUTURE COMPETITION BETWEEN RESPONDENTS

1527. Based on a review of the documents, testimony, and data, Dr. Rothman concluded that the transaction harmed future competition in e-cigarettes. Altria was actively working to improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (PX5000 at 053-57 (¶¶ 103-07) (Rothman Expert Report); (PX7048 (Rothman, Trial Dep. at 33-34)).

Response to Proposed Finding No. 1527:

The Proposed Finding is inaccurate and incomplete. Dr. Rothman's conclusion that the transaction harmed future competition is based on his "significant competitor" opinion. (PX5001 Rothman Rebuttal ¶ 57). However, this "significant competitor" opinion is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

Altria's existing products were commercial failures with dim regulatory prospects. (RFF ¶¶ 1501-31). The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have been years before such a design could have reached the market. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process), 184-91 (describing Nu Mark's failed efforts at internal product development)). The same is true for any product hypothetically introduced in collaboration with PMI.

Dr. Rothman ignored this evidence. He admitted that he could not say *how* Altria would have been a significant competitor in the e-vapor category. (RFF ¶¶ 1489-500). At bottom, his opinion amounted to this: because Altria had incentives to be successful in e-vapor and is a large company, it would have been a significant competitor. (PX7048 Rothman Trial Dep. at 74 ("[W]hat made [Altria] a competitive threat, was its ability to make significant up-front investments to compete for the long run, the long run payoff.")). But incentives and size are not enough to make a company a significant competitor. To the contrary, Altria's long history of failed innovation – both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-91), demonstrates that size and incentives are alone not sufficient to make a company a significant competitor.

1528. According to Dr. Rothman, to compete in closed-system e-cigarettes, Altria needed to develop or acquire new products; regulatory approval; distribution; shelf space; manufacturing; and marketing. (PX5000 at 053-57 (¶¶ 103-07) (Rothman Expert Report)). Altria had the ability and was well-situated to compete in all of those respects. Altria had the incentive to invest in closed-system e-cigarettes since sales were growing rapidly and the traditional cigarette market was shrinking. (PX7048 (Rothman, Trial Dep. at 31-32)). Altria has significant experience, distribution, infrastructure, a large sales team, valuable shelf space in retail stores, and prior to exiting, it had multiple products in the market and product development initiatives in the pipeline. (PX5000 at 053-54 (¶¶ 103-05 (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 31-32)).

Response to Proposed Finding No. 1528:

Dr. Rothman purported to make such a conclusion. However, his conclusion ignores the testimony and evidence that (1) Altria's experience with conventional tobacco products, (2) its distribution, infrastructure, and sales team, and (3) its ability to acquire shelf space were all meaningless without a product that appeals to consumers. (RFF ¶¶ 431-59; *see also* PX7014 Baculis (Altria) Dep. at 63 ("[N]othing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs.")). The evidence shows that Nu Mark's products were weak competitors that were not successful commercially and were unlikely to obtain

regulatory approval. (RFF ¶¶ 1501-1636). The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have been years before such a design could have reached the market. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process), 184-91 (describing Nu Mark's failed efforts at internal product development)).

Dr. Rothman ignored this evidence. He admitted that he could not say *how* Altria would have been a significant competitor in the e-vapor category. (RFF ¶¶ 1489-500). At bottom, his opinion amounted to this: because Altria had incentives to be successful in e-vapor and is a large company, it would have been a significant competitor. (PX7048 Rothman Trial Dep. at 74 ("[W]hat made [Altria] a competitive threat, was its ability to make significant up-front investments to compete for the long run, the long run payoff.")). But incentives and size are not enough to make a company a significant competitor. To the contrary, Altria's long history of failed innovation – both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-91), demonstrates that size and incentives are alone not sufficient to make a company a significant competitor.

1529. Although it is impossible to know precisely which future products Altria would have developed or commercialized in the but-for world absent the transaction, economists commonly evaluate such counterfactuals by focusing on incentives and ability. (PX7048 (Rothman, Trial Dep. at 36)). Altria was pushing a number of competitive initiatives in closed-system e-cigarettes, and it had strong incentives and significant ability to continue doing so absent the transaction with JLI. (PX5000 at 054-57 (¶¶ 106-07) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 35-36)).

Response to Proposed Finding No. 1529:

Respondents agree that Dr. Rothman admitted that he could not say *how* Altria would have been a significant competitor in the e-vapor category. (RFF ¶¶ 1489-1500). But the Proposed Finding is incomplete and misleading without additional context. While Dr. Rothman purported to consider Altria's incentives and ability, his opinion flies in the face of the evidence in the record

and presented at trial. This evidence shows that Nu Mark's products were weak competitors that were not successful commercially and were unlikely to obtain regulatory approval. (RFF ¶¶ 1501-1636). The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have been years before such a design could have reached the market. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process), 184-91 (describing Nu Mark's failed efforts at internal product development)).

1530. Dr. Murphy is incorrect that, because the e-cigarette market continued to evolve after Altria's exit, that Altria's exit did not harm competition. As Dr. Rothman noted, the e-cigarette market is a dynamic market. Competition plays out over time, and competitive outcomes in 2019-2020 reflect competitive initiatives from prior to 2019 when Altria was still competing, and when competitors made long-term investments to compete in part with Altria. (PX5001 at 014-15 (¶¶ 20-21) (Rothman Rebuttal Report); PX7048 (Rothman, Trial Dep. at 40)).

Response to Proposed Finding No. 1530:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Dr. Rothman argues that "[o]utcomes from prior to Altria's exit partially reflect the competition Altria brought to the market prior to its exit." (PX5001 Rothman Rebuttal ¶ 20). However, as the evidence shows, Altria was not a strong competitor with its Nu Mark products, (RFF ¶¶ 1501-31), and it would not have become one had it remained in the market, (RFF ¶¶ 1532-1636). Moreover, as Dr. Rothman admits, e-vapor is a "dynamic market," (PX7048 Rothman Trial Dep. at 40), which explained why Nu Mark's presence on the market was easily replaced, (Murphy Tr. 3127-28).

1531. In remarks its 2017 Investor Day presentation, Altria admitted that: "[W]e recognize that innovation can be achieved in multiple ways - through organic product development, through strategic partnerships and acquisitions . . . . We have an existing portfolio of products in multiple formats to meet the expectations of a range of adult smokers and vapers. And we have a promising pipeline of future e-vapor products in development." (PX9000 (Altria) at 019 (Nov. 2017 Investor Day remarks); PX1129 (Altria) at 027 (Altria Investor Day presentation, Nov. 2017)).

Response to Proposed Finding No. 1531:

The Proposed Finding is incomplete and misleading without additional context. Altria acquired all its in-market e-vapor products, (RFF ¶¶ 192-93), all of which were weak competitors with slim chance of regulatory success. (RFF ¶¶ 1501-31). By the time Altria discontinued Nu Mark in December 2018, it still had not finalized any design for a new e-vapor product. (RFF ¶ 1568). Even if Altria had ultimately developed a new e-vapor product through internal development efforts, which is highly speculative, it would have been years before such a product could have reached the market. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process), 184-91 (describing Nu Mark's failed efforts at internal product development)).

1. Altria Planned to Continue Discounting Its E-Cigarette Products

1532. The transaction directly eliminated discounts that Altria would have implemented but for the transaction. (*See* PX1617 (Altria) at 006, 011 ("Demand Review Meeting, October 3, 2018")). This reduced competition not just with respect to JLI but with all e-cigarette competitors, who reacted to Altria's price promotions and exit. (PX5000 at 078 (¶ 136), (Rothman Expert Report); [redacted]

Response to Proposed Finding No. 1532:

The Proposed Finding is incomplete and misleading without additional context. Both the cited documents (PX1617 (Altria) and [redacted]) reference Elite; however, the evidence showed that despite heavy promotional spending, Elite had dismal sales. (RFF ¶¶ 431-59). Moreover, the evidence demonstrates JLI never reacted to Nu Mark's entry or exit with pricing changes, (RFF ¶ 1354), and that Nu Mark's products did not constrain price within the e-vapor market, (RFF ¶¶ 1639-46). Indeed, thanks to aggressive discounting by competitors like Vuse and NJOY, device prices have fallen faster *post*-transaction than they did before Altria's

discontinuation of its e-vapor products. (Murphy Tr. 3147; RX1217 Murphy Report ¶¶ 62-63, Figs. V.1, V.2).

1533. Prior to the transaction, for MarkTen Elite, Altria had budgeted for an $8.99 battery and pod pack promotion at retailers that would first begin distributing Elite in October and November 2018, as well as $2 off any pod pack for customers at Speedway in November and December 2018. (PX1617 (Altria) at 006 (Altria October 2018 "Demand Review Meeting" presentation)). For MarkTen Elite, Altria had also budgeted for website promotions for Black Friday through Christmas Eve in 2018, as well as direct mail offers for November 2018. (PX1617 (Altria) at 011).

(PX1617 (Altria) at 011).

Response to Proposed Finding No. 1533:

The Proposed Finding is incomplete and misleading without additional context. The evidence showed that despite heavy promotional spending, Elite had dismal sales. (RFF ¶¶ 431-59). Moreover, the evidence demonstrates JLI never reacted to Nu Mark's entry or exit with pricing changes, (RFF ¶ 1354), and that Nu Mark's products did not constrain price within the e-vapor market, (RFF ¶¶ 1639-46). Indeed, thanks to aggressive discounting by competitors like Vuse and NJOY, device prices have fallen faster *post*-transaction than they did before Altria's

discontinuation of its e-vapor products. (Murphy Tr. 3147; RX1217 Murphy Report ¶¶ 62-63, Figs. V.1, V.2).

1534. The transaction also eliminated longer term competition and discounting by Altria. In a presentation from August 2018, Altria had planned to continue significant promotions on MarkTen Elite in 2019 and 2020, with a 6% reduction in spending from 2018 and 5% reduction in spending from 2019, but the transaction precluded those promotional opportunities. (PX1143 (Altria) at 028 (October 2018 Elite Business Case Presentation)).

Response to Proposed Finding No. 1534:

The Proposed Finding is incomplete and misleading without additional context. The evidence showed that despite heavy promotional spending, Elite had dismal sales. (RFF ¶¶ 431-59). Moreover, the evidence demonstrates JLI never reacted to Nu Mark's entry or exit with pricing changes, (RFF ¶ 1354), and that Nu Mark's products did not constrain price within the e-vapor market, (RFF ¶¶ 1639-46). Indeed, thanks to aggressive discounting by competitors like Vuse and NJOY, device prices have fallen faster *post*-transaction than they did before Altria's discontinuation of its e-vapor products. (Murphy Tr. 3147; RX1217 Murphy Report ¶¶ 62-63, Figs. V.1, V.2).

1535. When JLI's Joseph O'Hara was summarizing the competitive performance of MarkTen Elite on April 30, 2018, he wrote, "At risk of stating the obvious, we should continue to expect our competitors with large balance sheets, high-margin legacy businesses, and large/existing distribution networks to continue discounting their product even further." (PX2450 (JLI) at 002)).

Response to Proposed Finding No. 1535:

The Proposed Finding is incomplete and misleading without additional context. In the cited email, O'Hara also said that MarkTen Elite was "struggling to get off the ground" and a "lackluster product." (PX2450 (JLI) at 002; *see also* RFF ¶¶ 748-61 (describing JLI's dim view of Altria's e-vapor products)). Notably, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). By contrast,

JLI was forced to lower its prices in response to aggressive discounting by NJOY and Reynolds. (RFF ¶¶ 1308-14).

1536. JLI's Joseph O'Hara testified that he expected Altria to continue discounting their e-cigarette products absent the transaction because Altria along with Reynolds "were able to compete on price and offer a lower price to consumers as they continue to do so." (PX7033 (O'Hara (JLI), Dep. at 134-35)).

Response to Proposed Finding No. 1536:

The Proposed Finding is incomplete and misleading without additional context. O'Hara testified at trial that JLI was not threatened by Altria's Nu Mark products. (O'Hara Tr. 583-584 (explaining that "[c]igalike products [he] always thought were extremely low quality," and that "as soon as [he] tried [Elite] and saw several months of data . . . it was pretty clear that it was . . . a product failure")). Moreover, the record evidence demonstrates JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶ 1354). By contrast, JLI was forced to lower its prices in response to aggressive discounting by NJOY and Reynolds. (RFF ¶¶ 1308-14).

1537. [redacted] (PX3005 (ITG) at 007 (*in camera*); *see also* PX7012 (Eldridge (ITG), Dep. at 207-08)).

Response to Proposed Finding No. 1537:

The Proposed Finding is incomplete and misleading without additional context. When asked if ITG increased the price of *my*blu freebase pods after Elite was discontinued, Eldridge testified that they did not. (PX7012 Eldridge (ITG) Dep. at 208). Indeed, the evidence is consistent that Nu Mark's products did not constrain price within the e-vapor market. (RFF ¶¶ 1639-46). And thanks to aggressive discounting by competitors like Vuse and NJOY, device prices have fallen faster *post*-transaction than they did before Altria's discontinuation of its e-vapor products. (Murphy Tr. 3147; RX1217 Murphy Report ¶¶ 62-63, Figs. V.1, V.2).

2. Altria Ceased Efforts to Improve Its Existing Products

1538. Prior to the transaction, Altria had been working to improve its existing e-cigarette products, such as with its successful fix for leaking pods in MarkTen Elite. (*See* CCFF ¶¶ 1206-36, 1281-94, above). The transaction put a stop to those efforts. (PX7026 (Gardner (Altria), Dep. at 175-76)).

Response to Proposed Finding No. 1538:

The Proposed Finding is incomplete and misleading without additional context and is not supported by the cited paragraphs. At the outset, implementing the new gasket was not going to transform Elite into a successful product because it did not remedy Elite's lack of nicotine satisfaction. (RFF ¶ 674). As for the other cited improvements to Elite, *i.e.*, Elite 2.0, these were far from finished. (RFF ¶¶ 1597-603). And even if Altria had been able at some time in the future to finalize a new design for Elite, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1206-35 and 1281-94, Respondents incorporate their responses to those Proposed Findings herein.

1539. Prior to the transaction, Altria had 40-50 people focused on e-cigarette product development. (PX7018 (Schwartz (Altria), Dep. at 25)).

Response to Proposed Finding No. 1539:

The Proposed Finding is incomplete and misleading without additional context. Resources, in terms of either money or personnel, are not alone sufficient to successfully develop new products. In particular, the evidence demonstrated Altria struggled to hire the individuals with the needed expertise for e-vapor development. (RFF ¶¶ 971-77). Thus, notwithstanding its personnel, Altria had tried and failed for decades to develop successful innovative products internally, (RFF ¶¶ 140-73), and faced similar challenges with e-vapor product development, (RFF

¶¶ 181-91). Indeed, all of its in-market products were acquired rather than internally developed. (RFF ¶ 193).

1540. In June 2018, Altria's Richard Jupe told K.C. Crosthwaite that he would continue to invest in MarkTen Elite as a "contingency plan for project tree," while suggesting that MarkTen Elite could be scrapped if Altria were to successfully acquire JLI (PX1086 (Altria) at 001). Richard Jupe assumed that Elite's "Improved flavor/aerosol systems provide an enhanced experience over Juul" and that "Elite will ascertain a reasonable market share and presence." (PX1086 (Altria) at 001).

Response to Proposed Finding No. 1540:

The Proposed Finding is incomplete and misleading without additional context. At trial, Jupe testified regarding the cited document that he "questioned [Elite's] role as far as the Elite product was not a product that we found to be satisfying, and . . . we didn't think this was going to be a product that was going to convert or switch smokers." (Jupe (Altria) Tr. 2154). As a result, he "questioned [Elite's] role in the portfolio independent of" any transaction with JLI. (Jupe (Altria) Tr. 2155).

To the extent Jupe contemplated in the cited document attempting to make changes to Elite, *i.e.*, Elite 2.0 or 3.0, (PX1086 (Altria) at 001), (1) any new design of Elite was never finalized (RFF ¶¶ 1597-603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF ¶¶ 45-71); and (3) even if successful, that process would take years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26).

1541. Dr. Gogova testified that Altria's growth teams had the freedom to incorporate earlier Nu Mark e-vapor products into their work if they so chose. (PX7015 (Gogova (Altria), Dep. at 265-66)).

Response to Proposed Finding No. 1541:

The Proposed Finding is incomplete and misleading without additional context. As Dr. Gogova explained, "[t]hey potentially could [draw on other Nu Mark e-vapor products], but many

of [those] product platforms were also becoming older or even obsolete to the current marketplace," meaning "those product[s] would never be able to reach the goal of leapfrog innovation." (PX7015 Gogova (Altria) Dep. at 265-66).

Even had the growth teams developed a new design, it would require FDA approval before that new design could be launched, whether based on an earlier Nu Mark e-vapor product or not. (RFF ¶¶ 51, 66-70). As a result, even if the growth teams had come up with a new design and could have obtained FDA approval (both highly speculative), it would have been years before the hypothetical new design could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1542. Altria was working on adding nicotine salts to its existing e-cigarette products. (PX4541 (Altria) at 008 ("Objective: Rapidly screen potential e-vapor liquids (w/ salts) for the potential to enhance the Nu Mark portfolio of e-vapor products")). Michelle Baculis discussed some of the ongoing nicotine salt research that Altria was conducting in a June 2018 email. (PX4507 (Altria) at 001-03).

Response to Proposed Finding No. 1542:

The Proposed Finding is incomplete and misleading without additional context. The first cited document is proposing adding liquids with nicotine salts to Cync. (PX4541 (Altria) at 008). Cync was not an in-market product and had numerous issues that prevented its commercialization, including "a risk of acute chronic nickel poisoning." (Garnick (Altria) Tr. 1742-43; *see also* RFF ¶¶ 1524-27). The second cited document shows testing being done, (PX4507 (Altria) at 001-03), but it is undisputed that there was no finalized design for a new product with nicotine salts; to the contrary, Altria had not yet determined how to add nicotine salts into its existing products, (Jupe (Altria) Tr. 2137 ("We still had an awful lot of work to do to put [nicotine salts] into [Elite]."); PX7015 Gogova (Altria) Dep. at 323 ("So we were not close to achiev[ing] it.")).

Even if Altria had finalized a new product with nicotine salts, that new product would require FDA approval before it could be launched. (Jupe (Altria) Tr. 2256). As a result, whether

Altria could have launched a new product with nicotine salts is both highly speculative and, at best, would have taken years before the new product with salts could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1543. According to an August 2018 Altria "MT Elite Summary of Projects" presentation concerning projects relating to MarkTen Elite, Nu Mark proposed to launch a qualitative assessment of the performance of a MarkTen Elite Bold product with nicotine salts at 4% NBW and 3% Acid formulations by November 2018. (PX1671 (Altria) at 008).

Response to Proposed Finding No. 1543:

The Proposed Finding is incomplete and misleading without additional context. The cited document only discusses proposed consumer research. (PX1671 (Altria) at 008). When discussing a similar consumer research planned for earlier in the fall, Jupe explained that even if Altria understood the correct ratio, they still had "to hone in . . . on the appropriate mix" of acids. (Jupe (Altria) Tr. 2147).

It is undisputed that there was no finalized design for a new product with nicotine salts; to the contrary, Altria had not yet determined how to add nicotine salts into its existing products. (Jupe (Altria) Tr. 2137 ("We still had an awful lot of work to do to put [nicotine salts] into [Elite]."); PX7015 Gogova (Altria) Dep. at 323 ("So we were not close to achiev[ing] it.")).

Even if Altria had finalized a new product with nicotine salts, that new product would require FDA approval before it could be launched. (Jupe (Altria) Tr. 2256). As a result, whether Altria could have launched a new product with nicotine salts is both highly speculative and, at best, would have taken years before the new product with salts could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1544. As of September 10, 2018, Altria was continuing to invest in research & development to find the right mix of salts, flavors, and nicotine strength to satisfy consumers. (PX7015 (Gogova (Altria), Dep. at 323)).

Response to Proposed Finding No. 1544:

Respondents have no specific response except to note that (1) Altria had not finalized a new design with the right mix of salts, flavors, and nicotine strength, (PX7015 Gogova (Altria) Dep. at 323; Jupe (Altria) Tr. 2137), and (2) that any new design would have required FDA premarket authorization, (RFF ¶¶ 51, 59, 66-70), which is both highly speculative and would take years before the hypothetical new product could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1545. Dr. Maria Gogova explained that Altria developed three nicotine salt formulations for its e-cigarette products containing different acids, which Altria referred to as RK2 technologies. (PX7015 (Gogova (Altria), Dep. at 152-56); PX4006 (Altria)). October 2018 emails between Maria Gogova, Bill Gardner, and others indicate that Altria undertook a series of R&D efforts regarding nicotine salts, and that Altria's nicotine salt research continued into late 2018. (PX4006 (Altria); PX4519 (Altria) at 001-02). The R&D efforts included comparing Altria's nicotine salt formulas specifically with JLI's products. (PX4006 (Altria)).

Response to Proposed Finding No. 1545:

The Proposed Finding is incomplete and misleading without additional context. Dr. Gogova recalled that work done in October 2018 was "foundational work," not related any particular product platform. (PX7015 Gogova (Altria) Dep. at 161).

Altria never finalized a design for new e-vapor products with nicotine salts. (PX7015 Gogova (Altria) Dep. at 323; Jupe (Altria) Tr. 2137). Even if Altria had figured out how to incorporate nicotine salts into an existing product, that would have required FDA premarket authorization, (Jupe (Altria) Tr. 2256; *see also* RFF ¶¶ 51, 59, 66-70), which is both highly speculative and would take years before the hypothetical new product could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1546. Altria was testing a version of MarkTen Elite with nicotine salts in trials with consumers as of October 2018. (PX7015 (Gogova (Altria), Dep. at 159-62); PX4006 (Altria)). The study noted that Nu Mark "currently markets MarkTen® Elite, an e-vapor product, in market. New prototypes with different nicotine salt levels and mixes for two nicotine levels

. . . have been developed for the portfolio of this brand." (PX4512 (Altria) at 001, 003; *see also* PX4513 (Altria) at 001, 003).

Response to Proposed Finding No. 1546:

The Proposed Finding is incomplete and misleading without additional context. Dr. Gogova explained that she recalled the October 2018 study as "foundational work," not related to Elite as a product platform. (PX7015 Gogova (Altria) Dep. at 161).

It is undisputed that there was no finalized design for a new product with nicotine salts; to the contrary, Altria had not yet determined how to add nicotine salts into its existing products. (Jupe (Altria) Tr. 2137 ("We still had an awful lot of work to do to put [nicotine salts] into [Elite]."); PX7015 Gogova (Altria) Dep. at 323 ("So we were not close to achiev[ing] it.")).

Even if Altria had finalized a new product with nicotine salts, that new product would require FDA approval before it could be launched. (Jupe (Altria) Tr. 2256). As a result, whether Altria could have launched a new product with nicotine salts is both highly speculative and, at best, would have taken years before the new product with salts could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1547. Altria was working to improve its existing nicotine salt e-cigarette products sold under the brand name MarkTen Bold. (PX4509 (Altria) at 011-12, 017 (SPR Update Presentation, July 25, 2018)).

Response to Proposed Finding No. 1547:

The Proposed Finding is incomplete and misleading without additional context. The in-market version of MarkTen Bold "incorporated some salts into the liquid, but not enough unfortunately." (Jupe (Altria) Tr. 2228). And Bold had the wrong form factor, as it was part of the dying cig-a-like segment. (RFF ¶¶ 1324-1329; *see also* Jupe (Altria) Tr. 2283 ("[W]ould higher salt in a cigalike deliver the nicotine better? Yeah, of course it would, but the reality is that device, that format, that design was on its way out . . . .")).

Even if Altria had figured out how to improve the nicotine salts in Bold, that would have required FDA premarket authorization, (Jupe (Altria) Tr. 2256; *see also* RFF ¶¶ 51, 59, 66-70), which is highly speculative and would have taken years before the hypothetical new product could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1548. In October 2018, Altria was continuing to conduct research into nicotine salts. (PX1711 (Altria) at 005-06). Altria also continued research on e-cigarette flavors, where Altria had a large toolbox of flavors to integrate into products. (PX1711 (Altria) at 007-08).

Response to Proposed Finding No. 1548:

The Proposed Finding is incomplete and misleading without additional context. It is undisputed that there was no finalized design for a new product with nicotine salts; to the contrary, Altria had not yet determined how to add nicotine salts into its existing products. (Jupe (Altria) Tr. 2137 ("We still had an awful lot of work to do to put [nicotine salts] into [Elite]."); PX7015 Gogova (Altria) Dep. at 323 ("So we were not close to achiev[ing] it.")).

As for the research on flavors, Dr. Gogova explained that "[f]lavor formulation is really more of art than only having the list of compounds." (PX7015 Gogova (Altria) Dep. at 291). Thus, "having a toolbox, it doesn't guarantee you that you can create flavor." (PX7015 Gogova (Altria) Dep. at 291). Moreover, as a result of FDA's policy requiring the removal of pod-based system and cig-a-like flavors other than tobacco and menthol without first obtaining FDA approval, (PX9016 (FDA)), the extent to which manufacturers will compete on flavors in the future is highly speculative.

Even if Altria had finalized a new product with different flavors or nicotine salts, that new product would require FDA approval before it could be launched. (Jupe (Altria) Tr. 2256). As a result, whether Altria could have launched a new product with different flavors nicotine salts is both highly speculative and, at best, would have taken years before the new product with salts could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1549. On October 5, the same day that Altria's CEO Howard Willard sent JLI a letter restarting talks, Altria's executive team (Murray Garnick and K.C. Crosthwaite) ordered Brian Quigley to halt all research on nicotine salts for Nu Mark's products. (PX4494 (Altria) at 001). On the same day, Murray Garnick pushed against research into high nicotine and nicotine salt formulations of MarkTen Elite scheduled for October 2018 by the growth teams in a series of emails to Joe Murillo, Maria Gogova, and Richard Jupe. (PX1952 (Altria) at 001-02; PX1954 (Altria) at 001-03).

Response to Proposed Finding No. 1549:

The Proposed Finding is inaccurate, incomplete, ambiguous, and misleading without additional context. At the outset, the decision to stop work on Elite had been made in September 2018, and the cited research was in fact product-agnostic. (RFF ¶¶ 910-13; *see also* PX1952 (Altria) at 001 (describing this as "not Elite research per se"); PX1954 (Altria) at 001 ("I just want to reiterate is that this is not product specific study/learning.")).

More generally, Altria did not stop Nu Mark from conducting research into nicotine salts because it had reinitiated talks with JLI. To the contrary, on October 5, Altria shifted product development from Nu Mark to the Growth Teams. (RFF ¶¶ 966-67). Accordingly, the cited documents do not foreclose any research into nicotine salts. Instead, the cited documents simply refer to stopping research *by Nu Mark* so that the Growth Teams can decide what they wanted to pursue, and expressly contemplate that the Growth Teams could pursue research into nicotine salts. (PX4494 (Altria) at 001 ("[L]et Maria and BK decide what research they want done going forward" as part of the Growth Teams); PX1952 (Altria) at 001 ("If this is valuable research . . . then the teams can sponsor it."); PX1954 (Altria) at 002 (asking "why wouldn't we just stop [the research] and then your team can assess whether you want to do it later")).

The Proposed Finding's suggestion that Garnick attempted to stop the Growth Teams from researching high nicotine and nicotine salts is inaccurate. Nowhere in the cited documents does Garnick attempt to prohibit any research by the Growth Teams. To the contrary, Garnick is explicit that he does not want to make decisions about what research the Growth Teams should conduct

because "[i]ts not our decision to make," but rather the Growth Team's. (PX1954 (Altria) at 002; *see also* PX4494 (Altria) at 002 ("We just promised the teams full autonomy and I don't want to violate that first thing out of the box."); PX1952 (Altria) at 001 ("I think we need to be militant about the autonomy of these teams if this is going to work . . . .")).

1550. Prior to the transaction with JLI, Altria was pursuing a potential transaction with a foreign supplier that had pod-based nicotine salt e-cigarettes that were sold prior to the August 8, 2016 FDA deeming rule. (PX1942 (Altria) (July 2018 email string regarding the acquisition of the pod-based product "Purilum")).

Response to Proposed Finding No. 1550:

The Proposed Finding is incomplete and misleading without additional context. There is no evidence that what the Proposed Finding describes as a "potential transaction" was consummated or could have been consummated. The cited document says "Purilum is *confirming* sale of device/Pods/Flavors prior to 8/8/2016." (PX1942 (Altria) at 001 (emphasis added)). Complaint Counsel did not reference this document at trial (CC Exhibit Index at 30), or in any depositions, so there is no evidence in the record whether Purilum was able to make such a confirmation, whether any subsequent evaluation took place, and what the results of such evaluation were.

1551. As of December 10, 2018, Altria was discussing testing versions of MarkTen Elite and its cigalike products with higher nicotine strengths and nicotine salts as part of its planned growth team work, even though Elite had already been pulled from sale. (PX7015 (Gogova (Altria), Dep. at 168-73); PX4006 (Altria) PX4006 (Altria)). October 2018 emails between Maria Gogova, Bill Gardner, and others indicate that Altria undertook a series of R&D efforts regarding nicotine salts, and that Altria's nicotine salt research continued into late 2018); PX1975 (Altria) at 001(December 2018 email string discussing nicotine content consumer research)).

Response to Proposed Finding No. 1551:

The Proposed Finding is incomplete and misleading without additional context. Dr. Gogova explained that she recalled the October 2018 study as "foundational work," not related to Elite as a product platform. (PX7015 Gogova (Altria) Dep. at 161). The same was true for the

December research mentioned in the cited document, PX1975 (Altria). (PX7015 Gogova (Altria) Dep. at 170-71). When describing Altria's choice to use Nu Mark's existing products, Dr. Gogova said "this should be viewed as those devices were really used only as a delivery system," because as the Growth Teams were attempting "to develop leapfrog innovations, [they didn't] know where to start, so [they] tr[ied] to use what is currently with [them]." (PX7015 Gogova (Altria) Dep. at 171-72).

It is undisputed that there was no finalized design for a new product with nicotine salts; to the contrary, Altria had not yet determined how to add nicotine salts into its existing products. (Jupe (Altria) Tr. 2137 ("We still had an awful lot of work to do to put [nicotine salts] into [Elite]."); PX7015 Gogova (Altria) Dep. at 323 ("So we were not close to achiev[ing] it.")).

Even if Altria had finalized a new product with nicotine salts, that new product would require FDA approval before it could be launched. (Jupe (Altria) Tr. 2256). As a result, whether Altria could have launched a new product with nicotine salts is both highly speculative and, at best, would have taken years before the new product with salts could be brought to market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1552. Prior to the transaction, Altria was working on other improvements to existing products, such as packaging optimization for MarkTen Elite by removing the pod cap and switching to an improved foil bag. (PX1671 (Altria) at 005 (MarkTen® Elite Presentation, August 2018)).

Response to Proposed Finding No. 1552:

The Proposed Finding is incomplete and misleading without additional context. [redacted] Nevertheless, fixing Elite's leaking issue was not going to transform Elite into a successful product because it did not remedy Elite's lack of nicotine satisfaction. (RFF ¶ 674).

3. Altria Ceased Developing Next Generation E-Cigarette Products As Part of Its Agreement with JLI

1553. Innovation competition includes efforts to develop better products to respond to rivals developing and introducing better products. Based on a review of the documents and testimony, Dr. Rothman concluded that Altria's transaction with JLI reduces innovation competition. Altria had strong incentives and significant capabilities to develop and introduce better products. Altria was in fact investing aggressively to develop and bring new products to the market, and Altria's exit deprives the market of those efforts. (PX5000 at 053-57 (¶¶ 103-07) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 35)).

Response to Proposed Finding No. 1553:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Notwithstanding incentives to develop alternatives to conventional tobacco products and billions of dollars invested in innovative product development, Altria for decades had failed to develop successful innovative products that could potentially reduce the risks of smoking. (RFF ¶¶ 140-73). Altria's efforts at developing e-vapor products fared no better; Altria never successfully developed an e-vapor product internally. (RFF ¶¶ 181-91). Altria's attempts at internal product development were far from finished, as none of them were even close to design lock. (RFF ¶¶ 1553-611). Even if Altria had finalized a new design, it would have to obtain FDA approval before the new product could be brought to market. (RFF ¶¶ 59-61, 65). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 72-104, 122-26). Under these circumstances, there is no basis for Dr. Rothman's conclusion that Altria's exit from the market meaningfully lessened innovation competition. (RFF ¶¶ 1647-50).

1554. According to Dr. Rothman, it is not necessary to know exactly which products Altria would have had on the market, or precisely when they would have been released, to evaluate if Altria would have been a significant competitor. The proper way to evaluate whether Altria would have been a significant competitor is to evaluate Altria's incentives and ability to compete, innovate, and commercialize new and improved e-cigarette products. (PX5000

at 043 (¶ 91), 044 (¶ 93), 053-57 (¶¶ 103-07) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 38)).

Response to Proposed Finding No. 1554:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The very fact that Dr. Rothman acknowledges that he cannot say *how* Altria would have been a significant competitor in the e-vapor category, (RFF ¶¶ 1489-1500), demonstrates that his opinion is improperly speculative.

Moreover, an evaluation of Altria's "ability to compete, innovate, and commercialize" demonstrates why there is no basis for Dr. Rothman's opinion that Altria would have been a "significant competitor" in the future. Altria's long history of failed innovation—both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-91), demonstrates that size and incentives are alone not sufficient to make a company a significant competitor. And without FDA approval—which the evidence shows Altria's products were not likely to get—it doesn't matter how great a company's incentives are, its products are not allowed to stay on the market. (RFF ¶¶ 64, 1501-31).

1555. Altria was working to develop and commercialize new products, including Elite 2.0 with nicotine salts, and PMI's VEEV product with MESH technology. More generally, Altria was continuing to invest in innovation and planned to compete in e-cigarettes for the long-run. (PX5000 at 049 (¶ 98), 054-57 (¶¶ 106-07), 60-62 (¶ 112) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 48)).

Response to Proposed Finding No. 1555:

The Proposed Finding is incomplete and misleading without additional context. There was no finished design for an Elite 2.0; instead, Elite 2.0 was no more than "a series of concepts on pieces of paper." (PX7027 Murillo (Altria/JLI) Dep. at 158-59; *see also* RFF ¶¶ 1597-1603).

Similarly, whether Altria could have ever commercialized a VEEV product is inherently speculative: [redacted]

[redacted]

More generally, before a hypothetical Elite 2.0, VEEV, or any product that Altria's internal development might have produced could be brought to market, it would have to obtain FDA approval. (RFF ¶¶ 59-61, 66). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 1601-02; *see also* RFF ¶¶ 72-104, 122-26).

1556. Jupe testified that "learnings from consumer studies provided continuous feedback to [his] team's efforts to conduct product development with e-cigarettes." (Jupe (Altria) Tr. 2150).

Response to Proposed Finding No. 1556:

The Proposed Finding is misleading and incomplete without additional context. Jupe also explained that Altria had the wrong model for consumer research in innovative products: "We weren't good at kind of exploring where the consumer was or where the consumer was going. . . . And so this is one of the huge problems we faced in really getting ahead of the competition on leapfrogging." (PX7016 Jupe (Altria) Dep. at 179). Indeed, Altria never successfully developed an e-vapor product internally. (RFF ¶¶ 184-91, 1553-611).

1557. Altria's product development team used feedback from consumer research to inform the next round of product development efforts. (Jupe (Altria) Tr. 2150-51).

Response to Proposed Finding No. 1557:

The Proposed Finding is misleading and incomplete without additional context. Jupe also explained that Altria had the wrong model for consumer research in innovative products: "We weren't good at kind of exploring where the consumer was or where the consumer was going. . . .

And so this is one of the huge problems we faced in really getting ahead of the competition on leapfrogging." (PX7016 Jupe (Altria) Dep. at 179). Indeed, Altria never successfully developed an e-vapor product internally. (RFF ¶¶ 184-91, 1553-611).

Even if it had developed a new product, that would require FDA approval before the new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether any new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1558. Jupe testified that this process of "figur[ing] out what consumers wanted" was an "Edisonian approach" of "trial and error" and that approach "is how we get a light bulb." (Jupe (Altria) Tr. 2151-2152).

Response to Proposed Finding No. 1558:

Respondents have no specific response except to note that Altria was never able to get a "light bulb" in its attempts at innovative product development: Altria had a decades-long history of failure in its attempts to develop potentially reduced-risk products, including its failures internally to develop e-vapor products. (RFF ¶¶ 140-91).

Even if it had developed a new product, that would require FDA approval before the new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether any new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1559. Describing the nature of innovation, Jupe testified that "any textbook would teach us that . . . [i]f you're pushing and pushing hard, you are going to fail the lion's share of the times. (Jupe (Altria) Tr. 2182-83); *see also* PX7016 (Jupe (Altria), Dep at 215) ("Well, look, it's been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.")).

Response to Proposed Finding No. 1559:

Respondents have no specific response except to note that Altria had a decades-long history of failure in its attempts to develop potentially reduced-risk products, including its failures internally to develop e-vapor products. (RFF ¶¶ 140-91).

1560. Because some R&D projects are going to fail, innovation is about placing multiple bets. (Jupe (Altria) Tr. 2183; PX7016 (Jupe (Altria), Dep. at 215) ("And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You've got to have a lot of different bets.")).

Response to Proposed Finding No. 1560:

The Proposed Finding is incomplete and misleading without additional context. Jupe also testified that you have "to know when you fold up your cards." (Jupe (Altria) Tr. 2183).

1561. "Preceding e-vapor, [Altria] had bets that [it] placed on different products, on different processes," and that "[m]ore failed than worked." (PX7016 (Jupe (Altria), Dep. at 216)).

Response to Proposed Finding No. 1561:

Respondents have no specific response except to note that Altria *never* successfully developed an e-vapor product internally or came close to it. (RFF ¶¶ 184-91, 1553-611). As Begley testified, while Altria "plac[ed] multiple bets," it turned out that "how things developed is that . . . form and satisfaction were really the drivers," and Nu Mark's products lacked the right form and could not provide the necessary satisfaction to convert adult smokers. (Begley (Altria) Tr. 1079-80; RFF ¶¶ 1501-31).

1562. When projects involving tobacco products other than e-cigarettes failed, Altria "restructured" and "reset" rather than shutting down its product development group. (Jupe (Altria) Tr. 2183-84).

Response to Proposed Finding No. 1562:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Altria's long history of failed innovative product development shows that when it

determined that an innovative product was not going to be successful, it shut down the project and withdrew the product from the market. (RFF ¶¶ 140-73).

1563. Failed research and development efforts inform future product research. (Jupe (Altria) Tr. 2184); PX7016 (Jupe (Altria), Dep. at 63-64)).

Response to Proposed Finding No. 1563:

The Proposed Finding is incomplete and misleading without additional context. Jupe testified that failure "should" inform future research, (Jupe (Altria) Tr. 2184), and that Altria "tr[ied] to build on [its] failures," (PX7016 Jupe (Altria) Dep. at 64), but he admitted "[n]ot always are you successful on building on your failures," (PX7016 Jupe (Altria) Dep. at 64). That was certainly true for Altria, which *never* successfully developed an e-vapor product internally or came close to it. (RFF ¶¶ 184-91, 1553-611).

Even if it had developed a new product, that would require FDA approval before the new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether any new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1564. Altria was actively developing new innovations and leapfrog technologies that would have surpassed the existing products on the market. In June 2018, Altria's Richard Jupe wrote that if Altria's acquisition of JLI were not successful, that he had "a plan for Elite 2.0 (design for PMTA)," and was "currently scoping - what comes after that in Elite 3.0 (leapfrog)." (PX1086 (Altria) at 001).

Response to Proposed Finding No. 1564:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. To the extent Jupe contemplated in the cited document attempting to develop a new version of Elite, (PX1086 (Altria) at 001), (1) any new design of Elite was never finalized (RFF ¶¶ 1597-1603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF ¶¶ 45-71); and (3) even if successful, that process would take

years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26). As a result, Jupe testified in reference to the cited document that Elite 2.0 was at best "five to six years away," (Jupe (Altria) Tr. 2156), while as for Elite 3.0, he "would dare say we didn't have a plan, as much as we had a notion that we could maybe do that," (Jupe (Altria) Tr. 2157).

1565. Richard Jupe described Elite as Altria's platform going forward for small pod devices, which would consume and incorporate all of Altria's other internal R&D projects and innovations, like Project Panama. (PX1086 (Altria) at 001). Altria incorporated "relevant learnings" from Project Panama into plans for an "optimized version of MarkTen Elite." (PX4241 (Altria) at 010 (Email from Elizabeth Mountjoy, August 8, 2018)).

Response to Proposed Finding No. 1565:

The Proposed Finding is incomplete and misleading without additional context. The second cited document says that relevant learnings from Panama will be incorporated into "an optimized version of MarkTen Elite" for PMTA approval. (PX4241 (Altria) at 010). But (1) any new design of Elite was never finalized (RFF ¶¶ 1597-1603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF ¶¶ 45-71); and (3) even if successful, that process would take years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26). As a result, Jupe testified in reference to the cited document that Elite 2.0 was at best "five to six years away," (Jupe (Altria) Tr. 2156), while as for Elite 3.0, he "would dare say we didn't have a plan, as much as we had a notion that we could maybe do that," (Jupe (Altria) Tr. 2157).

1566. Prior to the transaction, Altria had already begun developing Elite 2.0 and planning for Elite 3.0. (PX1671 (Altria) at 006-07 (MarkTen® Elite Presentation, August 2018)). As of August 2018, Altria set a deadline for a design freeze on Elite 2.0 by December 2018, with a number of improvements over Elite 1.0, including reduction in harmful chemicals, LED battery indicator, temperature limits, voltage/current protection, new flavor systems, and new designs. (PX1671 (Altria) at 006). Altria had also targeted a design freeze of September 2019 for Elite 3.0, with additional flavor systems, improved industrial design, a new heater/wick design, and more efficient assembly. (PX1671 (Altria) at 007).

Response to Proposed Finding No. 1566:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel did not discuss the cited document at trial, (CC Exhibit Index at 22), or in any deposition, so there is no evidence as to the reasonableness of these deadlines. Indeed, the evidence shows that Altria's PMTA timelines were often optimistic and had to be continually pushed back. (Jupe (Altria) Tr. 2299-300).

Any new design of Elite was (1) never finalized (RFF ¶¶ 1597-603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF ¶¶ 45-71); and (3) even if successful, that process would take years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26). As a result, Jupe testified that Elite 2.0 was at best "five to six years away," (Jupe (Altria) Tr. 2156), while as for Elite 3.0, he "would dare say we didn't have a plan, as much as we had a notion that we could maybe do that," (Jupe (Altria) Tr. 2157).

1567. An Elite Business Case Elements presentation noted that Elite 2.0 would have "higher aerosol mass + flavor + immediate nicotine satisfaction + pod-based/discreet product," and that there was "[n]o product that is all of these things today." (PX4370 (Altria) at 008).

Response to Proposed Finding No. 1567:

The Proposed Finding is incomplete and misleading without additional context. The cited document shows how far Elite 2.0 was from being a reality. (PX4370 (Altria)). It describes Elite 2.0 as a "concept" only, (PX4370 (Altria) at 008, 010), and states that the "[p]lanned PMTA date" was 2022, (PX4370 (Altria) at 008, 010)—even under this optimistic scenario then, Elite 2.0 would still not be on the market. And as Jupe explained, Altria's timelines were often optimistic and had to be continually pushed back. (Jupe (Altria) Tr. 2299-300).

Any new design of Elite was (1) never finalized (RFF ¶¶ 1597-603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF

¶¶ 45-71); and (3) even if successful, that process would take years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26). As a result, Jupe testified that Elite 2.0 was at best "five to six years away," (Jupe (Altria) Tr. 2156; *see also* RFF ¶ 1600 (Elite 2.0 "was no more than a series of concepts on pieces of paper." (internal quotation marks omitted))).

1568. Altria had been researching flavor formulations for Elite 2.0 with nicotine salts. In an email to Richard Jupe from August 2018, an Altria employee noted that "With the current schedule for Elite 2.0, we plan to have all formulations, at all desired nicotine levels complete by Design Freeze in December 2018." (PX4537 (Altria) at 001-02 (August 2018 email string with Richard Jupe and others discussing Elite 2.0 formulation development)).

Response to Proposed Finding No. 1568:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel did not show Jupe this exhibit at trial, (CC Exhibit Index at 74), or in his deposition, (PX7016 Jupe (Altria) Dep.), so there is no evidence to support that these deadlines were realistic or ever met.

More generally, (1) any new design of Elite was never finalized (RFF ¶¶ 1597-1603); (2) even if there were a new design, it would require FDA approval before that new design could be launched, (RFF ¶¶ 45-71); and (3) even if successful, that process would take years before the hypothetical new design could be brought to market, (RFF ¶¶ 86-93, 122-26). As a result, Jupe testified that Elite 2.0 was at best "five to six years away," (Jupe (Altria) Tr. 2156; *see also* PX7027 Murillo (Altria/JLI) Dep. at 158-59 (Elite 2.0 was no more than "a series of concepts on pieces of paper")).

Finally, even if Nu Mark had finalized new flavor formulations, following FDA's flavor ban in early 2020, no e-vapor manufacturer is permitted to sell pod-based products in flavors other than tobacco or menthol. (Crozier (Sheetz) Tr. 1495-96; PX9016 (FDA)). As a result, no e-vapor manufacturers are currently competing along this dimension with pod-based products.

1569. Michelle Baculis, the former Director of Strategy and Brand Development at Nu Mark, testified that Altria had been working on Project Panama, whose purpose "was to leapfrog everything that was already in the marketplace." (PX7014 (Baculis (Altria), Dep. at 100). Nu Mark's goal with Project Panama was to achieve a product that delivered on the vast majority of consumer desires in the e-cigarette category and fulfill consumers' unmet needs in a way that none of the products currently in the marketplace were doing. (PX7014 (Baculis (Altria), Dep. at 100)).

Response to Proposed Finding No. 1569:

The Proposed Finding is incomplete and misleading without additional context. Baculis testified that any new product would need to have nicotine satisfaction, as that was consumers' "number one thing," (PX7014 Baculis (Altria) Dep. at 157), but that despite all Altria's research it had never achieved a product that delivered nicotine satisfaction to consumers. (PX7014 Baculis (Altria) Dep. at 113-15). Jupe explained that Altria "couldn't get [Panama's] heater to work properly [so] . . . . we threw that back." (PX7016 Jupe (Altria) Dep. at 59-60). Indeed, Panama was put on hold by March 2018, (RFF ¶¶ 1582-84), before there was any discussion between Altria and JLI about a noncompete, (RFF ¶ 767).

Moreover, even if there were a finalized Panama design, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether a Panama design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 86-93, 122-26).

1570. Altria was conducting sensory technology R&D to explore various generations of nicotine salt formulas for e-cigarettes. (PX7016 (Jupe (Altria), Dep. at 218-20)). Altria was researching flavor sensates that could take some of the sting out of nicotine, reducing the chance that consumers would reject the e-cigarette product. (PX7016 (Jupe (Altria), Dep. at 221-22); PX1673 at 005-08 (Altria) (New Product Development and Commercialization Readiness of Acquired Products presentation for Nu Mark's August 2018 Game Plan meeting)).

Response to Proposed Finding No. 1570:

The Proposed Finding is incomplete and misleading without additional context. Jupe explained that what was included in the cited document were just "technologies we would

consider," as this was "a planning document." (PX7016 Jupe (Altria) Dep. at 227-28). And in general, Jupe and others on his team took timelines in a document like this "with a grain of salt." (PX7016 Jupe (Altria) Dep. at 220).

Moreover, even if a new e-vapor design came out of this research, it would need to be developed into a workable prototype that would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 86-93, 122-26).

1571. In 2018, Altria was also working on flavor development incorporating "sensomics," which combines "sensory science and artisan flavor creation." (PX1704 (Altria) at 007 (Richard Jupe's June 2018 R&D Innovation Progress draft presentation); Quigley (Altria) Tr. 2005 ("Sensomics was kind of the study of kind of the senses and interaction with our products.")). According to Altria, its sensory innovations would have resulted in "Enhanced aerosol creation, characterization, stability and deposition to provide a similar level of satisfaction." (PX1704 (Altria) at 007).

Response to Proposed Finding No. 1571:

The Proposed Finding is incomplete and misleading without additional context. The cited document lists "[s]ensory" along with three other concepts ("[i]nsight [d]riven," "[e]xperience [d]esign," and "[r]egulatory [s]uccess") placed around the word "[a]spiration." (PX1704 (Altria) at 005). That Altria had the "[a]spiration" to undertake this sort of innovation, (PX1704 (Altria) at 005), does not mean it would be able to do it, (PX7013 Brace (Altria) Dep. at 174-75 (agreeing that "[m]any" of Nu Mark's "aspirations" failed to come true)).

Moreover, even if a new e-vapor design came out of this research, it would need to be developed into a workable prototype that would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 86-93, 122-26).

1572. Altria was researching ways to incorporate Bluetooth technology into e-cigarettes that would enable the devices to work with consumers' cell phones to provide information about their e-cigarettes' battery life and e-liquid level. (Jupe (Altria) Tr. 2161-62).

Response to Proposed Finding No. 1572:

The Proposed Finding is incomplete and misleading without additional context. Jupe explained that Altria was considering the possibility of incorporating Bluetooth technology into future e-vapor products as a "horizon thinking[]." (Jupe (Altria) Tr. 2162). He also observed, however, that adding Bluetooth technology into Altria's current e-vapor products would be akin to "putting in a new radio" into a "car [that] was not running properly," (Jupe (Altria) Tr. 2161), *i.e.*, that the effort demonstrated that Altria was not focusing on the right things.

Moreover, even if a new e-vapor design came out of this research, it would need to be developed into a workable prototype that would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 86-93, 122-26).

1573. Bluetooth technology could also potentially allow users to lock their e-cigarettes in order to ensure that only they could use it, which could prevent children from picking up their parents' devices and using them. (PX7016 (Jupe (Altria), Dep. at 48-49)).

Response to Proposed Finding No. 1573:

Respondents have no specific response except to note that even if a new e-vapor design came out of this research, it would need to be developed into a workable prototype that would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1574. Altria was also researching "Smart-Pod" technology that could enable an e-cigarette's pods to adapt to a consumer's puffing preferences and ensure that the device would not work with knock-off pods. (Jupe (Altria) Tr. 2163-64).

Response to Proposed Finding No. 1574:

The Proposed Finding is incomplete and misleading without additional context. Jupe explained that the idea of a "smart pod" could be defined to include lots of different projects all of which Altria was merely "imagining." (PX7016 Jupe (Altria) Dep. at 171-73).

Moreover, even if a new e-vapor design came out of this research, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1575. [redacted] (PX1715 (Altria) at 001 [redacted] (*in camera*); (PX7016 (Jupe (Altria), Dep. at 146-47)).

Response to Proposed Finding No. 1575:

The Proposed Finding is incomplete and misleading without additional context. The support for the Proposed Finding shows that this heater was nowhere near complete. In the same exchange cited in the Proposed Finding, Jupe explained that the serpentine heater "was a technology early on in the development cycle." (PX7016 Jupe (Altria) Dep. at 146). He described creating a durable heater as "one corner of the puzzle," but one that Altria had not created "a successful approach" at that time. (PX7016 Jupe (Altria) Dep. at 149). Indeed, in the cited document, [redacted]

Moreover, even if a new e-vapor design came out of this research, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly

speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1576. A July 2018 presentation entitled "Level Setting Scenarios" sent by Elizabeth Mountjoy to Brian Quigley indicated that Altria's strategic options for becoming reduced risk product leader included internal development, acquisitions, and third-party development, but obviously did not include abandoning the category. Altria planned to have a leapfrog product in 3-5 years, either through internal efforts or acquisition/third party approach. (PX1319 (Altria) at 006).

Response to Proposed Finding No. 1576:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel did not discuss the cited document at trial, (CC Exhibit Index at 12), or in any deposition, so there is no evidence as to what the answers to the questions posed on the cited slide were, (PX1319 (Altria) at 006).

Moreover, there are problems with each of the proposed "strategic options for becoming [a] reduced risk product leader" as the Proposed Finding suggests. *First*, Altria never successfully developed an e-vapor product internally. (RFF ¶¶ 1553-1611). *Second*, there is no evidence that Altria could have acquired a successful product from another company. Indeed, when Altria looked for a pod-based product to acquire, the most promising product it was able to acquire was Elite, (RFF ¶¶ 301-14, 324-31), which was a deeply flawed product that failed on the market, (RFF ¶¶ 431-85). *Third*, while Altria was working for some time with third-parties on developing a new product, nothing ever came of those partnerships. (RFF 1553-1611; *see also* PX7016 Jupe (Altria) Dep. at 189-90 (describing how Altria "had the wrong partners altogether" and did not know how to work with third parties strategically)).

And there is no support for Complaint Counsel's assertion that Altria "abandon[ed] the category." As early as 2017, Altria stated that it could participate in the e-cigarette space in

"multiple ways," including "through organic product development" and through "acquisitions." (RX0176 (Altria) at 156; RFF ¶ 340).

Finally, even if a new e-vapor design came out of this research, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1577. In October 2018, Altria formed two independent growth teams to develop next generation e-cigarette products. (Quigley (Altria) Tr. 1979-80; PX4010 (Altria) at 010 (Howard Willard's October 2018 Growth Strategy Update). The growth teams were comprised of Altria's top performers across different disciplines, such as science, regulatory affairs, finance, and marketing. (PX7010 (Gifford (Altria), IHT at 189-90)).

Response to Proposed Finding No. 1577:

The Proposed Finding is incomplete and misleading without additional context. Respondents agree that, having concluded that Nu Mark's on-market products were commercial failures, Altria pivoted to the Growth Teams to try to develop new e-vapor products for the distant future. (RFF ¶¶ 898-916, 962-77). But whether the Growth Teams would have ever been able to develop a competitive product is inherently speculative and, even if they had, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met).

The Growth Teams had not come up with any concept, let alone a leapfrog concept, at the time they were disbanded in December 2018. (RFF ¶¶ 1606-07). Moreover, staffing Growth Teams with Altria's top performers did not solve Altria's fundamental personnel issue, which is that Altria is not an innovative company and its employees did not have expertise in the area of

innovative product development. (RFF ¶¶ 971-77, 1610-11; *see also* PX7016 Jupe (Altria) Dep. at 184 (describing Altria's attempts to re-organize its structure to promote innovation a "[b]and-[a]id on something that was more systemic" due to Altria's lack of personnel with the right skills)).

Moreover, even if a new e-vapor design came out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1578. The growth teams were formed to augment Altria's product development capabilities by mimicking the faster design cycles of software firms. (PX7016 (Jupe (Altria), Dep. at 203-05)). The growth teams could have also continued R&D efforts on any of Altria's existing or discontinued products if the growth teams thought that those efforts would be worthwhile. (PX7016 (Jupe (Altria), Dep. at 213-14)).

Response to Proposed Finding No. 1578:

The Proposed Finding is incomplete and misleading without additional context. Respondents agree that, having concluded that Nu Mark's on-market products were commercial failures, Altria pivoted to the Growth Teams to try to develop new e-vapor products for the distant future. (RFF ¶¶ 898-916, 962-77). But whether the Growth Teams would have ever been able to develop a competitive product is inherently speculative and, even if it had, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)).

Jupe explained that "Altria's first run out of the gate with these growth teams was a mess . . . [since u]nfortunately we got the wrong partners to do this . . . . [and] [i]n some cases, the wrong people to do this." (PX7016 Jupe (Altria) Dep. at 205). And as Dr. Gogova explained,

even if the Growth Teams could have used or continued existing R&D efforts, "many of [Nu Mark's] product platforms were also becoming older or even obsolete to the current marketplace," meaning "those product[s] would never be able to reach the goal of leapfrog innovation." (PX7015 Gogova (Altria) Dep. at 265-66).

Even if a new e-vapor design came out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1579. Altria's CEO, Billy Gifford, told the growth teams that budget would not be a constraint, and that they could retain any third parties or hire any new talent that they needed to develop new e-cigarette products. (PX7010 (Gifford (Altria), IHT at 192-93) ("I met with each of the growth teams and told them do not let the budget be a constraint on any of your efforts.")).

Response to Proposed Finding No. 1579:

The Proposed Finding is incomplete and misleading without additional context. Resources, in terms of either money or personnel, are not alone sufficient to successfully develop new products. Notwithstanding billions in investments, Altria had tried and failed for decades to develop successful innovative products internally, (RFF ¶¶ 140-73), and faced similar challenges with e-vapor product development, (RFF ¶¶ 181-91).

Altria's efforts to hire personnel for the Growth Teams illustrates its challenges in attracting the right talent for innovation. The individual who Altria initially hired to lead the Growth Teams was a fraud who had fabricated his resume. (RFF ¶¶ 971-74). Altria was unable to find any other suitable candidate for the position. (RFF ¶ 977). As a result, Altria had to put Jupe—a cigarette designer with no expertise in developing innovative products or electronic-based products—in charge of the Growth Teams. (RFF ¶ 976).

Ultimately, according to the record evidence, any new product designed by the Growth Teams would have taken at least five or six years to reach the market, and possibly longer. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). Even if a new e-vapor design came out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1580. Altria's Murray Garnick testified that Altria was prepared to invest $100 million in the growth teams if the teams could justify the budget. (PX7000 (Garnick (Altria), IHT at 130)).

Response to Proposed Finding No. 1580:

The Proposed Finding is incomplete and misleading without additional context. Resources are not alone sufficient to successfully develop new products. Notwithstanding billions in investments, Altria had tried and failed for decades to develop successful innovative products internally, (RFF ¶¶ 140-73), and faced similar challenges with e-vapor product development, (RFF ¶¶ 181-91).

Notably, in the same testimony cited in the Proposed Finding, Garnick explained that Altria "didn't expect this to have fruition for years and years. . . . It was a bunch of people in a room saying, okay, think of something." (PX7000 Garnick (Altria) IHT at 132).

1581. An internal Altria email and presentation assumed that Altria's growth teams would have a new product ready by 2020, and acknowledged the possibility that a new platform or acquired products could be in place in 2019. (PX7015 (Gogova (Altria), Dep. at 263-65); PX1989 (Altria) at 001 (December 2018 email between several Altria employees with 3 Year Estimated Spend document attached)).

Response to Proposed Finding No. 1581:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. The cited document describes having a new product by 2020 as a "big assumption[]," saying "we will *possibly* have a new product from the Growth team that *may* be ready for a full stability study" by that time. (PX1989 (Altria) at 001 (emphases added)). The Proposed Finding cites to Dr. Gogova, but she described this plan as "wishful thinking." (PX7015 Gogova (Altria) Dep. at 264). According to the record evidence, any new product designed by the Growth Teams would have taken at least five or six years to reach the market, and possibly longer. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)).

Even if a new e-vapor design came out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1582. Altria was continuing to work on research and development of next generation technologies and e-cigarette products through the end of 2018, and recommended that nicotine salts be incorporated into all of Altria's e-cigarette products, regardless of nicotine strength. (PX1711 (Altria) at 003-08 (October 2018 "Tox Forum" presentation)). For example, Richard Jupe testified that, towards the end of 2018, Altria had brought on a number of superior technology partners for its e-cigarette business. (PX7016 (Jupe (Altria), Dep. at 190-91)). Altria's technology partnerships gave it access to R&D capabilities that it did not possess in-house. (PX7016 (Jupe (Altria) at 44-45, 50-53)).

Response to Proposed Finding No. 1582:

The Proposed Finding is incomplete and misleading without additional context. It is undisputed that Altria had not yet determined how to add nicotine salts into its existing products.

(Jupe (Altria) Tr. 2137 ("We still had an awful lot of work to do to put [nicotine salts] into [Elite]."); PX7015 Gogova (Altria) Dep. at 323 ("So we were not close to achiev[ing] it.")). And as Altria had transferred all responsibility for innovative product development to the Growth Teams by this point, these so-called "superior technology partners" would have been partners for the growth teams, which had not come up with any concept at the time they were disbanded in December 2018. (RFF ¶¶ 1606-07).

Moreover, the recommendation that nicotine salts be incorporated into all new products is further evidence as to why Nu Mark's existing products were not competitive. Only MarkTen Bold had any nicotine salts, but it had the wrong formula, (RFF ¶¶ 628, 638-51), and was in the wrong format (cig-a-like), (RFF ¶¶ 1324-1329; *see also* Jupe (Altria) Tr. 2283 ("[W]ould higher salt in a cigalike deliver the nicotine better? Yeah, of course it would, but the reality is that device, that format, that design was on its way out . . . .")).

Finally, even if a new e-vapor design came out of the combination of technology partnerships with the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1583. A November 18, 2018 email from Altria's Elizabeth Mountjoy to K.C. Crosthwaite indicated that Altria would have continued to drive e-cigarette innovation internally pending the outcome of JLI (Tree) negotiations: "The over-arching voiceover I would give is that the deck assumes we are going . . . to continue to drive innovation engine internally. . . . Anyhow, until we get more clarity on Tree, we will continue to push ahead with this work- unless you advise otherwise." (PX4242 (Altria) at 001).

Response to Proposed Finding No. 1583:

The Proposed Finding is incomplete and misleading without additional context. As Gifford explained, Altria's plan was to spend money on either the Growth Teams or on a JLI deal.

(PX7010 Gifford (Altria) IHT at 188-89). That does not mean the Growth Teams was not a serious effort; to the contrary, Altria made the Growth Teams unconstrained by any budget and gave them autonomy to go in whatever direction they so chose. (RFF ¶ 969). However, at the time the Growth Teams were disbanded in December 2018, they had not come up with any concept for a new design. (RFF ¶¶ 1606-07).

Even if a new e-vapor design had come out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1584. Altria's CEO and former CFO, Billy Gifford, testified that Altria's plan as of December 6, 2018 was to free up money and spend it either on the e-cigarette growth teams or on financing a JUUL deal. (PX7010 (Gifford (Altria), IHT at 188-89)).

Response to Proposed Finding No. 1584:

Respondents have no specific response.

1585. Altria's Billy Gifford testified that [redacted] (PX7010 (Gifford (Altria), IHT at 216) [redacted] (*in camera*)).

Response to Proposed Finding No. 1585:

Respondents have no specific response.

1586. All of Altria's efforts to develop and compete in e-cigarettes ceased after Altria entered into the transaction and non-compete agreement with JLI, and work on the growth teams ceased. (PX7026 (Gardner (Altria), Dep. at 175-76)).

Response to Proposed Finding No. 1586:

The Proposed Finding is incomplete and misleading without additional context. At the outset, the Proposed Finding is misleading to the extent it seeks to imply a causal relationship between the transaction and the discontinuation of Altria's existing e-vapor products, for which

there is no support. The evidence shows that Altria discontinued its existing e-vapor products for independent business reasons. (RFF ¶¶ 1001-07, 1074-92).

As for products under development, at the time the Growth Teams were disbanded in December 2018, they had not come up with any concept for a new design. (RFF ¶¶ 1606-07). Even if a new e-vapor design had come out of the Growth Teams, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

1587. Based on Altria's documents and testimony, Dr. Rothman concluded that absent the transaction, Altria would have continued to invest in e-cigarette innovation and planned to compete in e-cigarettes for the long-run. Altria understood that the e-cigarette market was dynamic, and Altria's significant resources and ability to make large upfront investments was a competitive advantage for Altria. (PX5000 at 053-57 (¶¶ 103-07); (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 48-49)).

Response to Proposed Finding No. 1587:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman opinion regarding Altria's abilities and incentives to compete is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

Notwithstanding billions of dollars invested in innovative product development, Altria for decades had failed to develop successful innovative products that could potentially reduce the risks of smoking. (RFF ¶¶ 140-73). Altria's efforts at developing e-vapor products fared no better; Altria never successfully developed an e-vapor product internally. (RFF ¶¶ 181-91). Altria's attempts at internal product development were far from finished, as none of them were even close to design lock. (RFF ¶¶ 1553-611). And, according to the record evidence, any new product designed by the Growth Teams would have taken at least five or six years to reach the market, and

possibly longer. (Garnick (Altria) Tr. 1661-62 (explaining that "bas[ed] . . . on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). Even if Altria had finalized a new design, it would require FDA approval before that new design could be launched. (RFF ¶¶ 45-71). As a result, it is highly speculative whether such a new design would have reached the market and, even it had, it would have taken years before it reached the market. (RFF ¶¶ 1606-09; *see also* RFF ¶¶ 86-93, 122-26).

At bottom, Dr. Rothman's opinion amounted to this: because Altria had incentives to be successful in e-vapor and is a large company, it would have been a significant competitor. (PX7048 Rothman Trial Dep. at 74 ("[W]hat made [Altria] a competitive threat, was its ability to make significant up-front investments to compete for the long run, the long run payoff.")). But incentives and size are not enough to make a company a significant competitor. To the contrary, Altria's long history of failed innovation—both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-91), demonstrates that size and incentives are alone not sufficient to make a company a significant competitor.

C. THE TRANSACTION FORECLOSED COLLABORATION BETWEEN ALTRIA AND PMI, INCLUDING THE OPPORTUNITY TO PARTICIPATE IN THE LAUNCH OF A PROMISING NICOTINE SALT POD DEVICE, VEEV

1. Altria and PMI Collaborated on E-Cigarettes Through a Joint Research, Development, and Technology Sharing Agreement

1588. Altria and PMI entered into an E-Vapor Joint Research, Development, and Technology Sharing Agreement ("JRDTA") [redacted] (RX0873 (Altria) at 001 (JRDTA) (in camera); King (PMI) Tr. 2407 (in camera)).

Response to Proposed Finding No. 1588:

Respondents have no specific response.

1589. [redacted] (RX0873 (Altria) at 027 (*in camera*)).

Response to Proposed Finding No. 1589:

Respondents have no specific response except to clarify that the [redacted].

1590. Martin King, CEO of PMI America, testified that PMI and Altria entered into the JRDTA to pool e-cigarette resources, technology, and intellectual property for Altria to use in the U.S. and for PMI to use outside of the U.S. (King (PMI) Tr. 2359).

Response to Proposed Finding No. 1590:

The Proposed Finding is incomplete and misleading without additional context. As King testified, [redacted], and, under the JRDTA, each "independently develop[ed] and execut[ed] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

[redacted]

As to "pool[ing] e-cigarette resources, technology, and intellectual property," (CCFF ¶ 1590), PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them, (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (PX7020 King (PMI) Dep. at 209).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted]

[redacted]

[redacted] And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1591. Altria and PMI used the term "Project Vulcan" to refer to their strategic partnership, which included the JRDTA in e-vapor. (Begley (Altria) Tr. 983-84; King (PMI) Tr. 2360; PX7020 (King (PMI), Dep. at 32)).

Response to Proposed Finding No. 1591:

Respondents have no specific response except to note that "Project Vulcan" may also refer to Altria and PMI's distribution agreement for the IQOS heat-not-burn product. (PX7028 Wappler (PWP) Dep. at 23; *see also* PX7040 Gifford (Altria) Dep. at 126 ("Vulcan was a master agreement we had in place with PMI. So, Vulcan was a title we used for two branches of that. One was a, I'll call it, product development or research and development related to vapor, and the other side was related to a distribution agreement for the product we talked about earlier, IQOS."); PX7020 King (PMI) Dep. at 32 (similar)).

a) Information Sharing

1592. [redacted] (RX0873 (Altria) at 007-08 (*in camera*)).

Response to Proposed Finding No. 1592:

Respondents have no specific response.

1593. [redacted] (RX0873 (Altria) at 007 (*in camera*)).

Response to Proposed Finding No. 1593:

Respondents have no specific response.

b) Development Activities

1594. [redacted] (RX0873 (Altria) at 008 ([redacted] (*in camera*)).

Response to Proposed Finding No. 1594:

Respondents have no specific response.

1595. [redacted] (RX0873 (Altria) at 008-10 (*in camera*)).

Response to Proposed Finding No. 1595:

Respondents have no specific response.

c) Regulatory Responsibilities

1596. [redacted] (RX0873 (Altria) at 012-16 (*in camera*); King (PMI) Tr. 2409 (*in camera*)).

Response to Proposed Finding No. 1596:

Respondents have no specific response except to note that [redacted].

1597. [redacted] (RX0873 (Altria) at 012-16 (*in camera*)).

Response to Proposed Finding No. 1597:

Respondents have no specific response except to note that [redacted]

d) Intellectual Property Ownership

1598. [redacted] (RX0873 (Altria) at 016-18 (*in camera*); King (PMI) Tr. 2394-95, 2409-10 (*in camera*); PX7020 (King (PMI), Dep. at 34 (*in camera*)).

Response to Proposed Finding No. 1598:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

Second, Altria did not have access to a viable finished product. Under the JRDTA, Altria and PMI each "independently develop[ed] and execut[ed] developed plans that [were] specific to

[each] party's territory." (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). Apex was the only product PMI developed and to which Altria had access during the term of the JRDTA and, as King himself described, it was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would have require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1599. [redacted] (RX0873 (Altria) at 016-18 (*in camera*); King (PMI) Tr. 2394-95, 2409-10 (*in camera*)); PX7020 (King (PMI), Dep. at 34) (*in camera*)).

Response to Proposed Finding No. 1599:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

Second, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

Third, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

e) Commercialization

1600. [redacted] (RX0873 (Altria) at 019-20 (*in camera*)).

Response to Proposed Finding No. 1600

For purposes of this response, Respondents assume that the "JRDA" is a typographic error and the intended reference is "JRDTA."

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]

Second, Altria did not have access to a viable finished product. Under the JRDTA, Altria and PMI each "independently develop[ed] and execut[ed] developed plans that [were] specific to [each] party's territory." (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). Apex was the only product PMI developed and to which Altria had access during the term of the JRDTA and, as King himself described, it was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that "PMI never intended for it to be successful on its own," (King (PMI) Tr. 2547; RFF ¶¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1601. [redacted] (RX0873 (Altria) at 018-19 (*in camera*)).

Response to Proposed Finding No. 1601:

For purposes of this response, Respondents assume that the "JRDA" is a typographic error and the intended reference is "JRDTA."

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]

Second, Altria did not have access to a viable finished product. Under the JRDTA, Altria and PMI each "independently develop[ed] and execut[ed] developed plans that [were] specific to [each] party's territory." (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). Apex was the only product PMI developed and to which Altria had access during the term of the JRDTA and, as King himself described, it was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so

disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶¶ 1522-23). [redacted] And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

f) Manufacturing

1602. [redacted] (RX0873 (Altria) at 018-20 (*in camera*)).

Response to Proposed Finding No. 1602:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

[redacted]

Second, [redacted], and, under the JRDTA, each "independently develop[ed] and execut[ed] developed plans that [were] specific to [each] party's territory." (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (PX7020 King (PMI) Dep. at 2532). And, as to MarkTen Elite, PMI was notified when Altria

acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

2. The Joint Research, Development, and Technology Sharing Agreement Between Altria and PMI Fostered Valuable Collaboration in the Closed-System E-Cigarette Market

1603. In its 2016 three-year strategic plan, Nu Mark wrote that it was "leveraging [the] PMI agreement to accelerate product development." (PX4040 (Altria) at 040). The plan also noted that Altria and PMI resources were "collaboratively focused" on cigalike platform

enhancements, pod-based systems development, e-liquid portfolio expansion, and other initiatives. (PX4040 (Altria) at 040).

Response to Proposed Finding No. 1603:

The Proposed Finding is incomplete and misleading without additional context. Despite Nu Mark's aspiration as of February 2016 (when the three-year plan was created), (PX4040 (Altria) at 001), to leverage the JRDTA to accelerate product development, two and a half years later, in October 2018, Altria still had not completed a single internally-developed e-vapor product, (RFF ¶ 191 (explaining that none of Nu Nark's development efforts ever bore fruit)).

Nor had the JRDTA produced any significant product innovations. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted] Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

Ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King

(PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (PX7020 King (PMI) Dep. at 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1604. Altria evaluated the strengths and opportunities of various reduced harm product competitors in March 2017. (PX1633 (Altria) at 005-06 (presentation entitled "Reduced Harm Products, Scorecard Summary")). Based on an assessment of R&D investment, portfolio strength, capabilities, and attractive economics, Altria ranked PMI as the number one reduced harm product supplier at the time. (PX1633 (Altria) at 006).

Response to Proposed Finding No. 1604:

The Proposed Finding is incomplete and misleading without additional context. Altria's assessment was not based on e-vapor specifically, but rather an assessment on companies' positions across all potential reduced harm products. PMI scored favorably because, among other things, it was diversified across multiple platforms not at issue here, including heat-not-burn and oral products. (PX1633 (Altria) at 006, 020).

In the e-vapor space, PMI was a late entrant. As of December 2013, PMI was pursuing three different categories of potential reduced-risk products but had not yet commercialized an e-vapor product. (PX1922 (Altria) at 004). Instead, PMI was attempting to secure the right to commercialize *Altria's* e-vapor products. (PX1922 (Altria) at 004). [redacted] In fact, a February 2019 PMI presentation noted that PMI "[p]lan[ned] to meaningfully enter the [e-vapor] category later [that] year." (PX1635 (PMI) at 002, 032). [redacted]

1605. Altria evaluated its own reduced harm product capabilities in March 2017. (PX1633 (Altria) at 005-06). In doing so, Altria noted that its partnership with PMI provided it access to IQOS—PMI's heat-not-burn product—and other innovative product platforms. (PX1633 (Altria) at 006); *see also* Begley (Altria) Tr. 1051).

Response to Proposed Finding No. 1605:

The Proposed Finding is of limited relevance as well as incomplete and misleading without additional context. *First*, Altria's ability to partner with PMI on innovative product platforms other than e-cigarettes—such as IQOS—is not at issue here.

Second, Altria's partnership with PMI on e-cigarettes did not result in commercially successful products. The only e-cigarette product that Altria ever licensed from PMI was Apex, a closed-tank product that was briefly sold only in limited e-commerce and lacked an appealing form factor, nicotine salts, or conversion potential. (RFF ¶¶ 1517-23). King himself described Apex as "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

[redacted] And even if Altria and PMI had collaboratively developed this new product during the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1606. In an e-vapor category review dated March 2017, Altria evaluated the portfolios of all the major tobacco manufacturers. (PX1733 (Altria) at 043-52). In its analysis, Altria combined its own portfolio with that of PMI, citing the JRDTA. (PX1733 (Altria) at 052).

Response to Proposed Finding No. 1606:

The Proposed Finding is incomplete and misleading without additional context. Although the deck acknowledges that Altria and PMI had access to each other's reduced-risk-product platforms through their technology sharing and distribution agreements, (PX1733 (Altria) at 052), the deck indicates that PMI brought nothing to the table in the e-vapor category. When the deck lists the major manufacturers in e-vapor, it makes no mention of PMI. (PX1733 (Altria) at 034-35). And when the deck summarizes PMI's "commercialization plans," it again makes no mention of e-vapor. (PX1733 (Altria) at 051). The upshot is that deck assesses that PMI's strengths lay in categories other potential reduced-risk-product categories, not e-vapor.

In any event, [redacted], and, under the JRDTA, each "independently develop[ed] and execut[ed] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

[redacted]

1607. Altria met regularly with PMI as part of their e-cigarette collaboration. (*See* CCFF ¶¶ 1608-19, below; *see also* RX0873 (Altria) at 007 (*in camera*)).

Response to Proposed Finding No. 1607:

The Proposed Finding is incomplete and misleading without additional context. Regular meetings are no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets

under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1608-19, Respondents incorporate their responses to those Proposed Findings herein.

1608. [redacted] (PX7016 (Jupe (Altria), Dep. at 297-98) (*in camera*)).

Response to Proposed Finding No. 1608:

The Proposed Finding is incomplete and misleading without additional context. Regular meetings and evaluating prototypes are no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets

under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1609. [redacted]

[redacted]

Response to Proposed Finding No. 1609:

The Proposed Finding is incomplete and misleading without additional context. Plans in a common format are no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired

the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1610. In August 2017, Altria and PMI representatives met in Richmond, VA. (PX1963 (Altria) at 002 (meeting minutes from PMI's visit to ALCS)). The parties provided updates on e-cigarette development efforts, including PMI's next-gen e-vapor product, called MESH 2.0; PMTA timing; and Altria's e-vapor developmental products that were "aiming at competing with JUUL." (PX1963 (Altria) at 004-05).

Response to Proposed Finding No. 1610:

The Proposed Finding is incomplete and misleading without additional context. Product development *efforts* are no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment,

it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1611. In the fall of 2017, Altria and PMI shared intelligence about JUUL and discussed how to best compete against JLI. (PX1916 (Altria) at 001 (email from PMI to Altria's Richard Jupe providing information on JUUL products sold in China); PX1916 (Altria) at 001 (email from Jupe to PMI) ("We will be ready to discuss what we know about Juul when we visit at the end of November, and our plans to compete against it in the USA.")).

Response to Proposed Finding No. 1611:

The Proposed Finding is incomplete and misleading without additional context. Regular meetings are no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment,

it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1612. In December 2017, PMI provided Altria with a 42-page presentation discussing a "reverse engineering" teardown that PMI performed on JUUL devices and pods. (PX1971 (Altria) at 003-044); *see also* PX7016 (Jupe (Altria), Dep. at 289-90) (testifying that PMI and Altria would share product breakdowns)). Altria's Richard Jupe shared the presentation internally with Howard Willard. (PX1971 (Altria) at 001).

Response to Proposed Finding No. 1612:

The Proposed Finding is incomplete and misleading without additional context. Product teardowns and intelligence gathering are no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment,

it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1613. [redacted]

Response to Proposed Finding No. 1613:

The Proposed Finding is incomplete and misleading without additional context. Providing updates on research and development efforts is no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment,

it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1614. [redacted]

Response to Proposed Finding No. 1614:

The Proposed Finding is incomplete and misleading without additional context. Providing updates on product development efforts is no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

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it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1615. [redacted] (PX4528 (Altria) at 050 (*in camera*)).

Response to Proposed Finding No. 1615:

The Proposed Finding is incomplete and misleading without additional context. This three-year plan was prepared in February 2018, (RX0974 (Altria) at 001 (including a cover page dated

February 2018)), before Altria had conducted a holistic assessment of e-vapor products in its pipeline, including those from PMI, (RFF ¶¶ 737-42). In addition, although the three-year plan prepared in 2016 anticipated that the technology-sharing agreement with PMI would aid Nu Mark's internal development efforts, two and a half years later, in October 2018, Altria still had not completed a single internally developed e-vapor product. (RFF ¶ 191 (explaining that none of Nu Mark's development efforts ever bore fruit)).

Nor had the JRDTA produced any significant product innovations. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

Ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets

under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1616. [redacted]

[redacted]
(PX1715 (Altria) at 002 (*in camera*)).

Response to Proposed Finding No. 1616:

The Proposed Finding is incomplete and misleading without additional context. When asked about this heater, Jupe explained that the research was in its early days and there were many downstream challenges that had not been resolved. Jupe testified that the challenge was, "how do you take a pod, put it on to a heater and expose it to the liquid without having liquid leak everywhere. . . . [T]hat became – it's like a jigsaw puzzle. You've solved one corner of the puzzle, but now you've got a new corner to solve of how do you get the liquid to interact with that heater." (PX7016 Jupe (Altria) Dep. at 149). In his words, "it wasn't, you know, a successful approach. . . . We weren't able to solve it for, I will call it conventional e-vapor products. . . . There would have had to have been a redesign in total of the product in order to have this type of heater being useful." (PX7016 Jupe (Altria) Dep. at 149-50).

1617. Altria and PMI worked on developing new e-liquids, including through the study of "sensomics." (PX1963 (Altria) at 003, 005 (meeting minutes from PMI's visit to ALCS in August 2017); *see also* Quigley (Altria) Tr. 2005 ("Sensomics was kind of the study of kind of the senses and interaction with our products.")).

Response to Proposed Finding No. 1617:

The Proposed Finding is incomplete and misleading without additional context. As with the heater discussed above, research does not equal results. Jupe explained the complexity of developing a new e-liquid:

> [I]n the laboratory, you might be able to discern what you think the optimal ratio would be of salts to nicotine, but now you've got to define what those salts are, what those acids are.
>
> Some acids give a vinegary taste to the product, so there's an off note associated with these acids.

> And so that's one big challenge, making sure you can get it in there at a level that doesn't give a negative note unto itself.
>
> Secondly, you're mixing acids with glycerol, with propylene glycol, with flavors. There's a whole stability of the flavor system.
>
> The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids.
>
> Then the flavor system has to survive within the pod, within a packed-down environment for at least six months to a year, such that it doesn't interact with the metals.

(PX7016 Jupe (Altria) Dep. at 333-34). Thus, analyzing the chemical composition of certain flavor ingredients, as PMI and Altria were doing, (PX1963 (Altria) at 005), was several steps removed from successful product development.

And successful product development was never achieved during the term of the JRDTA. PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as

soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶¶ 1523).

[redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1618. [redacted] PX7016 (Jupe (Altria), Dep. at 301-02) (*in camera*)).

Response to Proposed Finding No. 1618:

The Proposed Finding is incomplete and misleading without additional context. Sharing consumer research is no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that

information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323; *see also* PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522),

and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

1619. [redacted] (PX7016 (Jupe (Altria), Dep. at 303-04) (*in camera*)).

Response to Proposed Finding No. 1619:

The Proposed Finding is incomplete and misleading without additional information. Sharing information on potential trends is no substitute for successful product development and commercialization, which did not happen under the JRDTA. According to Willard, "early on, . . . people might have been excited about what we might do together in e-vapor, [but] at this time, the relationship had not resulted in significant successful activity in the e-vapor category, either in the US or overseas." (PX7031 Willard (Altria) Dep. at 244; *see also* [redacted]. Jupe shared a similar assessment: "You know, I would say there was limited, if any, success associated with that information sharing. We shared information, but I couldn't point to anything that I would say was a break-through that came from that relationship." (PX7016 Jupe (Altria) Dep. at 323;

see also PX7016 Jupe (Altria) Dep. at 163 ("[T]here wasn't really any technologies that I could put my finger [on] here, sitting here today, that says this was an outcome of this type of contract."); PX7026 Gardner (Altria) Dep. at 219 ("We did utilize their product mesh, which we called Apex, and we put it into the US market to test and learn, but other than that, I don't think we had any successful co-development activities.")).

And ultimately, PMI viewed Altria's contributions to the collaboration as "quite limited," and was frustrated that whereas PMI tended to build technology, test it, and then refine, Altria's approach was to buy products and, if necessary, try to improve them. (RFF ¶ 1562 (quoting King (PMI) Tr. 2529)). PMI attempted to place Altria's MarkTen cig-a-like in "limited test markets under the brand name Solaris," but "discontinued the product right after it attained low market share." (King (PMI) Tr. 2532). And, as to MarkTen Elite, PMI was notified when Altria acquired the product and could have chosen to commercialize it but did not because, in PMI's assessment, it was better off "pushing forward with [its] own developments." (PX7020 King (PMI) Dep. at 230). Put simply by King himself, PMI just "had not seen a lot of success coming from Altria's innovation in really any of the reduced-risk product areas." (RFF ¶ 1562 (quoting PX7020 King (PMI) Dep. at 209)).

As to PMI's contributions, the one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523 (quoting King (PMI) Tr. 2534-35, 2547)). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," (King (PMI) Tr. 2535; RX0532 (Altria) at 011; RFF ¶ 1522), and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted]

[redacted] And even if Altria and PMI had collaboratively developed this new product *during* the term of the JRDTA, it would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104, 122-26 (describing lengthy and onerous PMTA process)).

3. APEX

a) Altria Had the U.S. Rights to APEX

1620. APEX was an early generation closed-system pod e-cigarette product developed by PMI. (Begley (Altria) Tr. 983; Willard (Altria) Tr. 1240; *see also* PX2022 (Altria) at 002 (letter to FDA Commissioner Gottlieb)).

Response to Proposed Finding No. 1620:

Respondents have no specific response except to note that even PMI did not intend for Apex to be "anything other than a limited test"; the product lacked nicotine salts, was "big" and "bulky," and PMI understood from the outset that it would need to be "quite a bit smaller" to be a commercially viable product. (King (PMI) Tr. 2547; *see also* RFF ¶¶ 1520-23; King (PMI) Tr. 2535 ("Q. And you knew from the very beginning that the version [of mesh] you placed on that test market would be difficult for consumers to accept, right? A. Well, we knew the form factor, in particular, was something we needed to work on. It was too large.")).

1621. APEX consisted "of a closed tank of e-liquid that [was] heated through a mesh-like metal plate, rather than the traditional wick and coil method." (PX9000 (Altria) at 018 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 1621:

Respondents have no specific response.

1622. The JRDTA granted Altria the right to commercialize PMI's APEX product in the U.S. (PX9000 (Altria) at 018 (Nov. 2017 Investor Day remarks) ("Through our joint development agreement with PMI, Nu Mark has exclusive rights to commercialize [PMI's] "MESH" technology, which we put in the U.S. market before the FDA's August 8, 2016 deeming deadline."); PX4014 (Altria) at 044 (November 2017 Investor Day Presentation) (slide entitled "APEX by MarkTen"); PX7026 (Gardner (Altria), Dep. at 219); *see also* RX0873 (Altria) at 019-20 (JRDTA) (*in camera*)).

Response to Proposed Finding No. 1622:

The Proposed Finding is incomplete and misleading without additional context. Altria "got a distribution agreement with [PMI] in 2016 to introduce what was known as the Apex product into a lead market." (Jupe (Altria) Tr. 2133). However, as King himself described it, the product was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

b) Altria Sold Apex in E-Commerce

1623. Altria sold APEX in the U.S. without first needing to obtain a PMTA because the APEX product had been introduced prior to the FDA's August 2016 deeming deadline. (PX9000 (Altria) at 018 (Nov. 2017 Investor Day remarks); PX7027 (Murillo (Altria/JLI), Dep. at 188-89)).

Response to Proposed Finding No. 1623:

Respondents have no specific response except to note that as King himself described it, the product was "test" technology, placed on the market with the understanding that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523).

1624. Around August 2018, Altria began selling APEX in the U.S. through e-commerce (Murillo (Altria/JLI) Tr. 3053; Begley (Altria) Tr. 984; PX4012 (Altria) at 038 ("Nu Mark 2018 Three Year Strategic Plan")).

Response to Proposed Finding No. 1624:

Respondents have no specific response except to note that as King himself described it, the product was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523).

1625. [redacted] (PX4528 (Altria) at 049 (*in camera*)).

Response to Proposed Finding No. 1625:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, in a passage of the cited document Complaint Counsel replaces with ellipses, the three-year plan observes that Apex was "a convenient closed system alternative for open system [adult vapers]." (PX4528 (Altria) at 048). It was not seen as a product that could appeal to adult cigarette smokers. (Schwartz (Altria) Tr. 1916; PX1225 (Altria) at 001).

Second, the three-year plan, which was distributed in February 2018, (RX0974 (Altria) at 001), is not reflective of what actually happened. Apex was not launched in e-commerce until late in the third quarter of 2018, (PX1072 (Altria) at 004), and at no point in the third quarter or before Altria announced its withdrawal on October 25, 2018, was it sold in retail, (PX1066 (Altria) at 005).

In any event, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). Respondents note further that the quoted passage appears on page 48 of the cited document, not page 49.

c) Apex Was a Promising Product

1626. In November 2017 Investor Day remarks, Altria's Jody Begley stated that: "We've received positive results from our initial consumer research, and as a result, we plan to further test [PMI's MESH technology] – called APEX in the U.S. – as a line extension under the MarkTen brand." (PX9000 (Altria) at 018).

Response to Proposed Finding No. 1626:

The Proposed Finding is incorrect, incomplete, and misleading without additional context to the extent it implies that Apex performed well in consumer research. Early consumer research showed that "Apex prompted mixed reactions among [adult smokers and vapers]." (RX1290 (Altria) at 032). Consumers did "not like the fatter cigar-like shape" or its "[b]ulky feel in the hand." (RX1290 (Altria) at 032). In addition, "Apex was not seen, especially post-trial, as a product that would compete with JUUL." (RX1290 (Altria) at 032). While JUUL was seen as a product "for cigarette occasions," (RX1290 (Altria) at 032), Apex lacked nicotine salts, (RFF ¶ 1520), and was perceived as "like a vape," (RX1290 (Altria) at 032). An extended study of Apex, known as a home use test, (RFF ¶¶ 374-75), confirmed that "Apex [was] more for those seeking the vapor experience than the smoking experience," (PX1225 (Altria) at 001). Indeed, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also*

RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

1627. In August 2018, Altria's Craig Schwartz wrote that BP "expressed interest in APEX" and that Altria had "the opportunity to introduce APEX in BP on the West Coast … unique to Nu Mark." (PX1650 (Altria) at 001-02).

Response to Proposed Finding No. 1627:

The Proposed Finding is incomplete and misleading without additional context. When asked about this document in his deposition, Schwartz explained that Nu Mark offered Apex to BP in lieu of Cync when the company concluded that it could not commercialize Cync:

> We had plans to launch Cync into BP on the west coast. Cync was a highly problematic product for us, a tremendous amount of design issues, leaking issues, some other design issues as well, and so that never came to fruition. Again, looking for ways to move the needle, I'm just trying to suggest that perhaps, you know, Apex could be a replacement to the situation with BP so as not to alienate an important customer.

(PX7018 Schwartz (Altria) Dep. at 140). But, he continued, Apex "had its limitations" and Nu Mark was "not going to make it the success that we would have liked it to have been." (PX7018 Schwartz (Altria) Dep. at 141). Indeed, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

1628. In a consumer study conducted by Altria on APEX, the results showed that "Apex was well received by AS&V [adult smokers and vapers] due to its ease of inhale/exhale experience and good tasting flavors." (PX4012 (Altria) at 036 ("Nu Mark 2018 Three Year Strategic Plan")). The study identified other benefits to APEX, including "form that cued performance" and long battery life. (PX4012 (Altria) at 036).

Response to Proposed Finding No. 1628:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel omits the slide's discussion of the "[p]rimary drawbacks" of Apex, notably its "unappealing aesthetics and subtlety of flavor systems." (PX4012 (Altria) at 036). The underlying consumer research showed that "Apex was not seen, especially post-trial, as a product that would compete with JUUL." (RX1290 (Altria) at 032). While JUUL was seen as a product "for cigarette occasions," (RX1290 (Altria) at 032), Apex lacked nicotine salts, (RFF ¶ 1520), and was perceived as "like a vape," (RX1290 (Altria) at 032). An extended study of Apex, known as a home use test, (RFF ¶¶ 374-75), confirmed that "Apex [was] more for those seeking the vapor experience than the smoking experience," (PX1225 (Altria) at 001). Indeed, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

1629. In July 2018, a Nu Mark analysis of APEX noted that APEX had a "Potentially favorable device design from [an] FDA perspective", "strong IP", and an "Effortless inhale/exhale experience." (PX1144 (Altria) at 013).

Response to Proposed Finding No. 1629:

The Proposed Finding is incomplete and misleading without additional context. Although the relevant slide noted that the device was design was potentially favorable "from [an] FDA perspective," it noted that the "[f]lavor intensity [was] low for [a] vaping audience," the "[f]orm factor [was] not aesthetically pleasing—clunky," the "auto-off feature [was] confusing," the design "[w]ould need modifications to address leakage," and the "[c]ategory [was] trending toward smaller devices." (PX1144 (Altria) at 013).

Paige Magness, who was responsible for e-vapor PMTAs at the time, testified, "[w]e never really built out a [PMTA] plan for Apex." (PX7017 Magness (Altria) Dep. at 114)). As she explained, "Nu Mark deprioritized [Apex] because it was having trouble acquiring the devices for [Regulatory Affairs] to be able to get the answers [it] needed." (PX7017 Magness (Altria) Dep. at 63; *see also* PX7017 Magness (Altria) Dep. at 288-89).

In any event, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

1630. In comments on a draft of the August 2018 e-vapor update to Altria's Board, Jose Murillo told Murray Garnick that he expected APEX would do well in terms of product integrity and risk reduction assessment, both of which are relevant to the FDA's PMTA analysis. (PX1600 (Altria) at 001 (email from Murillo to Garnick dated August 14, 2018) (commenting on slide 36 of the draft e-vapor update); PX7027 (Murillo (Altria/JLI), Dep. at 191)).

Response to Proposed Finding No. 1630:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Murillo informed Garnick that Altria "would expect" Apex to do well on product integrity and risk reduction but "*we don't know*." (PX1600 (Altria) at 001) (emphasis added). And the reason Altria did not know is because the regulatory team "hadn't done much work" on Apex "given that [Nu Mark] was not pursuing" a PMTA. (PX1600 (Altria) at 001; *see also* PX1625 (Altria) at 038 ("No current plan to file PMTA[.]")).

Paige Magness, who was responsible for e-vapor PMTAs at the time, testified, "[w]e never really built out a [PMTA] plan for Apex." (PX7017 Magness (Altria) Dep. at 114)). As she explained, "Nu Mark deprioritized [Apex] because it was having trouble acquiring the devices for

[Regulatory Affairs] to be able to get the answers [it] needed." (PX7017 Magness (Altria) Dep. at 63; *see also* PX7017 Magness (Altria) Dep. at 288-89).

In any event, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

1631. Joe Murillo testified that Altria's regulatory team was of the opinion that APEX could meet the relevant manufacturing requirements for a PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 18); *see also* PX1600 (Altria) at 001 (noting that APEX was designed by PMI "to meet strict CMC requirements")).

Response to Proposed Finding No. 1631:

The Proposed Finding is incomplete and misleading without additional context. Regardless of whether Apex could potentially meet a single requirement, there was ample evidence that Apex did not have the conversion potential required by FDA nor was it a commercially viable product. (RFF ¶¶ 1520-23). As King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

Respondents note further that the relevant testimony from Murillo appears on pages 189-90 of the cited deposition, not page 18.

1632. In comments on a draft of the August 2018 e-vapor update to Altria's Board, Jose Murillo pushed back on the draft's poor characterization of APEX. (PX1600 (Altria) at 001 (email from Murillo to Garnick dated August 14, 2018) (commenting on slide 36 of the draft e-vapor update) ("This is voice over commentary, but on the page, it looks like we think [APEX is] a loser. That is not true-it should be good, but we don't know."); *see also* Murillo

(Altria/JLI) Tr. 3056 (testifying that APEX "should be good . . . because it is designed by people who . . . know what they're doing")).

Response to Proposed Finding No. 1632:

The Proposed Finding is inaccurate and misleading. Murillo did not "push[] back on the draft's poor characterization of Apex." Instead he provided additional context, both explaining why the regulatory team, which had created the presentation, (RFF ¶¶ 725-36), "ha[d] a check on manufacturing" and offering "voice over commentary" to contextualize the unknowns identified on the draft slide. (PX1600 (Altria) at 001; *see also* PX1625 (Altria) at 037 (explaining that Apex needed "[c]omplete product integrity assessment" and giving it a question mark in the field for the "Meaningful Risk Reduction" PMTA requirement). As Murillo explained at trial, when he wrote, "on the page it looks like we think it's a loser," his purpose was "to make sure that, because Mr. Garnick was not, you know, close to the details of what we were doing and what the status was, as I said, in your voiceover, be prepared to explain that the main reason for this is literally we don't know, that's why there are question marks." (Murillo (Altria/JLI) Tr. 3055). And Garnick incorporated that context into the presentation by adding a talking point in the slide notes: "Apex designed with regulatory framework in mind." (PX4149 (Altria) at 041).

Paige Magness, who was responsible for e-vapor PMTAs at the time, testified, "[w]e never really built out a [PMTA] plan for Apex." (PX7017 Magness (Altria) Dep. at 114)). As she explained, "Nu Mark deprioritized [Apex] because it was having trouble acquiring the devices for [Regulatory Affairs] to be able to get the answers [it] needed." (PX7017 Magness (Altria) Dep. at 63; *see also* PX7017 Magness (Altria) Dep. at 288-89).

In any event, as King himself described it, Apex was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was

seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523).

1633. PMI's Martin King testified that when PMI sold APEX in the U.K., PMI verified that the MESH aerosolization technology worked well and the engine worked successfully. (King (PMI) Tr. 2545-46). King also testified that PMI received good feedback from consumers on how APEX tasted and the way that APEX delivered a very consistent aerosol. (PMI) Tr. 2545-46).

Response to Proposed Finding No. 1633:

The Proposed Finding is incomplete and misleading without additional context. The remainder of King's answer states: "And so we did learn from that -- that launch, that commercialization, but knowing full well that we needed to make improvements in the form factor and other -- and other aspects in order to really go wide scale and commercialize it, which is now what you see happening with the latest version of VEEV." (King (PMI) Tr. 2546). In his next answer, King elaborated that Apex had "certain features and certain aspects that [PMI] want[ed] to know more about" but PMI was "not done with it . . . . That's why we kept the test quite limited to a relatively small geography and volumes, because we weren't really ready to put it into widescale commercial dispersal, if you will." (King (PMI) Tr. 2546). In other words, contrary to Complaint Counsel's characterization in the above heading, Apex was not "a Promising Product." According to King, "it was never intended to be successful on its own. [PMI] never really had any idea or plan that it would be anything other than a limited test." (King (PMI) 2547).

1634. Martin King testified that PMI never considered exiting the sale of e-cigarettes because of the performance of APEX. (King (PMI) Tr. 2547). According to King, the sale of APEX "reassured us that we had something reliable and that we needed to continue with finishing the improvements and get it on the market as soon as possible." (King (PMI) Tr. 2547).

Response to Proposed Finding No. 1634:

The Proposed Finding is incomplete and misleading without additional context. Just as Altria chose to withdraw products that were not commercially successful and faced regulatory

challenges, (RFF ¶¶ 940-43, 1001-02, 1074-92), PMI discontinued multiple e-vapor products that it did not believe would succeed. [redacted] Apex, in particular, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523).

[redacted]

1635. A February 2019 presentation by PMI's CEO Andre Calantzopoulos at the CAGNY investor conference noted that PMI "Successfully Introduced IQOS MESH [APEX] in the U.K. on a Limited Scale," and that the PMI received "Positive adult consumer reception." (PX1635 (PMI) at 031). The presentation stated that consumers viewed APEX "as addressing the fundamental requirements of consistency, reliability and convenience," and "Appreciate our range of superior flavors which offer sensorial satisfaction." (PX1635 (PMI) at 031).

Response to Proposed Finding No. 1635:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Complaint Counsel incorrectly assumes that IQOS Mesh, the product PMI launched in a U.K. test market in 2018, is synonymous with Apex. [redacted]

[redacted], and incorporated into Apex, (RFF ¶ 1615). And, unlike Apex, which was introduced in the United States by August 8, 2016, (RFF ¶ 1615), the second-generation product could not be introduced in the United States without prior FDA approval, (RFF ¶ 1618).

In addition, the February 2019 presentation by PMI noted that IQOS Mesh was still in the "[l]arge format" and "primarily addresse[d] open system consumer preferences." (PX1635 (PMI) at 031). Indeed, even PMI has moved on from this version, which is no longer in the market, and is pursuing yet another version of its mesh technology. (RFF ¶¶ 1618-19).

d) PMI Was Working to Improve APEX

1636. PMI learned from what worked well with APEX and took the feedback it received to make improvements in the form factor, e-liquids, and other aspects. (King (PMI) Tr. 2545-47; PX1635 (PMI) at 031 (February 2019 CAGNY Presentation) (stating that "Learnings instructed further product improvements")).

Response to Proposed Finding No. 1636:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

Moreover, there is no evidence that any feedback PMI received has resulted in the development of a e-vapor product that could be competitive in the United States. The one product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself

described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (King (PMI) Tr. 2534-35; *see also* RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] To date, PMI has only VEEV in test markets outside the United States. (RFF ¶ 1626). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets are a poor proxy for how it would perform in the United States. (RFF ¶ 1626). [redacted]

And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1637. While there were initially some leakage issues with APEX, adding a mouthpiece plug cut the leakage rates. (PX1557 (Altria) at 011 ("Domestic Shipping Study Results – MarkTen Elite and APEX"); PX1650 (Altria) at 002 (internal email from Altria's Craig Schwartz on APEX expansion opportunities dated August 2018)

Response to Proposed Finding No. 1637:

The Proposed Finding is incomplete misleading without additional context. Leakage was not the primary problem with Apex. Instead, the product was chiefly hobbled by its "clunky" and unappealing form factor, weak flavors, and "minimal nicotine satisfaction." (PX1144 (Altria) at 013; *see also* RFF ¶¶ 1520-23). And none of those problems could be fixed without significant modifications, modifications that would require pre-market approval from FDA. (RFF ¶¶ 66-71). In addition, the cited documents are ambiguous about whether Altria ever actually commercialized a version of Apex with the mouthpiece plug and Complaint Counsel made no attempt to develop the record on this point.

4. VEEV

1638. VEEV is a pod-based e-cigarette product sold by PMI. (King (PMI) Tr. 2343-44, 2346; *see also* PX9120 (VEEV stock photo)).

(PX9120 (VEEV stock photo)).

Response to Proposed Finding No. 1638:

Respondents have no specific response except to note that PMI started selling VEEV in late 2020, (King (PMI) Tr. 2355); it currently sells it in a handful of countries abroad, (CCFF ¶ 1648; King (PMI) Tr. 2354-55), [redacted]; and it does not sell VEEV in the United States, (CCFF ¶ 1649; King (PMI) Tr. 2355), [redacted].

a) VEEV is a Later Version of APEX

1639. VEEV is a later version of APEX and PMI's MESH technology. (King (PMI) Tr. 2343-44, 2355, 2545-46) (explaining that VEEV is the brand name of PMI's product and that the proprietary technology that VEEV uses is called MESH)).

Response to Proposed Finding No. 1639:

Respondents have no specific response except to note that while Apex and VEEV both have a mesh heater, there are substantial differences between the products including form factor, flavor profile, and nicotine formulation. (King (PMI) Tr. 2353-54, 2547; PX7020 King (PMI) Dep. at 78-79).

1640. PMI learned from the positive and negative feedback that it received on APEX and incorporated improvements into a new product using its MESH technology, which it branded as VEEV. (King (PMI) Tr. 2545-46).

Response to Proposed Finding No. 1640:

Respondents have no specific response.

1641. PMI improved the form factor in VEEV compared to APEX, "making it something that people could carry comfortably." (King (PMI) Tr. 2547). VEEV is smaller, fits the hand better, and has a more appealing shape. (King (PMI) Tr. 2547).

Response to Proposed Finding No. 1641:

Respondents have no specific response.

1642. PMI also made improvements to the e-liquids by adding nicotine salts to VEEV, and made other improvements compared to APEX such as the ability to have two power settings. (King (PMI) Tr. 2346, 2545-47).

Response to Proposed Finding No. 1642:

Respondents have no specific response except to note that [redacted]

1643. [redacted],

Response to Proposed Finding No. 1643:

The cited source does not support the Proposed Finding. [redacted] The only product Altria had access to during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted]

And even if at some time in the future Altria and PMI had collaboratively developed a new product like VEEV, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)). Notably, there is no evidence that VEEV will be competitive in the United States. To date, PMI has only commercialized its latest product (VEEV) in test markets outside the United States. (King (PMI) Tr. 2355; RFF ¶ 1626; *see also* RFF ¶ 1622). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted]

how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626).

b) Altria Had the U.S. Rights to VEEV and the MESH Technology

1644. (PX7020 (King (PMI), Dep. at 34 (*in camera*); RX0873 (Altria) at 019-20 (JRDTA) (*in camera*)).

Response to Proposed Finding No. 1644:

The Proposed Finding is inaccurate and not supported by the cited sources.

That is because, as King testified, Altria and PMI , and under the JRDTA, each "independently develop[ed] and execute[d] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133).

[redacted]

1645. [redacted] (RX0873 (Altria) at 016-020 (JRDTA) (*in camera*)).

Response to Proposed Finding No. 1645:

The Proposed Finding is inaccurate and not supported by the cited source. *First*, [redacted]

Second, [redacted], and, under the JRDTA, each "independently develop[ed] and execute[d] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). The JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96).

Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

1646. PMI's Martin King testified that when PMI and Altria entered into the JRDTA, the intention was for Altria to commercialize PMI's e-cigarette products in the U.S., including VEEV. (King (PMI) Tr. 2357-59; *see also* King (PMI) Tr. 2365 ("[U]nder the JRDTA . . . [Altria] would have been able to launch VEEV on their own with the technology that was shared in that agreement. They owned the technology, the IP, during the term of the agreement. They owned that in the United States."); PX7020 (King (PMI), Dep. at 44-45) ("That was our plan, for VEEV Mesh to be commercialized in the U.S. via Altria.")).

Response to Proposed Finding No. 1646:

The Proposed Finding is incomplete and misleading without additional context. [redacted], and was still in early development as of the time of Altria's investment in JLI. (*See* King (PMI) Tr. 2542 ("[VEEV] was obviously several years away [from commercialization in 2018] because it's now 2020 [sic], and we're still finalizing the application.")).

And although King testified that PMI's "original plan[]" was for Altria to commercialize VEEV in the United States, (PX7020 King (PMI) Dep. at 45), that does not address the companies' intentions after the agreement had been in force for several years. [redacted]

[redacted]

Complaint Counsel has not shown and cannot show that Altria and PMI would have reached an agreement to extend the JRDTA but for Altria's investment in JLI. [redacted]

Altria was aware of PMI's disappointment. In communications with Altria about the JRDTA, a PMI scientist conveyed that "[h]er executives [were] commenting that [PMI was] doing

too much for Altria." (PX4052 (Altria) at 001). This was "was a common concern in the relationship. . . . PMI was concerned they were going to do too much and Altria not enough." (PX7026 Gardner (Altria) Dep. at 222). And, according to a July 2018 email from Zane Underwood (one of the Chief Growth Officer's team members) to Liz Mountjoy (then Vice President of Corporate Strategy), K.C. Crosthwaite (then Chief Growth Officer) believed that "PMI [was] unlikely to want to renew" the JRDTA. (PX4253 (Altria) at 001; PX7034 Mountjoy (Altria) Dep. at 104; RFF ¶ 849).

And, when asked whether PMI intended to extend the JRDTA as of late 2018, King hedged, saying, "I don't know that we had made a firm decision. It would have all depended on that further discussion and whether, you know, it would make sense given whatever the two sides agreed to." (PX7020 King (PMI) Dep. at 218).

Moreover, even if the JRDTA had been extended, "agreements on exactly how [products] would be commercialized were not in the JRDTA." (King (PMI) Tr. 2359; *see also* King (PMI) Tr. 2359 (explaining an agreement between PMI and Altria to commercialize e-cigarettes in the United States "wasn't in the JRDTA")). [redacted]

[redacted]).

c) PMI Currently Sells VEEV Abroad

1647. PMI started selling VEEV internationally in late 2020. (King (PMI) Tr. 2355).

Response to Proposed Finding No. 1647:

Respondents have no specific response except to note that the one product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own," (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1648. PMI currently sells VEEV in several countries, including the U.K., Finland, Italy, and New Zealand. (King (PMI) Tr. 2354-55).

Response to Proposed Finding No. 1648:

Respondents have no specific response except to note that, [redacted].

1649. PMI does not currently sell VEEV in the U.S. (King (PMI) Tr. 2355).

Response to Proposed Finding No. 1649:

Respondents have no specific response except to note that PMI cannot sell VEEV in the United States unless and until FDA grants the product PMTA approval. **(**King (PMI) Tr. 2355; *see also* RFF ¶ 1622).

1650. PMI's Martin King testified that PMI has committed to selling VEEV in twenty countries by the end of 2021. (King (PMI) Tr. 2354-55).

Response to Proposed Finding No. 1650:

Respondents have no specific response except to note that "most of those additional markets will be in the EU," (King (PMI) Tr. 2354), [redacted]. By contrast, JUUL is sold in the United States in up to 5 percent nicotine. (RFF ¶ 1626).

d) VEEV is An Objectively Good Product

(1) MESH Technology

1651. Traditional e-cigarettes use a wick and coil that heats an e-liquid to create an aerosol. (King (PMI) Tr. 2350). PMI invented and patented a unique MESH technology, used in its VEEV e-cigarette, that uses a fine-wire mesh screen that creates an aerosol using electricity. (King (PMI) Tr. 2350-51).

Response to Proposed Finding No. 1651:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, the cited source does not state that PMI invented the mesh heater used in its products. (King (PMI) Tr. 2350-51). To the contrary, there is evidence that PMI acquired the mesh technology. (PX7033 O'Hara (JLI) Dep. at 119 (explaining that PMI acquired the device that Altria later commercialized as Apex)).

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1652. The MESH technology has some advantages over the traditional wick and coil heater, including a more even aerosolization; more energy efficiency, which results in longer battery life; and a more palatable aerosol. (King (PMI) Tr. 2350-51).

Response to Proposed Finding No. 1652:

The Proposed Finding is incomplete and misleading without additional context. *First*, contrary to the subsection heading, the evidence does not show that "VEEV is an objectively good product." (*See* CCFF Part X.C.4.d). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted], how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1653. Altria's Richard Jupe testified that a benefit of the MESH heater was that it lent itself to more automation compared with manufacturing a wick and coil. (Jupe (Altria) Tr. 2173-74; PX7016 (Jupe (Altria), Dep. at 297)).

Response to Proposed Finding No. 1653:

Respondents have no specific response except to note that Jupe also testified that "[t]here are some tradeoffs with the mesh heater." (Jupe (Altria) Tr. 2174).

(2) Nicotine Salts

1654. PMI incorporated nicotine salts into VEEV's e-liquid pods. (King (PMI) Tr. 2346).

Response to Proposed Finding No. 1654:

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted]

[redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

(3) Flavors

1655. VEEV's flavors are primarily tobacco and menthol, although VEEV also comes in additional flavors in countries where additional flavors are permitted to be sold. (King (PMI) Tr. 2346-47).

Response to Proposed Finding No. 1655:

Respondents have no specific response.

1656. PMI has conducted consumer testing and has real-life consumer data, which shows that consumers like PMI's flavors. (King (PMI) Tr. 2347-49).

Response to Proposed Finding No. 1656:

The Proposed Finding is incomplete and misleading without additional context. *First*, the evidence at trial demonstrated that nicotine satisfaction, not flavors, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test"

technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1657. According to Martin King, PMI has tested VEEV in consumer panels, which have shown that "consumers find [the VEEV e-liquids] to be equal or superior to other e-cigarette products". (King (PMI) Tr. 2347-48).

Response to Proposed Finding No. 1657:

The Proposed Finding is incomplete and misleading without additional context. *First*, the quote is ambiguous regarding the metrics on which King asserts that consumers find VEEV e-liquids to be "equal or superior to other e-cigarette products" and the countries in which the consumer research was performed. [redacted]

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test"

technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

(4) Satisfaction / Conversion

1658. VEEV has performed well in terms of nicotine satisfaction and conversion. (King (PMI) Tr. 2347-49).

Response to Proposed Finding No. 1658:

The Proposed Finding is incomplete and misleading without additional context. *First*, the only evidence Complaint Counsel offers on VEEV's conversion potential is King's testimony. But the cited testimony is ambiguous regarding the countries to which King is referring. Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States.

(RFF ¶ 1626). [redacted]

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1659. PMI conducted consumer testing, which showed that consumers are able to convert to VEEV from smoking, and that VEEV "performs well" in terms of nicotine satisfaction. (King (PMI) Tr. 2347-49).

Response to Proposed Finding No. 1659:

The Proposed Finding is incomplete and misleading without additional context. *First*, the only evidence Complaint Counsel offers on VEEV's conversion potential is King's testimony. But the cited testimony is ambiguous regarding the countries to which King is referring. Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted]

[redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States. (RFF ¶ 1626). [redacted]

Second, the one mesh product PMI developed and to which Altria had access during the term of the JRDTA was the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

(5) Overheating / Formaldehyde Prevention

1660. VEEV comes with dry puff prevention, which means that the device knows to shut down when the e-liquid is running out. (King (PMI) Tr. 2351).

Response to Proposed Finding No. 1660:

The Proposed Finding is incomplete and misleading without additional context. The one mesh product PMI developed and to which Altria had access during the term of the JRDTA was

the Apex product, which, as King himself described it, was "test" technology, placed on the market with the intent that PMI would "move to the next generation as soon as possible." (RFF ¶ 1523). The product had a "large," "baton"-like shape that was seen as too "[c]lunky," and it had nicotine satisfaction deficits that were so disabling that PMI "never intended [for it] to be successful on its own." (King (PMI) Tr. 2547; RFF ¶ 1523). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1661. Dry puff prevention is important because previous generation e-cigarettes would not sense when the wick was running out, which meant that the wick could be cooked and release formaldehyde and other toxic chemicals. (King (PMI) Tr. 2351).

Response to Proposed Finding No. 1661:

Respondents have no specific response except to note that this Proposed Finding's statement that "[d]ry puff prevention is important" illustrates one of the problems with Nu Mark's products at the time those products were discontinued: Although competitors such as JLI and Reynolds employed dry puff prevention technology (RFF ¶ 361), Nu Mark's products did not, (RFF ¶¶ 361-62, 365-66). And FDA regulations prevented Nu Mark from adding dry puff prevention technology without first filing a PMTA and obtaining regulatory approval. (RFF ¶ 498).

1662. VEEV's technology prevents dry puff from happening, which has an added benefit of allowing the device to be used at different tilt angles without having it run dry. (King (PMI) Tr. 2351-52).

Response to Proposed Finding No. 1662:

Respondents have no specific response.

1663. VEEV's MESH technology prevents the formation of formaldehyde in the aerosol. (PX1635 (PMI) at 030 (February 2019 CAGNY Presentation)). In addition, PMI's testing did not detect any toxic metals in VEEV's aerosol. (PX1635 (PMI) at 030).

Response to Proposed Finding No. 1663:

The Proposed Finding is misleading insofar as the cited source is not discussing VEEV; it is discussing the second version of PMI's mesh technology, piloted in the U.K. under the brand name IQOS Mesh. (PX1635 (PMI) at 030-32; *see also* RFF ¶ 1617). Complaint Counsel has not offered any evidence that the same results apply to VEEV.

1664. [redacted]

Response to Proposed Finding No. 1664:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted] Based on this information, it is unclear whether toxicological testing was *completed* as of the summer of 2020, and Complaint Counsel never showed this slide to any witness. [redacted]

[redacted]

Ultimately, [redacted]

[redacted]

. And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

(6) Form Factor and Materials / Finish

1665. VEEV comes in a metallic case that is shaped to fit in hand. (King (PMI) Tr. 2353; *see also* PX9120 (VEEV stock photo)). According to Martin King, VEEV also has a nice fit and finish. (King (PMI) Tr. 2353).

Response to Proposed Finding No. 1665:

Respondents have no specific response except to note that the evidence at trial demonstrated that nicotine satisfaction, not hand fit or finish, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted]

how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

(7) Long Battery Life

1666. VEEV has a longer battery life than competing e-cigarettes because PMI invested in better battery technology and the MESH technology is more energy efficient. (King (PMI) Tr. 2352).

Response to Proposed Finding No. 1666:

Respondents have no specific response except to note that the evidence at trial demonstrated that nicotine satisfaction, not battery life, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

1667. VEEV's MESH technology is "Approximately 30% more efficient vs. coil and wick systems at the same power level or at the same size." (PX1635 (PMI) at 030 (February 2019 CAGNY Presentation)).

Response to Proposed Finding No. 1667:

The Proposed Finding is misleading insofar as the cited source is not discussing VEEV; it is discussing the second version of PMI's mesh technology, piloted in the U.K. under the brand name IQOS Mesh. (PX1635 (PMI) at 030-32; *see also* RFF ¶ 1617). Complaint Counsel has not offered any evidence that the same results apply to VEEV.

(8) Other Innovative Features

1668. VEEV has two different power settings, which gives the consumer the ability to select more or less of a plume when vaping. (King (PMI) Tr. 2352).

Response to Proposed Finding No. 1668:

Respondents have no specific response except to note that the evidence at trial demonstrated that nicotine satisfaction, not multiple power settings, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

1669. VEEV comes with a battery indicator, which is a series of lights on the side of the device that indicate when the battery is running. (King (PMI) Tr. 2352-53). The battery indicator helps consumers easily know whether they need to recharge the device before going out. (King (PMI) Tr. 2353).

Response to Proposed Finding No. 1669:

Respondents have no specific response except to note that the evidence at trial demonstrated that nicotine satisfaction, not a battery indicator, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

e) PMI, Altria, and JLI Viewed VEEV as a Good Product

1670. [redacted] (King (PMI) Tr. 2502 (*in camera*)). [redacted] King (PMI) Tr. 2504) (*in camera*)).

Response to Proposed Finding No. 1670:

The Proposed Finding is incomplete and misleading without additional context. [redacted] Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

Second, there is no evidence that, but for the transaction, Altria would have commercialized VEEV in the United States. As King testified, Altria and PMI [redacted], and, under the JRDTA, each "independently develop[ed] and execute[d] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). The JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

[redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1671. Martin King testified that so far in the countries in which VEEV has been released, "the consumer feedback has been very good, and we've been encouraged by the results and, therefore, continue with the expansion as we had planned." (King (PMI) Tr. 2356). King also testified that international consumers so far have been "very happy with" VEEV. (PX7020 (King (PMI), Dep. at 78-79)).

Response to Proposed Finding No. 1671:

The Proposed Finding is incomplete and misleading without additional context. *First*, King's cited testimony does not identify the markets in which he believes VEEV is competitive or the countries where VEEV has received positive feedback. Given that nicotine satisfaction is the number one requirement for adult smokers in the United State, (RFF ¶ 704), [redacted] how VEEV has performed in those

markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

Second, there is no evidence that, but for the transaction, Altria would have commercialized VEEV in the United States. As King testified, Altria and PMI [redacted], and, under the JRDTA, each "independently develop[ed] and execute[d] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). The JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

[redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1672. Martin King believes that VEEV is a "very competitive product, superior product" to other closed-system e-cigarettes sold in the U.S. (King (PMI) Tr. 2352). Compared to other e-cigarettes sold in the U.S., VEEV has a more efficient aerosolization engine, dry puff prevention, two different puff settings, and a nice form factor. (King (PMI) Tr. 2352-53).

Response to Proposed Finding No. 1672:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, King stated that VEEV was a "very competitive" and "superior product" in the context of an answer addressing VEEV's "efficient aerosolization engine," "dry puff prevention," "form factor," and "two different power settings." (King (PMI) Tr. 2352). But nicotine satisfaction, not the features referenced by King, is the number one requirement for converting adult smokers and achieving commercial success in the United States. (*See, e.g.*, RFF ¶ 704). [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

Second, there is no evidence that, but for the transaction, Altria would have commercialized VEEV in the United States. As King testified, Altria and PMI "are separate companies since 2008," (King (PMI) Tr. 2448), and, under the JRDTA, each "independently develop[ed] and execute[d] developed plans that [were] specific to [each] party's territory," (PX7020 King (PMI) Dep. at 206-07). The JRDTA did not include any terms as to distribution or "details of

commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted] And even if Altria and PMI had collaboratively developed a new product like VEEV during the term of the JRDTA, such a product would require FDA approval before it could be launched, which is both highly speculative and a process that would take years. (RFF ¶¶ 72-104 (describing lengthy and onerous PMTA process)).

1673. Martin King believes that VEEV "will compete well with JUUL." (King (PMI) Tr. 2354). According to King, VEEV is better shaped for the hand than JUUL, has a longer battery life, and provides nicotine satisfaction as effectively as any other e-cigarette product. (King (PMI) Tr. 2353-54).

Response to Proposed Finding No. 1673:

The Proposed Finding is incomplete and misleading without additional context. Notwithstanding King's self-serving and inherently speculative testimony, there is no evidence that VEEV contains an e-liquid formula capable of offering sufficient nicotine satisfaction so that the product could be competitive in the United States. Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted] Neither PMI nor any other company may sell VEEV in the United States. unless and until FDA grants the product PMTA approval. (King (PMI) Tr. 2355; *see also* RFF ¶ 1622). [redacted]

1674. Martin King testified that there were "several aspects to the product superiority" of VEEV, including "the Mesh technology, which is more energy efficient, and therefore would allow for longer battery life"; "The flavors developed . . . were very good and consumers appreciated them"; "The form factor, the way it felt in the hand"; and "the way [VEEV has] performed overall." (PX7020 (King (PMI), Dep. at 108)).

Response to Proposed Finding No. 1674:

Respondents have no specific response except to note that the evidence at trial demonstrated that nicotine satisfaction, not battery life, flavors, or hand fit, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

1675. [redacted] (PX3106 (PMI) at 001) (*in camera*)).

Response to Proposed Finding No. 1675:

The Proposed Finding is incomplete and misleading without additional context. *First,* [redacted] Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

[redacted]

1676. [redacted]

Response to Proposed Finding No. 1676:

Respondents have no specific response except to note that the evidence at trial demonstrated that nicotine satisfaction, not product size, is the most important factor for converting adult smokers and commercial success in the United States. (*See, e.g.*, RFF ¶ 704). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

1677. [redacted]

Response to Proposed Finding No. 1677:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

1678. [redacted]

Response to Proposed Finding No. 1678:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

1679. [redacted]

Response to Proposed Finding No. 1679:

The Proposed Finding is incomplete and misleading without additional context. [redacted] robust regulatory capabilities cannot secure approval for a product that FDA determines is not appropriate for the protection of the public health. (PX7017 Magness (Altria) Dep. at 279 ("It's almost irrelevant how good we are as a regulatory team. If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")). And meeting that standard requires demonstrating conversion potential. (Murillo

(Altria/JLI) Tr. 2954-55) ("[I]f a product is, like, super good at risk reduction and could be controlled in the manufacturing sense and so forth, but doesn't convert smokers, then it's a failure . . . ."). [redacted]. Neither PMI nor any other company may sell VEEV in the United States unless and until FDA grants the product PMTA approval. (King (PMI) Tr. 2355; *see also* [redacted]

1680. [redacted]

Proposed Finding of Fact No. 1680:

The Proposed Finding is incomplete and misleading without additional context. As King testified, "[o]bviously the information in [this slide] would have had to come from PMI." (PX7020 King (PMI) Dep. at 115). [redacted] is enclosed in brackets, indicating "a very uncertain part of the presentation," (PX7020 King (PMI)

Dep. at 115-19). [redacted]

1681. [redacted]

Response to Proposed Finding No. 1681:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted] Neither PMI nor any other company may sell VEEV in the United States unless and until FDA grants the product PMTA approval. (King (PMI) Tr. 2355; *see also* RFF ¶ 1622). [redacted]

1682. [redacted]

Response to Proposed Finding No. 1682:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 66), or in any deposition so there is no testimony to contextualize it. [redacted]

[redacted] Neither PMI nor any other company may sell VEEV in the United States unless and until FDA grants the product PMTA approval. (King (PMI) Tr. 2355; *see also* [redacted]). [redacted]

1683. JLI's Joseph O'Hara testified that PMI and JUUL competed in foreign markets, and that PMI's IQOS MESH, also known as VEEV, was a high-quality e-cigarette product. (O'Hara (JLI) Tr. 612-21; PX7033 (O'Hara (JLI), Dep. at 113) ("Yes, I thought [VEEV] was a high quality product. Yeah, it was a high quality product. It performed well in all of our performance characteristic analysis.")).

Response to Proposed Finding No. 1683:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, when asking O'Hara about the quality of PMI's e-vapor product, Complaint Counsel did not specify VEEV. And, after O'Hara asked Counsel to "be a little bit more specific," Complaint Counsel said, "[y]ou're familiar with a product called IQOS Mesh, correct?" (O'Hara

(JLI) Tr. 610; *see also* PX7033 O'Hara (JLI) Dep. at 113 ("Do you have a view as to the product quality of IQOS Mesh?")). [redacted] Complaint Counsel then asked about a product breakdown of IQOS Mesh, the second-generation product. (O'Hara (JLI) Tr. 614-17; PX2449 (JLI) at 052).

Second, in speaking to the quality of IQOS Mesh, O'Hara specified that the product "had high-quality *components*." (O'Hara (JLI) Tr. 612 (emphasis added)). And although O'Hara noted that IQOS Mesh "performed as well as any other vapor product for the most part," while being piloted in the U.K. (a nicotine limited market, (RFF ¶ 1626)), he added, "that doesn't necessarily mean it was a commercial success." (O'Hara (JLI) Tr. 613-14).

1684. Joseph O'Hara testified that from time to time in his competitive intelligence role that he worked with a third-party vendor called Cambridge Consultants. (O'Hara (JLI) Tr. 614). O'Hara further testified that Cambridge Consultants "did good work" and was "reliable." (O'Hara (JLI) Tr. 614).

Response to Proposed Finding No. 1684:

Respondents have no specific response.

1685. An analysis of JUUL competitor product performance prepared by Cambridge Consultants dated November 2018 stated that "The Iqos Mesh [VEEV] pods did not leak when subjected to three consecutive negative pressure events when full." (PX2449 (JLI) at 058 (draft report entitled "Competitive Device Testing")).

Response to Proposed Finding No. 1685:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted] In addition, the cited analysis does not address whether the product could deliver nicotine satisfaction to be competitive in the United States market. (PX7033 O'Hara (JLI) Dep. at 115).

1686. Cambridge Consultants characterized PMI's e-cigarette as the "Rolls Royce" of e-vapor products. (O'Hara (JLI) Tr. 616).

Response to Proposed Finding No. 1686:

The Proposed Finding is incomplete and misleading without additional context. *First*, the product breakdown is assessing [redacted].

Second, as O'Hara testified, "[w]hen they said that it was a 'Rolls Royce product' -- quote unquote -- they were referring to the *componentry* inside of the product and its construction, and what they were referring to was how *expensive* they assumed the -- they estimated all the parts inside of there were." (O'Hara (JLI) Tr. 616 (emphases added); *see also* O'Hara (JLI) Tr. 618 (elaborating that the report assesses "technical performance and mechanical experience")).

And as Cambridge Consultants' breakdown acknowledged, there are downsides to selling a "Rolls Royce." IQOS Mesh, the report observed, has "many elements" that are "over engineered." (PX2449 (JLI) at 063). For example, the battery cell "was designed to be replaced at end of life," which made "no sense . . . . No-one is going to pay to replace the battery when a new durable is cheaper." (PX2449 (JLI) at 064). As a result, Cambridge Consultants concluded that IQOS Mesh was "without doubt the most expensive device in terms of [manufacturing] cost" of any of the products it was evaluating and "certainly not as profitable as any of the Smoore made devices or J1 [presumably, JUUL]." (PX2449 (JLI) at 062; PX2449 (JLI) at 098 (implying that J1 refers to JUUL)).

Third, as O'Hara emphasized, the product breakdown "didn't take a view on . . . whether or not the nicotine strength was going to be able to convert smokers or whether the flavors were any good or anything like that." (PX7033 O'Hara (JLI) Dep. at 115). In fact, the IQOS Mesh product sold in the U.K. in 2018 had just 1.9 percent nicotine content, (PX2468 (JLI) at 001, 004),

making it approximately the same concentration as Elite (1.8 percent), (RX2036 (Altria) at 005), a product that was unsatisfying and never achieved more than one percent share of closed-system cartridge sales in the United States, (RFF ¶¶ 1513-14).

Finally, IQOS Mesh had not overcome Apex's unattractive form factor. IQOS Mesh maintained the long, cylindrical, cigar-like shape. (PX2449 (JLI) at 052). Cambridge Consultants observed that it was "physically very large and feels too long in the hand." (PX2449 (JLI) at 006).

f) Altria Was Familiar With the Development of VEEV and the MESH Technology Prior to Entering Into the Transaction with JLI

1687. Prior to Altria entering into the transaction with JLI in December 2018, PMI knew that, with VEEV, it had good technology and "a product which could succeed in the e-cigarette space in any market that had e-cigarettes." (King (PMI) Tr. 2363-64).

Response to Proposed Finding No. 1687:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. VEEV did not exist in December 2018. [redacted], there is no evidence that such bench models were shared with Altria. Complaint Counsel provides a lengthy summary of the information shared between Altria and PMI, (CCFF ¶¶ 1609-19), and, based on those documents, [redacted]).

1688. PMI's Martin King testified that, prior to Altria's transaction with JLI in December 2018, PMI provided Altria with updates through the JRDTA regarding the development of VEEV and what PMI thought about the product. (King (PMI) Tr. 2364).

Response to Proposed Finding No. 1688:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Complaint Counsel provides a lengthy summary of the information shared between Altria and PMI, (CCFF ¶¶ 1609-19), and, based on those documents, [redacted]

1689. [redacted]

Response to Proposed Finding No. 1689:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]

g) Altria Would Likely Have Introduced VEEV if Not for the Transaction

1690. Prior to Altria's transaction with JLI, PMI intended and expected that Altria would commercialize VEEV in the U.S. (King (PMI) Tr. 2357; PX7020 (King (PMI), Dep. at 37, 44-45, 79, 96-97).

Response to Proposed Finding No. 1690:

The Proposed Finding is incomplete and misleading without additional context. [redacted] that does not address the companies' intentions after the agreement had been in force for several years. The evidence shows that VEEV was not ready for commercialization anywhere until late 2020, *after* the JRDTA had expired. (CCFF ¶¶ ¶¶ 1588-89, 1647; King (PMI) Tr. 2355; *see also* [redacted]

In addition, Complaint Counsel has not shown and cannot show that Altria and PMI would have reached an agreement to extend the JRDTA but for Altria's investment in JLI. Contemporaneous documents indicate that PMI had significant concerns about the utility of the agreement. [redacted]

[redacted]

Altria was aware of PMI's disappointment. In communications with Altria about the JRDTA, a PMI scientist conveyed that "[h]er executives [were] commenting that [PMI was] doing too much for Altria." (PX4052 (Altria) at 001). This "was a common concern in the relationship. . . . PMI was concerned they were going to do too much and Altria not enough." (PX7026 Gardner (Altria) Dep. at 222). And, according to a July 2018 email from Zane Underwood (one of the Chief Growth Officer's team members) to Liz Mountjoy (then Vice President of Corporate Strategy), K.C. Crosthwaite (then Chief Growth Officer) believed that "PMI [was] unlikely to want to renew." (PX4253 (Altria) at 001; PX7034 Mountjoy (Altria) Dep. at 104; RFF ¶ 849).

And, when asked whether PMI intended to extend the JRDTA as of late 2018, King hedged, saying, "I don't know that we had made a firm decision. It would have all depended on that further discussion and whether, you know, it would make sense given whatever the two sides agreed to." (PX7020 King (PMI) Dep. at 218).

Moreover, even if the JRDTA had been extended, "agreements on exactly how [products] would be commercialized were not in the JRDTA." (King (PMI) Tr. 2359). [redacted]

[redacted]

1691. [redacted]
see also PX7020 (King (PMI), Dep. at 34) (*in camera*); (RX0873 (Altria) at 008 (JRDTA) (*in camera*)).

Response to Proposed Finding No. 1691:

The Proposed Finding is inaccurate and not supported by the cited sources. [redacted]

[redacted] In addition, the JRDTA did not include any terms as to distribution or "details of commercialization" for an e-vapor product. (PX7020 King (PMI) Dep. at 195-96). Thus, for Apex, Altria signed a separate "distribution agreement with [PMI] in 2016." (Jupe (Altria) Tr. 2133). [redacted]

[redacted]

h) Altria Could Submit a PMTA Quickly For VEEV and Obtain Regulatory Approval

1692. [redacted] *see also* King (PMI) Tr. 2515-16 (*in camera*)).

Response to Proposed Finding No. 1692:

The Proposed Finding is inaccurate, not supported by the cited sources, incomplete, and misleading without additional context. [redacted] As Complaint Counsel asserts elsewhere, whether any particular product can ultimately obtain FDA approval is "difficult for anybody" to predict. (CCFF ¶ 1898; *see also* PX7027 Murillo (Altria/JLI) Dep. at 42). The evidence shows that robust regulatory capabilities cannot secure approval for a product that is not appropriate for the protection of the public health. (PX7017 Magness (Altria) Dep. at 279 ("It's almost irrelevant how good we are as a regulatory team. If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")). And meeting that standard requires demonstrating conversion potential. (Murillo (Altria/JLI) Tr. 2954-55) ("[I]f a product is, like, super good at risk reduction and could be controlled in the manufacturing sense and so forth, but doesn't convert smokers, then it's a failure

. . . .")). [redacted]

Third, although King has professed that VEEV is a competitive product, there is no evidence that it will be commercially successful or can demonstrate conversion potential in a market without nicotine limits. To date, PMI has only commercialized VEEV in test markets outside the United States. (King (PMI) Tr. 2354-55; RFF ¶ 1626). Given that nicotine satisfaction is the number one requirement for adult smokers in the United States, (RFF ¶ 704), [redacted] how VEEV has performed in those markets is a poor proxy for how it would perform in the United States, (RFF ¶ 1626). [redacted]

1693. PMI entered into the JRDTA with Altria because PMI believed that Altria would help speed up the commercialization of IQOS and VEEV and make the success of PMI's products in the U.S. much more likely and faster. (PX7020 (King (PMI), Dep. at 47-48) ("[We] felt that with Altria's footprint, outstanding sales force, access to retail shops, all of their other supporting abilities, including government affairs, etcetera, would help commercialization of both IQOS heat not burn and [VEEV], and it would speed the commercialization and make the success much more likely and faster.")).

Response to Proposed Finding No. 1693:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

Second, PMI currently intends to try to commercialize VEEV in the United States on its own, (*see, e.g.*, King (PMI) Tr. 2339; *see also* King (PMI) Tr. 2467), and the evidence shows that PMI does not need Altria's support to do so. PMI, which sells combustible cigarettes in over 180 countries, (King (PMI) Tr. 2337), and "hold[s] the number one or number two market share position" in "many of these markets," (RX1014 (PMI) at 006), [redacted] In fact, he stated that PMI has already "invested in the science to verify what's in the aerosol and to be able to submit regulatory packages, including to the FDA." (King (PMI) Tr. 2375).

5. The Non-Compete Agreement Prevented Altria from Selling VEEV and Ended E-Cigarette Collaboration Between Altria and PMI

1694. [redacted] PX7020 (King (PMI), Dep. at 37-39) (*in camera*)).

Response to Proposed Finding No. 1694:

The Proposed Finding is incomplete and misleading without additional context. *First*, while the noncompete generally prohibited Altria from commercializing new e-vapor products in the United States or engaging in research and development related to e-vapor, (Jupe (Altria) Tr.

2192-94), even absent the noncompete, Altria could not have commercialized VEEV during the five-year term of the JRDTA for three reasons: (1) VEEV was not ready for commercialization until late 2020, [redacted]; and (3) even if VEEV had been ready earlier, it would have needed premarket approval from FDA, which is not guaranteed, and the time for PMTA preparation and FDA review adds at least an additional three years to the timeline, (RFF ¶¶ 1548-50; *see also* [redacted]

Second, Complaint Counsel has not shown and cannot show that Altria and PMI would have reached an agreement to extend the JRDTA but for Altria's investment in JLI.

[redacted]

Altria was aware of PMI's disappointment. In communications with Altria about the JRDTA, a PMI scientist conveyed that "[h]er executives [were] commenting that [PMI was] doing too much for Altria." (PX4052 (Altria) at 001). This was "was a common concern in the relationship. . . . PMI was concerned they were going to do too much and Altria not enough." (PX7026 Gardner (Altria) Dep. at 222). And, according to a July 2018 email from Zane Underwood (one of the Chief Growth Officer's team members) to Liz Mountjoy (then Vice

President of Corporate Strategy), K.C. Crosthwaite (then Chief Growth Officer) believed that "PMI [was] unlikely to want to renew" the JRDTA. (PX4253 (Altria) at 001; PX7034 Mountjoy (Altria) Dep. at 104; RFF ¶ 849).

And, when asked whether PMI intended to extend the JRDTA as of late 2018, King hedged, saying, "I don't know that we had made a firm decision. It would have all depended on that further discussion and whether, you know, it would make sense given whatever the two sides agreed to." (PX7020 King (PMI) Dep. at 218).

Third, "agreements on exactly how [products] would be commercialized were not in the JRDTA." (King (PMI) Tr. 2359). [redacted]

1695. [redacted]

Response to Proposed Finding No. 1695:

The Proposed Finding is incomplete and misleading without additional context. While the noncompete generally prohibited Altria from commercializing new e-vapor products in the United States or engaging in research and development related to e-vapor, (Jupe (Altria) Tr. 2192-94),

[redacted]

1696. [redacted] PX7020 (King (PMI), Dep. at 38-39 (*in camera*)).

Response to Proposed Finding No. 1696:

The Proposed Finding is incomplete and misleading without additional context. In February 2019, Jupe wrote to his PMI counterpart, Michele Cattoni, informing him that Altria had "announced a minority investment in JUUL and a significant cost reduction exercise that includes the dismantling of infrastructure and the separation of people that have been associated with, among other things, the development of e-vapor products and technologies." (PX1920 (Altria) at 002). But, far from abandoning the JRDTA, Jupe suggested that the two sides meet to "(i) develop the schedule for completing identified on-going studies, (ii) identify information that has yet to be communicated that each party would like to have transferred to it[,] . . . and (iii) define the continuing activities of the IP working group." (PX1920 (Altria) at 002).

6. Project Universe

a) PMI and Altria Engaged in Merger Negotiations

1697. [redacted] (King (PMI) Tr. 2507; PX7022 (Begley (Altria), Dep. at 48); (PX7028 (Wappler (PWP), Dep. at 22-23); *see also* [redacted]

Response to Proposed Finding No. 1697:

Respondents have no specific response except to note that, initially, "Altria's investment in Juul was highly attractive to PMI" and "prompted PMI's interest in Altria." (PX7028 Wappler (PWP) Dep. at 105). The possibility of a merger had been "looked at from time to time" in the years following the spinoff but there were no formal negotiations until early 2019, shortly after the Altria-JLI transaction. (PX7028 Wappler (PWP) Dep. at 18).

[redacted]

b) The Non-Compete Had An Exception if PMI Acquired Altria

1698. The non-compete agreement between Altria and JLI had an exception that allowed Altria to compete in e-cigarettes in the U.S. if it merged with PMI. (PX1276 (Altria) at 020, 027-029 ("Relationship Agreement" between Altria and dated December 20, 2018); [redacted]

Response to Proposed Finding No. 1698:

Respondents have no specific response.

1699. Under the non-compete agreement between Altria and JLI, if Altria merged with PMI, then Altria would have to give up its voting rights in JLI, but not its economic interest in JLI. (PX1276 (Altria) at 020, 027-029 ("Relationship Agreement" between Altria and dated December 20, 2018); PX3055 (Altria/PMI) at 108 [redacted]; *see also* PX1471 (Altria) at 030 (*in camera*)).

Response to Proposed Finding No. 1699:

Respondents have no specific response.

1700. [redacted]

[redacted]

Response to Proposed Finding No. 1700:

Respondents have no specific response.

1701. [redacted]

Response to Proposed Finding No. 1701:

Respondents have no specific response except to note that [redacted]

1702. [redacted]

Response to Proposed Finding No. 1702:

Respondents have no specific response.

1703. James Wappler of PWP, which advised Altria in its negotiations with PMI, testified that if Altria merged with PMI, it had the option of either distributing PMI's MESH e-cigarette globally, including in the U.S., or continuing to focus on its investment in JLI. (PX7028 (Wappler (PWP), Dep. at 20-22)).

Response to Proposed Finding No. 1703:

Respondents have no specific response except to note that [redacted]

In addition, Wappler testified that he did not view those two paths as mutually exclusive. (PX7028 Wappler (PWP) Dep. at 22). And that is consistent with contemporaneous documents. [redacted]

c) Altria and PMI Contemplated Introducing VEEV in U.S. if They Merged

1704. [redacted]

Response to Proposed Finding No. 1704:

Respondents have no specific response except to note that [redacted]

[redacted]

1705. [redacted]

Response to Proposed Finding No. 1705:

Respondents have no specific response except to note that the [redacted]

1706. [redacted]

[redacted]

Response to Proposed Finding No. 1706:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

1707. [redacted] (PX3107 (PMI) at 072, 076) (*in camera*)).

Response to Proposed Finding No. 1707:

Respondents have no specific response except to note that [redacted]

d) Altria and PMI Contemplated Submitting a PMTA for VEEV by April 2020

1708. [redacted]

Response to Proposed Finding No. 1708:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

1709. [redacted]

Response to Proposed Finding No. 1709:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

1710. [redacted] (PX1440 (Altria) at 003) (*in camera*); *see also* PX3055 (Altria/PMI) at 115

Response to Proposed Finding No. 1710:

The Proposed Finding is incomplete and misleading without additional context. [redacted], robust regulatory capabilities cannot secure approval for a product that FDA does not believe is appropriate for the protection of the public health. (PX7017 Magness (Altria) Dep. at 279 ("It's almost irrelevant how good we are as a regulatory team. If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")). And meeting that standard requires demonstrating conversion potential. (Murillo (Altria/JLI) Tr. 2954-55) ("[I]f a product is, like, super good at risk reduction and could be controlled in the manufacturing sense and so forth, but doesn't convert smokers, then it's a failure

. . . .”). [redacted] Neither PMI nor any other company may sell VEEV in the United States unless and until FDA grants the product PMTA approval. (King (PMI) Tr. 2355; *see also* RFF ¶ 1622). [redacted]

e) [redacted]

1711. [redacted]

Response to Proposed Finding No. 1711:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]

[redacted]

[redacted]

[redacted]

f) Altria Could Not Agree to a Joint Venture with PMI to Distribute VEEV in the United States Because of the Non-Compete Agreement with JLI

1712. [redacted] (King (PMI) Tr. 2504-05 (*in camera*); PX3100 (PMI) at 028 [redacted]

Response to Proposed Finding No. 1712:

Respondents have no specific response except to note that [redacted]

1713. [redacted] (King (PMI) Tr. 2506-07 (*in camera*); PX7020 (King (PMI), Dep. at 112-13) (*in camera*)).

Response to Proposed Finding No. 1713:

Respondents have no specific response.

1714. [redacted]

Response to Proposed Finding No. 1714:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

1715. [redacted] (PX1470 (Altria) (*in camera*)).

Response to Proposed Finding No. 1715:

Respondents have no specific response.

1716. [redacted] (PX1470 (Altria) (*in camera*)).

Response to Proposed Finding No. 1716:

Respondents have no specific response except to note that [redacted]

D. THE TRANSACTION PREVENTED ALTRIA FROM COLLABORATING WITH OR ACQUIRING OTHER E-CIGARETTE COMPANIES

1717. JLI perceived a risk of competition from large tobacco companies like Altria buying small competitors like Phix and scaling them up quickly, but that threat was eliminated after Altria entered into the transaction and non-compete agreement with JLI. (PX2126 (JLI) at 001).

Response to Proposed Finding No. 1717:

The Proposed Finding is incomplete and misleading without additional context. The apparent import of the Proposed Finding is that, but for the JLI transaction, Altria could have made a toehold acquisition that would have improved consumer choice. But whether, absent the transaction, Altria would have acquired a small company like Phix and scaled it up is pure speculation.

As for Phix, Complaint Counsel has not presented any evidence on its product attributes and the trial testimony shows that JLI ultimately concluded that it was not a viable competitor. According to a competitive analysis funnel prepared by JLI's Joseph O'Hara around March 2018, Phix was a funnel dropout, meaning a product without "demonstrated traction" or "product viability." (O'Hara (JLI) Tr. 528, 550, 641).

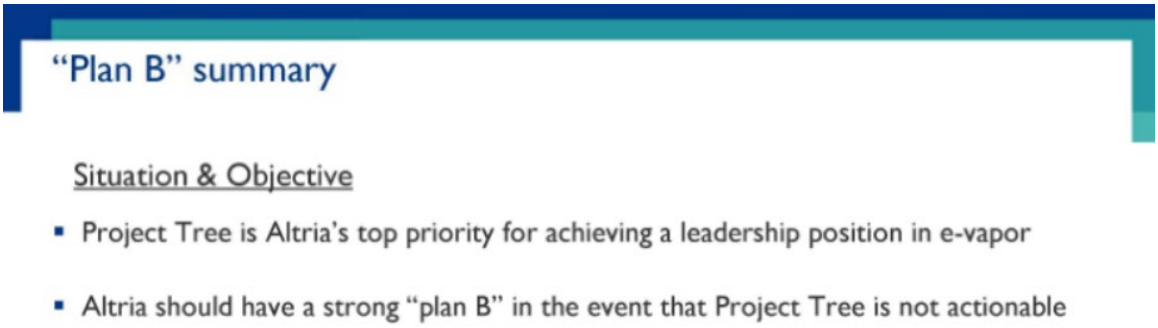
There is also no evidence that there were promising acquisition opportunities available to Altria. The record shows that the market for Deeming-Date-compliant products was already picked over by the time Altria acquired Elite and Cync, (RFF ¶¶ 326-31), and did not improve over the course of 2018, (PX7018 Schwartz (Altria) Dep. at 166). Altria's decision to launch the Growth Teams on October 5, 2018, with the stated objective of internally developing a leapfrog product, reflects the company's business decision that Elite and Cync were failures and that there were no viable off-the-shelf e-vapor products that Altria could quickly commercialize. (PX7003 Quigley (Altria) IHT at 104-05 ("[Altria] didn't believe that there were any other products. That work had already been completed.")).

1718. When Quigley became President and CEO of Nu Mark around June 2018, Altria CEO Willard told Quigley and Crosthwaite that a transaction with JLI was "Plan A" for Altria's e-cigarette business, and that "Plan B" would be Altria's e-cigarette business without a JLI transaction. (PX7003 (Quigley (Altria), IHT at 160-61)).

Response to Proposed Finding No. 1718:

Respondents have no specific response except to note that "Plans A, B, C were used around a lot of different things in the company;" the term "Plan B," in particular, was "thrown around" "loosely." (PX7034 Mountjoy (Altria) Dep. at 123, 128). And, insofar as the JLI transaction was sometimes referred to as "Plan A" and growing Altria's e-cigarette business was sometimes referred to as "Plan B," Quigley did not believe that the company leadership favored "Plan A" over "Plan B." (Quigley (Altria) Tr. 2002).

1719. In August 2018, Altria's K.C. Crosthwaite forwarded a presentation to senior executives, including Billy Gifford and Murray Garnick, summarizing Altria's "Plan B" options in the event that the JLI transaction did not work out. (PX1317 (Altria) at 001 (August 2018 Alternative Pod-Based Systems draft presentation)). The presentation noted that "Project Tree is Altria's top priority for achieving a leadership position in e-vapor," and that "Altria should have a strong 'plan B' in the event that Project Tree is not actionable." (PX1317 (Altria) at 003). Some of the "Plan B" options included NJOY with CYNC or other pod-based systems, Bo ("Project Tower"), synthetic nicotine (J WELL, Kangertech, and Smoore), or other 8/8/2016 products. (PX1317 (Altria) at 004). According to Altria, NJOY's "Management is open to a transaction with Altria." (PX1317 (Altria) at 007). K.C. Crosthwaite wrote that "I also spoke with the J Well (Bo product) management team today and the Bo asset is still a viable option for us." (PX1317 (Altria) at 001).



(PX1317 (Altria) at 003).

(PX1317 (Altria) at 004).

Response to Proposed Finding No. 1719:

The Proposed Finding is incomplete and misleading without additional context. Whether Altria would have partnered with one of these companies but for the transaction is pure speculation. Moreover, whether any of these companies had a product that would be appealing to consumers and commercially successful is also pure speculation. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 12), or in any deposition, so there was no testimony about the likelihood or potential success of any of these options.

Notwithstanding Complaint Counsel's failure to pursue this line of evidence, the limited evidence in the record from other sources shows that none of the options highlighted in the Proposed Finding were promising.

Combining Cync with NJOY liquid, as proposed in "Project Forest," was doubly flawed insofar as a new pairing of device and e-liquid would require pre-market FDA approval, (Gifford (Altria) Tr. 2796-97), and the Cync device had a series of debilitating flaws, including "risk of acute chronic nickel poisoning," (RFF ¶ 1526). And, by September 2018, the "NJOY conversations appear[ed] to have stalled," while "CYNC product improvement work (aerosol mass and replacement of nickel related materials) ha[d] been put on hold," (PX4007 (Altria) at 001).

Altria had considered and passed on Bo (referred to as Project Tower in the cited document) in 2017. (PX1317 (Altria) at 004). Although Nu Mark executives gave Bo a second look in mid-2018, after realizing Elite would not be competitive, (PX7003 Quigley (Altria) IHT at 104), they ultimately concluded it would fare no better. On conversion potential, Bo "perform[ed] more like Elite than Juul" by failing to offer "immediate satisfaction," and it was prone to both "leaking and spitting." (PX1812 (Altria) at 001).

As for the possibility of acquiring another product that was on the market as of August 8, 2016, the evidence shows that the market for Deeming-Date-compliant products was already picked over by the time Altria acquired Elite and Cync, (RFF ¶¶ 326-31), and did not improve over the course of 2018, (PX7018 Schwartz (Altria) Dep. at 166). Altria's decision to launch the Growth Teams on October 5, 2018, with the stated objective of internally developing a leapfrog product, reflects the company's business decision that that Elite and Cync were failures and that there were no viable off-the-shelf e-vapor products that Altria could quickly commercialize. (PX7003 Quigley (Altria) IHT at 104-05 ("[Altria] didn't believe that there were any other products. That work had already been completed.")).

Finally, regarding synthetic nicotine, as detailed in RRFF ¶¶ 1722-24, Complaint Counsel has adduced essentially no evidence on this topic and Jupe testified that, despite the hype, synthetic nicotine "was a lot of puffery." (PX7016 Jupe (Altria) Dep. at 229).

1720. Altria was reviewing potential pod-based alternative acquisition targets as early as May 2018 as part of its "Plan B" strategy if it could not acquire JLI. Some of the potential targets included NJOY, Five Pawns, J WELL, Bo, Avail, Kangertech, and Byrd. (PX1631 (Altria) at 001, 003-06 (Altria May 2018 Pod-based System Alternatives draft presentation)).

Response to Proposed Finding No. 1720:

The Proposed Finding is incomplete and misleading without additional context. Whether Altria would have partnered with one of these companies but for the transaction is pure speculation. Moreover, whether any of these companies had a product that would be appealing to consumers and commercially successful is also pure speculation. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 21), or in any deposition, so there was no testimony about the likelihood or potential success of any of these options. And, once again, the record evidence shows that none of the options highlighted in the Proposed Finding were promising.

Combining Cync with NJOY liquid, as proposed in "Project Forest," was doubly flawed insofar as a new pairing of device and e-liquid would require pre-market FDA approval, (Gifford (Altria) Tr. 2796-97), and the Cync device had a series of debilitating flaws, including "risk of acute chronic nickel poisoning," (RFF ¶ 1526). And, by September 2018, the "NJOY conversations appear[ed] to have stalled," while "CYNC product improvement work (aerosol mass and replacement of nickel related materials) ha[d] been put on hold," (PX4007 (Altria) at 001).

Five Pawns was not actually a new option. It was the "liquid manufacturer for Cync." (PX7022 Begley (Altria) Dep. at 174; PX7003 Quigley (Altria) IHT at 99-100).

J WELL and Bo were not different acquisition opportunities. J WELL owned the Bo product. (RX1103 (Altria) at 007; PX1631 (Altria) at 004). Although Nu Mark executives gave

Bo a second look in mid-2018, after realizing Elite would not be competitive, (PX7003 Quigley (Altria) IHT at 104), they ultimately concluded it would fare no better. On conversion potential, Bo "perform[ed] more like Elite than Juul" by failing to offer "immediate satisfaction," and it was prone to both "leaking and spitting." (PX1812 (Altria) at 001).

Avail, Kangertech, and Byrd were just three different options for synthetic nicotine (PX1631 (Altria) at 006; PX4257 (Altria) at 035), and, as detailed in RRFF ¶¶ 1722-24, Complaint Counsel has adduced essentially no evidence on this topic and Jupe testified that, despite the hype, synthetic nicotine "was a lot of puffery." (PX7016 Jupe (Altria) Dep. at 229).

1721. If JLI ("Tree") were to remain independent or be acquired by another competitor, as of July 2018, [redacted]

(PX1701 (Altria) at 002 (*in camera*)).

Response to Proposed Finding No. 1721:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context.

[redacted]

1722. Altria partnered with Next Generation Labs to produce and research synthetic nicotine products. (PX4501 (Altria) at 001 (Email discussing Altria's agreement with Next Generation Labs)). Next Generation Labs also had a pod-based product ("Obot") in development. (PX4498 (Altria) at 004 (Altria January 2018 Project Torrey presentation)).

Response to Proposed Finding No. 1722:

The Proposed Finding is incomplete and misleading without additional context. Whether Altria would have acquired a Next Generation Labs product and scaled it up but for the transaction is pure speculation. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 72-73), or in any deposition, so there was no testimony about the likelihood or potential success of such an approach.

The only testimony that Complaint Counsel elicited about synthetic nicotine from Altria witnesses was a single background question posed to Richard Jupe in his deposition, "what is synthetic nicotine?" Jupe explained that it is nicotine developed through a chemical reaction, rather than derived from tobacco. But, he added, "[e]ssentially what it turned out to be was a lot of puffery," no pun intended. (PX7016 Jupe (Altria) Dep. at 229). Under these circumstance, Complaint Counsel cannot carry its burden of demonstrating that but for the JLI transaction, Altria would have launched this product and it would have improved consumer choice.

1723. In June 2018, Nu Mark's Brian Quigley highlighted Altria's potential to unlock synthetic nicotine as a means of improving its ability to compete. (PX1669 (Altria) at 001).

Response to Proposed Finding No. 1723:

The Proposed Finding is incomplete and misleading without additional context. The cited source only indicates that, as of June 7, 2018, six days after he began working at Nu Mark, (RFF ¶ 701), Quigley was aware that synthetic nicotine might offer advantages, (PX1669 (Altria) at 001). But Complaint Counsel never asked Quigley about the cited document specifically or synthetic nicotine generally, much less how his view of it progressed as he learned more about the e-vapor space. (Quigley (Altria) Tr. 1924-2098; PX7041 Quigley (Altria) Dep. at 1-177; PX7003 Quigley (Altria) IHT at 1-188).

Indeed, the only testimony that Complaint Counsel elicited about synthetic nicotine was a single background question posed to Richard Jupe in his deposition, "what is synthetic nicotine?" Jupe explained that it is nicotine developed through a chemical reaction, rather than derived from tobacco. But, he added, "[e]ssentially what it turned out to be was a lot of puffery," no pun intended. (PX7016 Jupe (Altria) Dep. at 229). Under these circumstance, Complaint Counsel cannot carry its burden of demonstrating that but for the JLI transaction, Altria would have launched this product and it would have improved consumer choice.

1724. Altria's innovation partnership with Next Generation Labs fell apart following the non-compete agreement with JLI. (PX4501 (Altria) at 001-02 (Email discussing Altria terminating their agreement with Next Generation Labs)). On December 19, 2018, Next Generation Labs wrote to Altria "As you know [Next Generation Labs] worked extremely hard on the initial production and with all the news going around regarding your discontinuing your e-cig brands and possible investment into JUUL we are concerned about future business with Altria and TFN." (PX4501 (Altria) at 002). On January 4, 2019, Altria's Steven Schroder wrote back, "I was planning to call [Next Generation Labs] and tell [them] we are out of the evapor business and no longer need synthetic nicotine and see where the conversation goes without making any monetary commitment on terminating the agreement." (PX4501 (Altria) at 001).

Response to Proposed Finding No. 1724:

The Proposed Finding is incomplete and misleading without additional context. *First*, in the cited source, Next Generation Labs acknowledges that the company only made an "initial

production" and "there was no guarantee that [Altria] would continue to order." (PX4501 (Altria) at 002). In fact, [redacted]

Second, there is no evidence that, but for the transaction, Altria would have continued purchase from Next Generation Labs. To the contrary, Jupe's testimony that the claims about synthetic nicotine were simply "a lot of puffery," (PX7016 Jupe (Altria) Dep. at 229), indicates that Altria would not.

1725. In May 2019, Altria [redacted] (PX4543 (Altria) at 001 (*in camera*)). Following the transaction, [redacted] (PX4543 (Altria) at 005 (*in camera*).

Response to Proposed Finding No. 1725:

The Proposed Finding is not relevant to the antitrust analysis in this case. [redacted]

1726. In September-October 2018, Altria's Eric Hawes wrote to Altria's VP of Product Design and Development, Richard Jupe, that "Ayr Labs [is] suddenly very interested" in a potential

transaction for their e-cigarette technology and platform. (PX1654 (Altria) at 001). Eric Hawes supported a transaction with Ayr, telling Richard Jupe that "I see a lot of value here, and an easy lift on our side with respect to resource time/commitment. I'm inclined to lean into this." (PX1654 (Altria) at 001). However, Richard Jupe declined to pursue the opportunity, telling Eric Hawes, "At this time make no commitment I will explain." (PX1654 (Altria) at 001).

Response to Proposed Finding No. 1726:

The Proposed Finding is incomplete and misleading without additional context. *First*, as Dr. Gogova explained, the product, Ayr, was only a "concept." (PX7015 Gogova (Altria) Dep. at 192). "There was no product in place, not even manufacturing of the product." It was just an early prototype and even that "wasn't truly functioning." (PX7015 Gogova (Altria) Dep. at 194). In addition, Ayr Labs "had very little consumer data to fully persuade [Dr. Gogova] that [its] business [was] the right option [for Altria] to acquire." (PX7015 Gogova (Altria) Dep. at 193).

Second, to the extent Complaint Counsel intends to imply that Jupe's email is evidence that Altria declined to pursue Ayr because of an alleged agreement with JLI, that implication would be belied by the evidence. Jupe sent his email on October 1, 2018, four days before Altria internally announced the formation of the Growth Teams, which were given full autonomy to decide what technologies to pursue. And, according to deposition testimony elicited by Complaint Counsel, Altria scientist Dr. Gogova met with Ayr Labs as part of a Growth Team. (PX7015 Gogova (Altria) Dep. at 192).

1727. In October 2018, Altria had partnered with Molex (Phillips / Medisize), Jabil, and Flex to address e-cigarette procurement and R&D needs. (PX4497 (Altria) at,\ 009 (September 2018 Altria EMA Strategy presentation); PX4558 (Altria) at 001 (Nu Mark Supply Chain Perspective May '18); PX4547 (Altria) at 008, 010 (Altria June Product Portfolio Review); PX4548 (Altria) at 005-06 (Altria June 2018 Project Cloud RFP Decision Making presentation).

Response to Proposed Finding No. 1727:

The Proposed Finding is incomplete and misleading without additional context. Whether Altria would have partnered with one of these companies but for the transaction is pure speculation.

Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 72, 75), or in any deposition, so there was no testimony about the likelihood or potential success of such a partnership.

Nor does Complaint Counsel make any attempt to explain how working with these three companies would improve competition. As the cited documents explain, these were primarily manufacturing companies and Altria was exploring options to "Move Current e-Vapor Production from China to North America." (PX4497 (Altria) at 008). And the document discussing a potential collaboration with Jabil on product development is from June 2018, (PX4547 (Altria) at 008), before Altria created the Growth Teams, which were not constrained by what Altria had pursued in the past and had "free rein" to determine the direction of e-vapor product development, (RFF ¶ 967). And, Complaint Counsel has offered no evidence that the Growth Teams chose to continue a potential collaboration with Jabil.

1728. As of September 2018, Altria was continuing to explore new product concepts with partners including Bressler, Avail, and Kangertech, and Avail also suggested that Altria partner with Jwell, Davinci, Pax 3, or Glow. (PX4560 (Altria) at 001-02 (September 2018 email between Altria employees Ryan Bailey and Eric Hawes regarding Project AKA)).

Response to Proposed Finding No. 1728:

The Proposed Finding is incomplete and misleading without additional context. Whether Altria would have partnered with one of these companies but for the transaction is pure speculation. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 60), or in any deposition, so there was no testimony about the likelihood or potential success of such a partnership.

In addition, the cited source predates the creation of the Growth Teams, announced on October 5, 2018. (RFF ¶¶ 962-70). The Growth Teams were not constrained by what Altria had pursued in the past and had "free rein" to determine the direction of e-vapor product development,

(RFF ¶ 967), and, by extension, which third-party vendors to work with. And, Complaint Counsel has offered no evidence that the Growth Teams chose to continue exploring new product concepts with Bressler, Avail, or Kangertech, much less that they acted on Avail's suggestion regarding Jwell, Davinci, Pax 3, or Glow.

1729. In July 2018, Altria was pursuing a deal with Purilum, a Chinese manufacturer that had access to 8/8/16 pod-based e-cigarette products with nicotine salts that could be sold in the U.S. immediately prior to obtaining a PMTA. (PX1942 (Altria) (email regarding Purilum between Altria employees, including Altria's VP of Product Design and Development, Richard Jupe)).

Response to Proposed Finding No. 1729:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Whether Altria would have partnered with Purilum but for the transaction is pure speculation. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 30), or in any deposition. Nor did Complaint Counsel ask any witness even a single question about Purilum, either at trial or in deposition. As a result, there was no testimony about the likelihood or potential success of such a partnership.

Moreover, according to the cited document, Purilum had not yet confirmed that the relevant products were sold prior to the Deeming Date, August 8, 2016. (PX1942 (Altria) at 001). It was "unclear if [the] Pod also has a device." (PX1942 (Altria) at 001). If it did not have a device and needed to be paired with different product or the device was not also sold before the Deeming Date, then it would require pre-market FDA approval. (Gifford (Altria) Tr. 2796-97; RFF ¶ 65).

1730. In a February 2018 draft of its 2018 three-year plan, Altria wrote that it was evaluating "additional investment opportunities to address other product platform gaps with a focus on closed tank products." (PX1251 (Altria) at 050).

Response to Proposed Finding No. 1730:

The Proposed Finding is incomplete and misleading without additional context. Whether Altria would have identified and capitalized on other investment opportunities but for the

transaction is pure speculation. And the fact that the partnership or investment opportunities identified by Complaint Counsel in the above paragraphs did not show promise (*See* Resps. CCFF ¶¶ 1717, 1719-24, 1726, 1729), suggests that Altria's prospects for another as of yet unidentified prospect were dubious at best.

XI. RESPONDENTS HAVE NOT DEMONSTRATED PRO-COMPETITIVE BENEFITS OR THAT THE TRANSACTION IS NECESSARY TO ACHIEVE THEM

1731. As a pro-competitive justification for their agreement not to compete in the U.S. e-cigarette market, Respondents point to services that Altria has provided to JLI pursuant to the Services Agreement. (*See* CCFF ¶¶ 1873-79, below).

Response to Proposed Finding No. 1731:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1873-79, Respondents incorporate their responses to those Proposed Findings herein.

1732. In January 2020, Respondents amended the terms of the Services Agreement, halting all services other than regulatory services in support of JLI's PMTA and MRTP filings. (*See* CCFF ¶¶ 1880-83, below).

Response to Proposed Finding No. 1732:

Respondents have no specific response except to note that while "the gist of" the regulatory services "was to support [JLI's] PMTA filing and their MRTP," the Amended Services Agreement also continued the provision of shelf space to JUUL products through March 31, 2020. (PX7040 Gifford (Altria) Dep. at 32).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1880-83, Respondents incorporate their responses to those Proposed Findings herein.

1733. Respondents have not demonstrated how Altria's services to JLI have benefitted consumers or competition. (*See* CCFF ¶¶ 1891-917, 1956-95, below).

Response to Proposed Finding No. 1733:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. The evidence shows that Altria's regulatory services were critical in enabling JLI to file a high-quality and timely PMTA. (RFF ¶¶ 1215-68). JLI's need to file a high-quality and timely PMTA was existential. (RFF ¶ 1221). If JLI does not obtain regulatory approval for JUUL, the product will have to come off the market, resulting in less e-vapor competition. (RFF ¶ 1222).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1891-917 and 1956-95, Respondents incorporate their responses to those Proposed Findings herein.

1734. Even if Respondents could demonstrate pro-competitive justifications, the agreement not to compete was not necessary to achieve them. (*See* CCFF ¶¶ 1918-55, 1965-66, 1972-75, 1984, 1992-94, below).

Response to Proposed Finding No. 1734:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. The evidence refutes Complaint Counsel's argument that there were less restrictive alternatives. (RFF ¶¶ 1269-83).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1918-55, 1965-66, 1972-75, 1984, and 1992-94, Respondents incorporate their responses to those Proposed Findings herein.

XII. THE TRANSACTION IS PRESUMPTIVELY ANTICOMPETITIVE, AND THE EVIDENCE BOLSTERS THAT PRESUMPTION

A. THE TRANSACTION IS PRESUMPTIVELY ANTICOMPETITIVE

1735. The transaction is presumptively anticompetitive because market shares, both from ordinary-course documents and Dr. Rothman's calculations, establish that the market was highly concentrated before and after the transaction. (*See* CCFF ¶¶ 1736-63, below).

Response to Proposed Finding No. 1735:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. There is no basis for a presumption that the transaction is anticompetitive. Indeed, undisputed real-world data shows that market concentration decreased substantially in the two years following the transaction. (RFF ¶¶ 1451-53).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1736-63, Respondents incorporate their responses to those Proposed Findings herein.

1736. Dr. Rothman's analyses establish that in this highly-concentrated market and with a large increase in the HHI due to the transaction, the transaction is presumed likely to enhance market power under the thresholds laid out in the Horizontal Merger Guidelines. (*See* CCFF ¶¶ 1749-61, below).

Response to Proposed Finding No. 1736:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. Dr. Rothman's HHI calculation suffers from numerous flaws that prevent it from forming the basis of a presumption of anticompetitive harm. (RFF ¶¶ 1431-54).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1749-61, Respondents incorporate their responses to those Proposed Findings herein.

1. Ordinary Course Market Share Estimates Show That the E-Cigarette Market Was Highly Concentrated before and after the Transaction

1737. Ordinary course documents from Altria, JLI, and other e-cigarette competitors show that the e-cigarette market was highly concentrated before the transaction. (*See* CCFF ¶¶ 1738-47, below).

Response to Proposed Finding No. 1737:

The Proposed Finding is incomplete and misleading without additional context. The Horizontal Merger Guidelines state that "even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings." (PX9098 Horizontal Merger Guidelines ("HMG") at 021 § 5.3;

RFF ¶ 1475). The evidence demonstrates that market shares in the e-vapor market exhibited substantial fluctuation and that the market has become less concentrated since the transaction. (RFF ¶¶ 1368-76, 1451-52). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1738-47, Respondents incorporate their responses to those Proposed Findings herein.

1738. In an internal JLI document titled "JUUL Business Overview" and dated December 15, 2017, JLI reports market shares for e-cigarettes sold at U.S. convenience stores. (PX2597 (JLI) at 005). The market shares for e-cigarettes sold at U.S. convince stores are as follows: JUUL (JLI) at 43.2%; Vuse (Reynolds) at 25.0%, MarkTen (Altria) at 14.5%, Blu (ITG) at 8.5%, Logic (JTI) at 6.1%, and all others at 2.7%. (PX2597 (JLI) at 005).

Response to Proposed Finding No. 1738:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1739. Altria's (Nu Mark's) BOD Orientation materials dated April 11, 2018, include the top brands' shares of e-vapor for 2017. (PX4029 (Altria) at 013). For FY 2017, Vuse (Reynolds) held a 33.3% share, MarkTen (Altria) was 12.5%, JUUL (JLI) was 12.3%, Blu (ITG) was 10% and Logic (JTI) was 8.1%. (PX4029 (Altria) at 013).

Response to Proposed Finding No. 1739:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a

concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1740. Altria's E-Vapor Business Update, circulated by email on April 13, 2018, reports shares by brand for the total e-vapor marketplace. (PX1098 (Altria) at 012). The data show that as of April 13, 2018, JUUL (JLI) held a 42.7% share, followed by Vuse (Reynolds) at 22.7%, MarkTen (Altria) at 9.4%, at Blu (ITG) at 7.2%, Logic (JTI) at 5.6%, and all others at 12.3%. (PX1098 (Altria) at 012).

Response to Proposed Finding No. 1740:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1741. [redacted]

[redacted]

(PX3218 (Reynolds) at 002 (*in camera*)).

Response to Proposed Finding No. 1741:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1742. [redacted]

[redacted]

(PX3223 (Reynolds) at 034 (*in camera*)).

Response to Proposed Finding No. 1742:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1743. In an email dated April 30, 2018, JLI executive O'Hara presents market shares prepared by IRI for vapor companies selling product in convenience stores for the four weeks ending April 22, 2018. (PX2085 (JLI) at 003). The shares reported in the email are as follows: JUUL (JLI) at 51.3%, Vuse (Reynolds) at 23%, Blu (ITG) at 8.7%, and Logic (JTI) at 5%; MarkTen's share was not reported in the email. (PX2085 (JLI) at 003).

Response to Proposed Finding No. 1743:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

Moreover, while in the cited email O'Hara did not even list MarkTen's market share, he did observe that it "was a disappointing 4-week period for MarkTen as its pod-based product is struggling to get off the ground." (PX2085 at 002).

1744. In a JUUL Labs document titled "Q1 2018 Unaudited Investor Information" and dated May 2018, JLI reported 2017 and 2018 retail market shares for JUUL and its competitors. (PX2345 (JLI) at 004). The shares were reported as follows:

Rank	Brand	April 2017 Share
1	VUSE	37.3%
2	blu	12.4%
3	MarkTen	16.8%
4	Logic	11.6%
5	JUUL	17.2%
Rest	All Others	4.8%

Rank	Brand	April 2018 Share
1	JUUL	63.0%
2	VUSE	17.0%
3	MarkTen	8.7%
4	blu	5.9%
5	Logic	3.7%
Rest	All Others	1.7%

(PX2345 (JLI) at 004).

Response to Proposed Finding No. 1744:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1745. A MarkTen Monthly Share and Volume Report, circulated by email on August 6, 2018, reports shares by brand of e-vapor products. (PX1236 (Altria) at 004). The data show that for the four weeks ending on July 29, 2018, JUUL (JLI) held a 71.39% share, followed by Vuse (Reynolds) at 16.21%, Logic (JTI) at 9.83%, MarkTen (Altria) at 8.63%, at Blu (ITG) at 7.41%, and balance at 13.47%. (PX1236 (Altria) at 004). The report also includes current year shares for 2018, as of July 29, as follows: JUUL (JLI) held a 62.27% share, followed by Vuse (Reynolds) at 20.91%, Logic (JTI) at 11.03%, MarkTen (Altria) at 10.53%, at blu (ITG) at 8.14%, and balance at 12.88%. (PX1236 (Altria) at 004).

Response to Proposed Finding No. 1745:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1746. [redacted] (PX3225 (Reynolds) at 032 (*in camera*)).

Response to Proposed Finding No. 1746:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

1747. A JLI Sales and Marketing document dated November 15, 2018, contains U.S. vapor market share data for convenience stores. (PX2052 (JLI) at 012. The market shares reported in the document are JUUL (JLI) at 74.4%, Vuse (Reynolds) at 9.9%, blu (ITG) at 6.3%, MarkTen (Altria) at 4.7%, Logic (JTI) at 2.5%, NJOY at 1.1%, and others at 1.0%. (PX2052 (JLI) at 012; *see also* PX2336 (JLI) at 002-008 (document contains IRI retail sales data for six weeks in November and December 2018 showing similar shares to PX2052)).

Response to Proposed Finding No. 1747:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). Indeed, as Dr. Rothman admitted, the e-vapor market is "dynamic." (PX7048 Rothman Trial Dep. at 108). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

As for MarkTen's share in the cited document, (PX2052 (JLI) at 012), the Court observed that such a share made it "[h]ardly a strong competitor." (Tr. 54).

1748. Ordinary course documents show that the e-cigarette market remains highly concentrated after the transaction. A JUUL Investor Update for 2020, contains "Closed Pod and Disposable" dollar shares for January 2019 through April 2020. (PX2782 (JLI) at 008). As

of April 2020, JUUL (JLI) held a 60% share of closed pods and disposables, Vuse Alto (Reynolds) was at 17%, Disposable (blu/ITG) were 9%, NJOY Ace was at 5%, *my*blu (ITG) was at 2%, and others comprised 8%. (PX2782 (JLI) at 008).

Response to Proposed Finding No. 1748:

Respondents have no specific response except to note that the evidence, (RFF ¶¶ 1368-76, 1475-79), and the documents cited by Complaint Counsel, (*see* CCFF ¶¶ 1738-48), demonstrate that market shares in the e-vapor market "fluctuate substantially" as would be expected in a concentrated yet still competitive market, (PX9098 HMG at 021 § 5.3). As of September 2020, JUUL had only about 30 percent of pod-based device sales, while Reynolds had about 60 percent. (RFF ¶¶ 1371-72).

2. The E-Cigarette Market Remains Highly Concentrated

1749. Dr. Rothman concluded that Altria's exit from e-cigarettes increased concentration in the market for closed-system e-cigarettes sold in the United States. (PX7048 (Rothman, Trial Dep. at 24); PX5000 at 042 (¶ 85) (Rothman Expert Report)).

Response to Proposed Finding No. 1749:

The Proposed Finding is incomplete and misleading without context. Dr. Rothman purported to make such a conclusion, but his calculations were incorrect for at least three reasons: (1) he analyzes concentrations in the wrong market, (2) he uses pre-transaction market shares that ignore the decline in the relative share of cig-a-likes compared to pod-based products, and (3) he assumes proportional diversion when the evidence shows little to no substitution between cig-a-likes and pod-based products. (RFF ¶¶ 1431-1454). Regardless of whether the market is defined as pod-based products or all closed-system e-vapor products, an assessment of HHI using actual market data "shows that market concentration has decreased substantially following the transaction." (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68).

1750. Dr. Rothman measured concentration in the market for closed-system e-cigarettes sold in the United States using the Herfindahl–Hirschman Index ("HHI") as described in the Horizontal Merger Guidelines. (PX7048 (Rothman, Trial Dep. at 24-25); PX5000 at 042-

43 (¶¶ 86-89) (Rothman Expert Report); PX9098 (Horizontal Merger Guidelines) § 5.3 at 021-22)).

Response to Proposed Finding No. 1750:

The Proposed Finding is incomplete and misleading without context. Dr. Rothman purported to make such a measurement, but his calculations were incorrect for at least three reasons: (1) he analyzes concentrations in the wrong market, (2) he uses pre-transaction market shares that ignore the decline in the relative share of cig-a-likes compared to pod-based products, and (3) he assumes proportional diversion when the evidence shows little to no substitution between cig-a-likes and pod-based products. (RFF ¶¶ 1431-1454). Regardless of whether the market is defined as pod-based products or all closed-system e-vapor products, an assessment of HHI using actual market data "shows that market concentration has decreased substantially following the transaction." (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68).

1751. To calculate the HHI and measure concentration before the transaction between Altria and JLI, Dr. Rothman used shares of Altria, JLI, ITG, JTI, NJOY, and Reynolds in the 12-month period from October 2017 to September 2018, before Altria began to remove its e-cigarette products from the market. (PX7048 (Rothman, Trial Dep. at 24-26); PX5000 at 042 (¶ 87) (Rothman Expert Report)).

Response to Proposed Finding No. 1751:

The Proposed Finding is incomplete and misleading without additional context. By using a 12-month period to calculate shares, Dr. Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share in particular. (RFF ¶¶ 1438-39). Dr. Rothman's choice to use an average share from October 2018 to September 2018 hides the fact that Nu Mark's share was declining over this entire period. (RFF ¶ 1440). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶ 1442-43).

1752. To calculate the HHI and measure concentration after the transaction, Dr. Rothman assumed Altria's share is reallocated to the remaining competitors in proportion to their

shares. (PX7048 (Rothman, Trial Dep. at 26-27); PX5000 at 042 (¶ 88) (Rothman Expert Report)). He then calculated the change in HHI as the difference between the HHI after the transaction and the HHI before the transaction. (PX7048 (Rothman, Trial Dep. at 27); PX5000 at 042 (¶ 88) (Rothman Expert Report)).

Response to Proposed Finding No. 1752:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman undertook no analysis to confirm whether reallocation in the e-vapor market after Altria's discontinuation of Nu Mark products was proportional. (PX7048 Rothman Trial Dep. at 123). To the contrary, the evidence shows that reallocation from Nu Mark's products was far from proportional. (RFF ¶¶ 1445-48; *see also* RX1217 Murphy Report ¶ 113). Dr. Rothman's incorrect assumption that JLI would capture over half of Altria's diverted sales accounts for 94 percent of his calculated HHI increase of 652 points. (RFF ¶ 1450).

1753. Dr. Rothman's market shares are based on unit sales of closed-system consumables in pods, cartridges, and disposables. (PX7048 (Rothman, Trial Dep. at 25)). Dr. Rothman used STARS data, which covers shipments from wholesalers to retailers, to calculate market shares. (PX7048 (Rothman, Trial Dep. at 25); *see* PX5000 at 108 (Ex. 3a) (Rothman Expert Report)). Dr. Rothman also used Nielsen Syndicated Major Market data to calculate market shares. (*See* PX5000 at 109 (Ex. 3b) (Rothman Expert Report)).

Response to Proposed Finding No. 1753:

Respondents have no specific response to the Proposed Finding except to note that by using a 12-month period to calculate shares, Dr. Rothman's calculation improperly disregards the dramatic decline of cig-a-likes, and the impact that had on Nu Mark's share in particular. (RFF ¶¶ 1438-39).

1754. Dr. Rothman calculated that the transaction resulted in an HHI of 3,929 and an increase in HHI of 652. (PX7048 (Rothman, Trial Dep. at 27); PX5000 at 043 (¶ 89) (Rothman Expert Report)). Dr. Rothman's specific results, as reported in Table 2 of his expert report, are as follows:

Table 2
Change in HHI

	Pre-Transaction	Post-Transaction
Shares		
Altria	10.1%	–
ITG	6.6%	7.3%
JTI	3.7%	4.1%
JLI	51.0%	56.7%
NJOY	1.8%	2.0%
Reynolds	22.7%	25.3%
HHI	**3,276**	**3,929**
Change in HHI		**652**

Note: Shares are based on units of closed-system consumables, including cartridges, pods, and disposables, and are calculated using data from October 2017 to September 2018.

(PX5000 at 043 (Table 2) (Rothman Expert Report)).

Response to Proposed Finding No. 1754:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Dr. Rothman purported to make such a conclusion, but his calculations were incorrect for at least three reasons: (1) he analyzes concentrations in the wrong market, (2) he uses pre-transaction market shares that ignore the decline in the relative share of cig-a-likes compared to pod-based products, and (3) he assumes proportional diversion when the evidence shows little to no substitution between cig-a-likes and pod-based products. (RFF ¶¶ 1431-1454). Regardless of whether the market is defined as pod-based products or all closed-system e-vapor products, an assessment of HHI using actual market data "shows that market concentration has decreased substantially following the transaction." (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68).

1755. Under the Horizontal Merger Guidelines, a market is highly concentrated if the HHI is greater than 2,500. (PX7048 (Rothman, Trial Dep. at 25-26); PX5000 at 042 (¶ 86) (Rothman Expert Report) (citing classification of market types in Horizontal Merger Guidelines (PX9098 (Horizontal Merger Guidelines) at 022 (§ 5.3)). Also, if the market is highly concentrated and the change in HHI is greater than 200, the transaction is presumed to be likely to enhance market power. (PX7048 (Rothman, Trial Dep. at 25-26); PX5000 at 042 (¶ 86) (Rothman Expert Report) (citing PX9098 (Horizontal Merger Guidelines) at 022 (§ 5.3)).

Response to Proposed Finding No. 1755:

Respondents have no specific response except to note that the Proposed Finding is improper because it consists entirely of a legal conclusion.

Moreover, regardless of whether the market is defined as pod-based products or all closed-system e-vapor products, an assessment of HHI using actual market data "shows that market concentration has decreased substantially following the transaction," (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68), which refutes any claimed presumption.

1756. Dr. Rothman concluded that, under the thresholds in the Horizontal Merger Guidelines, the post-transaction HHI of 3,929 indicates that the market for closed-system e-cigarettes is highly concentrated. (PX5000 at 043 (¶ 90) (Rothman Expert Report)). Dr. Rothman also concluded that, combined with the large increase in HHI of 652 and under the thresholds in the Horizontal Merger Guidelines, the transaction is presumed likely to enhance market power. (PX7048 (Rothman, Trial Dep. at 28); *see also* PX5000 at 043 (¶ 90) (Rothman Expert Report)).

Response to Proposed Finding No. 1756:

The Proposed Finding is incorrect, incomplete and misleading without additional context. Dr. Rothman purported to make such a conclusion, but his calculations were incorrect for at least three reasons: (1) he analyzes concentrations in the wrong market, (2) he uses pre-transaction market shares that ignore the decline of cig-a-likes compared to pod-based products, and (3) he assumes proportional diversion when the evidence shows little to no substitution between cig-a-likes and pod-based products. (RFF ¶¶ 1431-1454). Regardless of whether the market is defined as pod-based products or all closed-system e-vapor products, an assessment of HHI using actual market data "shows that market concentration has decreased substantially following the transaction." (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68).

Specifically, the evidence shows that from October 2018 to September 2020 the HHI in the market for pod-based products fell by over 3,000, a decrease of over 35 percent. (RFF ¶ 1452;

RX1217 Murphy Report ¶ 67). And even in a hypothetical market of all closed-system e-vapor products, the HHI fell by nearly 500 points. (RFF ¶ 1452; RX1217 Murphy Report ¶ 68).

1757. Dr. Rothman testified and described in this rebuttal report that Dr. Murphy's critiques of Dr. Rothman's concentration analysis are misguided and wrong in many ways. (PX7048 (Rothman, Trial Dep. at 28-29); PX5001 at 040-041 (¶¶ 71-72) (Rothman Rebuttal Report)).

Response to Proposed Finding No. 1757:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Dr. Rothman criticizes Professor Murphy for supposedly not conducting a specific analysis of potential confounding factors. (PX5001 Rothman Rebuttal ¶ 72). But Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶¶ 28-32), and Complaint Counsel's expert, Dr. Rothman, did not conduct such an analysis to demonstrate that his hypothetical confounding is real, (RFF ¶¶ 1377-78).

Moreover, no such analysis by Professor Murphy was necessary: At bottom, his review of the real-world data demonstrated that the e-vapor market is intensely competitive, (RFF ¶¶ 1338-76), such that any competitive constraint Altria afforded was easily replaced, (RFF ¶¶ 1637-64).

1758. Dr. Rothman concluded that Dr. Murphy's before and after comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors. (PX5001 at 040-041 (¶ 72), *see also* 031-032 (¶ 50) (Rothman Rebuttal Report)). Dr. Murphy's before-and-after comparisons of market concentration do not identify the effect of the transaction on concentration because Dr. Murphy's analysis confuses correlation with causation. (PX7048 (Rothman, Trial Dep. at 28-29, 39-41); *see also* PX5001 at 040-041 (¶¶ 71-72) (Rothman Rebuttal Report)). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124, below).

Response to Proposed Finding No. 1758:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive

effects, (RCoL ¶¶ 28-32), and Complaint Counsel's expert, Dr. Rothman, did not conduct such an analysis to demonstrate that his hypothetical confounding is real, (RFF ¶¶ 1377-78).

Moreover, no such analysis by Professor Murphy was necessary: At bottom, his review of the real-world data demonstrated that the e-vapor market is intensively competitive, (RFF ¶¶ 1338-76), such that any competitive constraint Altria afforded was easily replaced, (RFF ¶¶ 1637-64).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 2094-124, Respondents incorporate their responses to those Proposed Findings herein.

1759. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." PX7048 (Rothman, Trial Dep. at 30); PX5001 at 8-9, n.26 (¶ 14) (Rothman Rebuttal Report)).

Response to Proposed Finding No. 1759:

The Proposed Finding is incomplete and misleading without additional context. Dr. Rothman purported to evaluate the effects of the transaction by using a but-for world analysis. However, Dr. Rothman is unable to say, *inter alia*, how Altria would have been a significant competitor in the but-for world, what products it would have had on the market at any point in time, or what Altria could have done differently to be successful had it kept its e-vapor products on the market. (RFF ¶¶ 1489-500). As a result, Dr. Rothman's but-for analysis is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-31).

1760. Dr. Rothman concluded that Dr. Murphy's critique of Dr. Rothman's re-allocation of Altria's share to the remaining market participants in in proportion to their share is invalid because Dr. Murphy ignores confounding factors that influence market shares and confuses correlation with causation. (PX7048 (Rothman, Trial Dep. at 28-29); PX5001 at 040-43 (¶¶ 71-78) (Rothman Expert Report)). In his report, Dr. Rothman also showed that the transaction increased concentration even if reallocation of Altria's sales would have been different from one proportional to pre-transaction shares. (PX5001 at 040-41, n.174 (¶ 72) (Rothman Rebuttal Report) ("For example, if all of Altria's share goes to Reynolds, the change in HHI would be 460.”))

Response to Proposed Finding No. 1760:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶¶ 28-32), and Complaint Counsel's expert, Dr. Rothman, did not conduct such an analysis to demonstrate that his hypothetical confounding is real, (RFF ¶¶ 1377-78). Moreover, no such analysis by Professor Murphy was necessary: At bottom, his review of the real-world data demonstrated that the e-vapor market is intensively competitive, (RFF ¶¶ 1338-76), such that any competitive constraint Altria afforded was easily replaced, (RFF ¶¶ 1637-64).

Lastly, Dr. Rothman made no attempt to test his assumption of proportional re-allocation. (RFF ¶ 1445). His single hypothetical of how non-proportional re-allocation could have still led to increased concentration is improperly speculative and contrary to the real-world evidence, which demonstrates that "market concentration has decreased substantially following the transaction." (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68).

1761. Dr. Murphy's claim that Dr. Rothman should have accounted for differences in cartridge volumes across brands is not supported by any economic rationale and in any case, an alternative calculation does not change the conclusion that the transaction is presumptively anticompetitive based on the concentration statistics. (PX5001 at 40-41 (¶ 72) (Rothman Rebuttal Report)). Dr. Rothman calculated HHIs using Dr. Murphy's alternative shares based on cartridge volumes and found that the market for closed-system e-cigarettes would be highly concentrated and Altria's exit would increase concentration. (PX5001 at 40-41, n.175 (¶ 72) (Rothman Rebuttal Report)). Using Dr. Murphy's alternative shares, Dr. Rothman calculated that the HHI with Altria competing would be 2,850, the HHI without Altria competing would be 3,368, and the change in HHI would be 519. (PX5001 at 40-41, n.175 (¶ 72) (Rothman Rebuttal Report)).

Response to Proposed Finding No. 1761:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Regardless of whether cartridge units or volumes are used, Dr. Rothman's calculations were incorrect for at least three reasons: (1) he analyzes concentrations in the wrong market, (2) he uses pre-transaction market shares that ignore the decline in the relative share of cig-a-likes compared

to pod-based products, and (3) he assumes proportional diversion when the evidence shows little to no substitution between cig-a-likes and pod-based products. (RFF ¶¶ 1431-1454). Regardless of whether the market is defined as pod-based products or all closed-system e-vapor products, an assessment of HHI using actual market data "shows that market concentration has decreased substantially following the transaction." (RFF ¶ 1451; *see also* RX1217 Murphy Report ¶¶ 67-68).

3. Share of Device Sales Are Not a Reliable Metric to Assess Competition in the Relevant Market

1762. Dr. Rothman calculated market shares by using unit data on closed-system consumables, or the pods, cartridges, and disposables. (PX7048 (Rothman, Trial Dep. at 69)). Dr. Rothman did not use device shares in his models or his conclusions. (PX7048 (Rothman, Trial Dep. at 69)).

Response to Proposed Finding No. 1762:

Respondents have no specific response.

1763. Dr. Rothman used shares of consumables rather than of devices because "[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products." (PX7048 (Rothman, Trial Dep. at 69)).

Response to Proposed Finding No. 1763:

The Proposed Finding is incomplete and misleading without additional context. Respondents agree that shares of consumables "reflect the extent to which consumers are purchasing the products repeatedly," (PX7048 Rothman Trial Dep. at 69), and is thus an important metric—for example, Elite's share of closed-system e-vapor cartridge sales never topped 1 percent because consumers did not like the product and were not re-purchasing after initial trial, (RFF ¶ 1514). However, device shares can be a helpful metric as well because if a manufacturer successfully "seeds" the market with discounted devices that provide the customer with a

satisfying experience, that can be, but is not necessarily (as the experience of Elite shows), an indicator of cartridge sales to come. (RX1217 Murphy Report ¶ 69; RFF ¶¶ 431-59).

B. EVIDENCE OF COMPETITIVE HARM BOLSTERS THE PRESUMPTION

1764. The transaction eliminated head-to-head competition between Altria and JLI, both in terms of price and non-price competition, and eliminated products that appealed to consumers. (*See* CCFF ¶¶ 1417-526, above). The transaction also foreclosed future competition between Altria and JLI. (*See* CCFF ¶¶ 1527-87, above). Moreover, it foreclosed collaboration between Altria and PMI (*see* CCFF ¶¶ 1588-716, above), and prevented Altria from collaborating with or acquiring other e-cigarette companies (*see* CCFF ¶¶ 1717-30, above).

Response to Proposed Finding No. 1764:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. Altria did attempt to compete for a period of time in the e-vapor category through its subsidiary Nu Mark. But Altria never successfully developed an e-vapor product internally, (RFF ¶¶ 184-91), and its externally acquired in-market products were commercial and regulatory losers, (RFF ¶¶ 1501-31). Given the inability of Altria's existing products to receive FDA approval, (RFF ¶¶ 698-99), and the lengthy and complex process for developing a new product, (RFF ¶¶ 72-104, 122-26, 1604-11) it is speculative to suggest that Altria would have been competing in any serious way in the future.

As for so-called "head-to-head competition" prior to the transaction, JLI did not change any pricing as a result of the introduction or removal of Nu Mark products, (RFF ¶¶ 1639-46), nor is there any evidence that Nu Mark's presence impacted JLI's product development, (RFF ¶¶ 1647-50). And since Altria has exited the e-vapor category, competition has increased: Prices have gone down, output has increased, and market concentration has decreased. (RFF ¶¶ 1338-76).

As to collaboration between Altria and PMI, there are numerous reasons why this was unlikely to result in any new e-vapor product anytime soon. (*See* RRFF ¶¶ 1588-716). *First*, while the noncompete with JLI generally prohibited Altria from commercializing new e-vapor products

in the United States or engaging in research and development related to e-vapor, (Jupe (Altria) Tr. 2192-94), even absent the noncompete, [redacted]

Second, Complaint Counsel has not shown and cannot show that Altria and JLI would have reached an agreement to extend the JRDTA but for Altria's investment in JLI. [redacted]

[redacted]

And as to collaborating with or acquiring other e-cigarette companies, whether Altria would have partnered with one of these companies but for the transaction is pure speculation. Likewise, whether any of these companies had a product that would be appealing to consumers and commercially successful is pure speculation. Notwithstanding Complaint Counsel's failure to pursue this line of evidence, the limited evidence in the record from other sources shows that none of the options identified by Complaint Counsel in its Proposed Finding were promising. (*See* RRFF ¶¶ 1717-30).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1417-730, Respondents incorporate their responses to those Proposed Findings herein.

XIII. ENTRY AND EXPANSION DO NOT REBUT THE PRESUMPTION OF COMPETITIVE HARM

1765. The qualitative and quantitative evidence demonstrate that entry and expansion would not be timely, likely, and sufficient to offset harm from Altria's exit. (PX7048 (Rothman, Trial Dep. at 009-010, 088-091); *see also* CCFF ¶¶ 1767-870, below).

Response to Proposed Finding No. 1765:

The Proposed Finding is incorrect and unsupported by the paragraphs that follow. The real-world evidence shows that since the transaction, competition from other e-vapor companies has more than offset any competition that had been offered by Nu Mark. (RFF ¶¶ 1639-64).

[redacted]

[redacted] competition has increased along all relevant metrics since Altria discontinued its e-vapor products, (RFF ¶¶ 1338-76).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1767-870, Respondents incorporate their responses to those Proposed Findings herein.

1766. Dr. Rothman concluded that entry and expansion would not be timely, likely, and sufficient to offset harm from Altria's exit. (PX7048 (Rothman, Trial Dep. at 88-89); PX5000 at 097-102 (¶¶ 177-86) (Rothman Expert Report)).

Response to Proposed Finding No. 1766:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. While Dr. Rothman purported to make such a conclusion, the real-world evidence shows that since the transaction, competition from other e-vapor companies has more than offset any competition that had been offered by Nu Mark. (RFF ¶¶ 1639-64). [redacted] competition increased along all relevant metrics since Altria discontinued its e-vapor products. (RFF ¶¶ 1338-76).

A. THE RELEVANT MARKET HAS HIGH BARRIERS TO DE NOVO ENTRY AND EXPANSION

1767. De novo entry can occur by development of a closed-system e-cigarette or acquiring the technology. De novo entry is expensive, time consuming, requires specialized personnel and significant personnel, and requires significant sales and marketing capability. (*See* CCFF ¶¶ 1768-78, below). The PMTA process is also time intensive and costly, and there are barriers relating to shelf space and marketing. (*See* CCFF ¶¶ 1784-802, below). Open tank e-cigarettes face even more challenges to receive PMTA approval than closed-system e-cigarettes. (*See* CCFF ¶¶ 1803-04, below).

Response to Proposed Finding No. 1767:

Respondents have no specific response except to note that as a result of the Deeming Rule's requirement that products not on the market as of August 8, 2016 receive premarket authorization

(RFF ¶¶ 62-65), the barriers described in the Proposed Finding applied to Nu Mark just as they do to any other manufacturer.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1768-78 and 1784-804, Respondents incorporate their responses to those Proposed Findings herein.

1768. "To enter de novo into either combustible cigarettes or Electronic Cigarettes, a company would generally need to: 1) develop or acquire a product, 2) manufacture the product, 3) develop a sales force or alternative method to sell the product, and 4) develop, use, or contract for an established distribution system. . . . With the FDA regulation of combustible cigarettes and more recently, Electronic Cigarettes, entrants also would need to satisfy FDA regulatory requirements to bring a product to market." (PX0007 (Altria) at 010-11 (Narrative Response to Request for Additional Information and Documentary Materials issued to Altria Group, Inc., Specification 20)).

Response to Proposed Finding No. 1768:

Respondents have no specific response except to note that as a result of the Deeming Rule's requirement that products not on the market as of August 8, 2016 receive premarket authorization (RFF ¶¶ 62-65), the barriers described in the Proposed Finding applied to Nu Mark just as they do to any other manufacturer.

1769. [redacted] (Huckabee (Reynolds) Tr. 445 (*in camera*); Willard (Altria) Tr. 1344-45; PX8008 at 007-10 (¶ 18) (Huckabee (Reynolds), Decl.) (*in camera*); *see also* PX0007 (Altria) at 010-11 (Narrative Response to Specifications 4, 20, 26 and 27 of the Second Request, October 15, 2019)).

Response to Proposed Finding No. 1769:

Respondents have no specific response.

1770. [redacted] (King (PMI) Tr. 2382 (*in camera*); *see also* PX7020 (King (PMI), Dep. at 29-31 (*in camera*)); PX3106 (PMI) at 001 (*in camera*) [redacted]).

Response to Proposed Finding No. 1770:

Respondents have no specific response.

1771. [redacted] (PX7020 (King (PMI), Dep. at 30-31) (*in camera*) [redacted]

Response to Proposed Finding No. 1771:

Respondents have no specific response except to note that, [redacted].

1772. Altria's Willard testified that Altria "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341).

Response to Proposed Finding No. 1772:

Respondents have no specific response except to note that despite this massive investment, Altria's existing e-vapor products were commercial failures, (RFF ¶¶ 431-59, 1501-31), and it had never successfully developed an e-vapor product internally, (RFF ¶¶ 1553-611).

1773. E-cigarette businesses require personnel with knowledge and skill-sets specific to e-cigarettes. (King (PMI) Tr. 2375-76 ("[T]here were individuals hired specifically for their knowledge around the technology and the skill-sets required for e-cigarettes . . . [Y]ou need certain strengths in technology and know-how around the liquids, around how to create the aerosolization engine, and, of course, the device itself has some differences, although the battery technology and some of the aspects can be shared with the other developments we had made."); Jupe (Altria) Tr. 2116-20 (Mr. Jupe testified that within the product development organization he worked on at Altria, Altria had a group of developers and engineers working on Altria's e-cigarette products, a technology scoping team researching new components for future generations of e-cigarettes, a group called sensory sciences that was predominantly made up of flavor scientists and chemists, and a group focused on consumer wants and needs)).

Response to Proposed Finding No. 1773:

Respondents have no specific response except to note that Altria lacked personnel with the technological and engineering expertise required to develop e-vapor products, (RFF ¶¶ 848, 906-07), and was unable to hire individuals with the necessary expertise despite its efforts to do so, (RFF ¶¶ 971-77). Moreover, money and resources do not guarantee success, as reflected by Altria's decades-long history of failed innovation in e-vapor and other alternatives to conventional tobacco products, notwithstanding the investment of billions of dollars. (RFF ¶¶ 140-73).

1774. E-cigarette businesses require a significant number of personnel focused e-cigarette development. (PX7018 (Schwartz (Altria), Dep. at 28) (estimating that Altria had 40 to 50 people focused exclusively on e-cigarette development); PX7009 (Burns (JLI), IHT at 150) ("[B]etween December of 2017 and December of 2018, I think we grew from 225 people to 2200. So we were growing the resources in the company functions such as scientific affairs. We were growing the quality organization. We grew our legal organization. We grew almost all the backbone capabilities. So the premise was you can drive the business and make the numbers, but if you are not building up the infrastructure, we are not going to create the ability to continue to grow and add capability into the company.")).

Response to Proposed Finding No. 1774:

Respondents have no specific response except to note that Altria lacked personnel with the technological and engineering expertise required to develop e-vapor products, (RFF ¶¶ 848, 906-07), and was unable to hire individuals with the necessary expertise despite its efforts to do so, (RFF ¶¶ 971-77). Moreover, money and resources do not guarantee success, as reflected by Altria's decades-long history of failed innovation in e-vapor and other alternatives to conventional tobacco products, notwithstanding the investment of billions of dollars. (RFF ¶¶ 140-73).

1775. Altria's Quigley testified that when he was president and CEO of Nu Mark, it had roughly 145 employees. (Quigley (Altria) Tr. 1938).

Response to Proposed Finding No. 1775:

Respondents have no specific response.

1776. Nu Mark had headquarters in Richmond, Virginia at Altria headquarters, manufacturing operations in Shenzhen, China, product development and e-commerce support in Beit

Shemesh, Israel, and a fulfillment center in Miami. (Schwartz (Altria) Tr. 1857). Altria worked with "at least" two contract manufacturers in China, Samco and Smoore. (Schwartz (Altria) Tr. 1862).

Response to Proposed Finding No. 1776:

Respondents have no specific response except to note that the Chinese contract manufacturer is named "Smaco" not "Samco." (Schwartz (Altria) Tr. 1862).

1777. Altria's Schwartz testified, "We felt it was important to have a presence in our factories every day to ensure that quality was what we needed it to be, that compliance was what we needed it to be. We would audit these facilities as well, audit the suppliers. So we were -- we had a full -- full staff. We felt it was a small price to pay to ensure integrity." (Schwartz (Altria) Tr. 1860). Schwartz described that Nu Mark had 20 employees in Shenzhen, China handling "quality technicians to purchasing agents to engineers to export/import logistics folks." (Schwartz (Altria) Tr. 1859-60). Nu Mark also had an organization in Israel called NMI. (Quigley (Altria) Tr. 1938-39).

Response to Proposed Finding No. 1777:

Respondents have no specific response except to note that despite these operations in China and Israel, Altria's existing e-vapor products were commercial failures, (RFF ¶¶ 431-59, 1501-31), and it had never successfully developed an e-vapor product internally, (RFF ¶¶ 1553-611).

1778. Altria's Quigley testified that Nu Mark spent $76 million in 2018 for marketing and sales expenditures, in addition to $100 million on the ITP program. (Quigley (Altria) Tr. 1982; *see* PX9045 (Altria) at 007 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018) ("Of course, the e-vapor category continues to evolve, and leadership has changed hands numerous times over the past seven years. 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."); *see also* Huckabee (Reynolds) Tr. 391 (*in camera*) ([redacted]).

Response to Proposed Finding No. 1778:

Respondents have no specific response except to note that despite this massive investment in resources, Altria's existing e-vapor products were commercial failures, (RFF ¶¶ 431-59, 1501-31), and it had never successfully developed an e-vapor product internally, (RFF ¶¶ 1553-611).

1. The PMTA Process Is a Barrier to Entry and Expansion

1779. The PMTA process is a barrier to entry or expansion. (*See* CCFF ¶¶ 1780-802, below).

Response to Proposed Finding No. 1779:

Respondents have no specific response except to note that the PMTA process and obligations applied equally to Nu Mark and its portfolio of products, and that Altria had determined in the summer of 2018 that Nu Mark did not have any products that were likely to obtain PMTA authorization. (RFF ¶¶ 512, 521, 612-13, 636, 692, 694, 698-700, 718-23, 732-35, 741-43, 849, 861).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1780-802, Respondents incorporate their responses to those Proposed Findings herein.

1780. The PMTA process is "very expensive and time-consuming." (Garnick (Altria) Tr. 1699; *see* Schwartz (Altria) Tr. 1866; [redacted]

Response to Proposed Finding No. 1780:

Respondents have no specific response except to note that both Garnick and Schwartz were discussing the burdens of the PMTA process in the context of the barriers it placed on Nu Mark's ability to offer a competitive product. (Garnick (Altria) Tr. 1700 ("The kind of changes that were being contemplated for Elite 2.0 would clearly require a PMTA . . . ."); Schwartz (Altria) Tr. 1866 ("And so if you had not sold a product, an e-vapor product, on or before 8/8 of 2016, you could not sell a product. The only means by which you could sell a product that had not been commercialized before 8/8/16 is you would have to go the route of the PMTA, a very costly, protracted process, and ultimately with no real clear sense of when that product would be coming out the other end that you would receive a market order and could sell it. I say all that because, quite frankly, there was not a lot available for us to sell.")).

1781. "PMTAs are costly applications, and [a] startup would need access to the resources required to put together an application like that . . . ." (PX7033 (O'Hara (JLI), Dep. at 31)).

Response to Proposed Finding No. 1781:

The Proposed Finding is incomplete and misleading without additional context. The quoted statement of O'Hara was made in response to a question regarding the impact of FDA's PMTA process on the ability of "startups or small e-vapor companies to compete long term" and O'Hara made clear in the portion of his answer that Complaint Counsel omits that "there's no inherent reason why individual startups are unable to submit a PMTA." (PX7033 O'Hara (JLI) Dep. at 31).

1782. The PMTA applications are "very involved," "challenging," and present "a very high bar" for new entrants. (PX7017 (Magness (Altria), Dep. at 87-90)).

Response to Proposed Finding No. 1782:

Respondents have no specific response except to note that Magness was not referring specifically to new entrants when Complaint Counsel asked if applications were "very involved." (PX7017 Magness (Altria) Dep. at 87-89). In the same portion of her testimony, Magness agreed that even experienced manufacturers have to invest a lot to be successful in the PMTA process. (PX7017 Magness (Altria) Dep. at 90).

1783. Successful completion of the PMTA process is a requirement to introduce a new e-cigarette product to the United States. (*See* CCFF ¶¶ 197-207, above).

Response to Proposed Finding No. 1783:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 197-207, Respondents incorporate their responses to those Proposed Findings herein.

a) FDA Regulations Limit Market Entry and Expansion

(1) FDA Regulations Limit the Products That Can Be Sold on the Market

1784. A new entrant would need to acquire a product sold in the U.S. prior to August 8, 2016, to sell the product immediately, or it would need to wait to market its product until it was developed and obtained PMTA approval. (*See* CCFF ¶¶ 197-207, above).

Response to Proposed Finding No. 1784:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 197-207, Respondents incorporate their responses to those Proposed Findings herein.

1785. After September 2020, no one can introduce a new e-vapor product without PMTA approval. (Garnick (Altria) Tr. 1698-1699) ("Q. Mr. Garnick, just to follow up on that, so as of September 2020, no one can introduce a new e-vapor product without PMTA approval? A. Right. After that date, they cannot."). In discussing the September 2020 deadline, Reynolds observed, [redacted] (PX3212 (Reynolds) at 002 (*in camera*).

Response to Proposed Finding No. 1785:

Respondents have no specific response except to note that the Reynolds document cited by Complaint Counsel, including the referenced page, [redacted].

1786. [redacted] (PX3191 (NJOY) at 013, 023) (*in camera*)).

Response to Proposed Finding No. 1786:

Respondents have no specific response except to note that [redacted]

[redacted] [redacted]

[redacted]

[redacted].

1787. Danaher (JLI) said the PMTA process was "an existential threat" to JLI's business. (PX7042 (Danaher (JLI), Dep. at 132)).

Response to Proposed Finding No. 1787:

Respondents have no specific response except to note that it is precisely because obtaining PMTA approval was so critical to JLI that the regulatory services from Altria were a key component of the transaction. (RFF ¶¶ 1219-32; Pritzker (JLI) Tr. 820 ("[G]etting PMTA approval is literally existential for the company. You cannot operate without PMTA approval, and it was pending, and it was the company's view that as good a team that JUUL had put together, that Altria's team was the best in the country, and that their willingness to provide services through that team was invaluable."); *see also* Murillo (Altria/JLI) Tr. 3009).

1788. Turning Point COO said in the Q3 2020 earnings call, that "Ultimately, [the PMTA process] will consolidate the vape market and create significant barriers to entry with several of our competitors already exiting ahead of the deadline given the expense and work needed to go through this process." (PX9086 (Turning Point) at 006).

Response to Proposed Finding No. 1788:

Respondents have no specific response except to note that, in the cited document, Turning Point stated that it felt "confident with our applications" and that its "submissions covered a broad portfolio of 250 products." (PX9086 (Turning Point) at 006). Turning Point also stated its belief that the regulatory process would leave "ample products available for our sales channels." (PX9086 (Turning Point) at 007).

(2) PMTA Applications Are Costly and Time-Intensive

(a) PMTA Applications Are Intensive

1789. "The PMTA process requires substantial time and resources. Indeed, proof of this is found in RAI's extensive efforts to complete and submit its PMTAs, which generally included the following steps: develop research and application plans for its ENDS portfolio; conduct, or contract with third parties to conduct, the research; monitor and evaluate the research results; prepare extensive narratives regarding the research results; and draft and finalize the PMTAs. . . . . And the resources required to satisfy these standards include the use of certified laboratories, rigorous safeguards to provide for well-controlled investigations (those that are designed and conducted in such a way that minimizes or controls for bias, confounding variables, and other factors that may render the results unreliable), as well as extensive review of available scientific literature." (PX8009 at 014 (¶ 43) (Garner (Reynolds), Decl.); *see also* PX8005 at 004 (¶¶ 20, 23) (Graham (NJOY), Decl.)).

Response to Proposed Finding No. 1789:

Respondents have no specific response except to note that the referenced time and resources requirements apply equally to Altria and that the burdens of the PMTA process made Altria's regulatory services to JLI valuable. (RFF ¶¶ 1219-32).

1790. Studies submitted with PMTAs per FDA guidance can take from six months to three (3) years to complete. (Garnick (Altria) Tr. 1661 ("it takes the FDA a long time to review a PMTA for an e-vapor product . . . . I know that some of the studies, before you can even file a PMTA, can take months and months. And then I know that before you can even begin those studies, you need to have a prototype that you know you can mass-produce."); PX8009 at 015 (¶ 45) (Garner (Reynolds), Decl.) ("[B]ased on my understanding, the studies that we believe are expected to be submitted in a PMTA pursuant to FDA guidance can take from one (1) year to three (3) years to complete, which includes planning, protocol development, securing a contract laboratory to perform work, sample generation, testing conducted by the laboratory, data evaluation, and generation of the final reports."); PX8005 at 005 (¶ 28) (Graham (NJOY), Decl.) (describing product studies can take 6-12 months or longer); (PX8002 at 003 (¶ 13) (Cushman (Turning Point), Decl.) ("It is almost impossible for us to complete all of the necessary testing in 12 months [to meet PMTA deadlines].")).

Response to Proposed Finding No. 1790:

Respondents have no specific response except to note that the referenced time and resources requirements apply equally to Altria and that the burdens of the PMTA process made Altria's regulatory services to JLI valuable. (RFF ¶¶ 1219-32). In fact, in the cited portion of

Garnick's transcript he is describing how it would have taken Altria's Growth Teams five to ten years to develop a product and obtain PMTA approval. (Garnick (Altria) Tr. 1660-62).

1791. PMTA applications for new products take 18 months to 3 years to complete. (Schwartz (Altria) Tr. 2038 ("And I think from what I can recall, it was, you know, in essence minimum of two years to get a new product PMTA together . . ."); PX7016 (Jupe (Altria), Dep. at 341) ("You then go into your commercial phase and write all your specifications. Once you've defined the product lock, as we call it, then you go into your science gathering phase, which is generating the science evidence that the Food and Drug Administration requires for a PMTA application. That process, on the data gathering, is at least a year, if not closer to two, depending on the complexity of the project."); PX8005 at 005 (¶ 28) (Graham (NJOY), Decl.); PX7022 (Begley (Altria), Dep. at 121)) (Begley said it took Altria about 18 months to prepare a "compelling" PMTA application); PX8009 at 018 (¶ 57) (Garner (Reynolds), Decl.) (noting that [redacted]) (*in camera*)); PX8010 at 002 (¶ 8) (Folmar (ITG), Decl.) ("[I]t would take at least 18 months to 2 years to prepare a PMTA for a new product.")).

Response to Proposed Finding No. 1791:

Respondents have no specific response except to note that the Proposed Finding erroneously attributes the first citation to the testimony of Schwartz. It was actually the testimony of Quigley. (Quigley (Altria) Tr. 2038). Moreover, the referenced time estimates apply equally to Altria and support the idea that any future products from the Growth Teams were five to ten years away. (RFF ¶¶ 1608-09).

1792. PMTAs require numerous scientific tests, and labs capable of performing these tests are limited. (PX7017 (Magness (Altria), Dep. at 72-76); PX8009 at 009-011, 015 (¶¶ 30-35, 44) Garner (Reynolds), Decl.)); (PX8002 at 002-003 (¶¶ 10-11) (Cushman (Turning Point), Decl.); PX8005 at 004 (¶ 26) (Graham (NJOY), Decl.)).

Response to Proposed Finding No. 1792:

Respondents have no specific response except to note that the limited available laboratory resources made Altria's regulatory support more valuable to JLI. (RFF ¶¶ 1225, 1278-83; Murillo (Altria/JLI) Tr. 2975 ("A lot of these folks, for example, had developed the methods in chemistry, right? So it's one thing to hire a lab, but some of the folks on the chemistry group [at Altria] had invented any number of methods to actually assess products.")). Moreover, the referenced PMTA

requirements apply equally to Altria and support the idea that any future products from the Growth Teams were five to ten years away. (RFF ¶¶ 1608-09).

1793. "PMTAs are very involved and one cannot underestimate the depth of information FDA wants." (PX1785 (Altria) at 001 (Sept. 8, 2018 email from Paige Magness)).

Response to Proposed Finding No. 1793:

Respondents have no specific response except to note that the referenced burdens apply equally to Altria and that the burdens of the PMTA process made Altria's regulatory services to JLI valuable. (RFF ¶¶ 1219-32).

(b) PMTA Applications Are Costly

1794. [redacted] (PX8009 at 016-17 (¶ 50) (Garner (Reynolds), Decl.) (*in camera*)).

Response to Proposed Finding No. 1794:

Respondents have no specific response.

1795. Altria estimates PMTA costs of $131 million to $154 million for Elite 1.0, Elite 2.0, Project Hudson, MarkTen Bold, and MarkTen Bold flavors. (PX1400 (Altria) at 005-011 (May, 30, 2018 E-Vapor Product One Pagers); *see also* PX7015 (Gogova (Altria), Dep. at 65) (third-party spending on a PMTA application "depends on the number of products filed within the same PMTA – it can be anywhere between 10 to 30, 40 millions [sic] easily"); *see also* PX4505 (Altria) at 005 (July 19, 2018 Vapor Products To Assess)).

Response to Proposed Finding No. 1795:

The Proposed Finding is inaccurate. The referenced Altria "One Pagers" estimate PMTA costs of $174 million to $197 million for the listed products rather than the $131 million to $154 million identified by Complaint Counsel. (PX1400 (Altria) at 005-011). In addition, the cited page of PX4505 and the page bearing the title listed in the parenthetical do not reference specific

costs associated with PMTAs and, therefore, do not support the Proposed Finding. (PX4505 (Altria) at 004-05).

1796. [redacted] (PX7027 (Murillo (Altria/JLI), Dep. at 73-74) (*in camera*)); PX7007 (Murillo (JLI), IHT at 095) (noting that in 2019 alone, JLI had over 100 employees working on PMTA applications)).

Response to Proposed Finding No. 1796:

Respondents have no specific response except to note that JLI expended significant resources because obtaining PMTA approval was and remains critical to JLI's operations, which, in turn, made Altria's regulatory services valuable. (RFF ¶¶ 1219-32; Pritzker (JLI) Tr. 820 ("[G]etting PMTA approval is literally existential for the company. You cannot operate without PMTA approval, and it was pending, and it was the company's view that as good a team that JUUL had put together, that Altria's team was the best in the country, and that their willingness to provide services through that team was invaluable."); *see also* Murillo (Altria/JLI) Tr. 3009).

1797. NJOY believes that JUUL "expected to spend more than $125 million by the end of 2019 on its PMTA effort." (PX8005 at 004 (¶ 20) (Graham (NJOY), Decl.)).

Response to Proposed Finding No. 1797:

Respondents have no specific response.

1798. Turning Point's "PMTA cost estimate for the bare minimum of products we need to remain viable could be up to $20 million over the next two years. We do not know the final cost for the application because the requirements and timeline are constantly shifting." (PX8002 at 004 (¶ 18) (Cushman (Turning Point), Decl.); *see also* PX9086 at 006) (Turning Point Brands 2020Q3 Earnings Call)).

Response to Proposed Finding No. 1798:

Respondents have no specific response.

1799. [redacted] (PX8010 at 002 (¶ 7) (Folmar (ITG), Decl.) (*in camera*)).

Response to Proposed Finding No. 1799:

Respondents have no specific response.

1800. "The two biggest challenges facing an ENDS manufacturer in the PMTA process are time and resources. A PMTA is a very substantial undertaking, likely to cost at least tens of millions of dollars." (PX8005 at 004 (¶ 20) (Graham (NJOY), Decl.)).

Response to Proposed Finding No. 1800:

Respondents have no specific response except to note that the burdens described applied equally to Altria.

1801. Magness (Altria) believed that small or inexperienced players would struggle with the FDA pathway and would need to invest a lot. (PX7017 (Magness (Altria), Dep. at 89-91) ("Q. Would you say that PMTA is a significant hurtle [sic] in entering the e-vapor space? A. It is a very high bar, yes. Q. Are you convinced that small or inexperienced players would struggle with the PMTA pathway? A. Yes, I am. … Q. Why is that? A. Because of the scope of the resources it requires. You know, it requires significant investment. It also requires, to our learning, it requires a really integrated perspective. So a small player would need to have the right set of disciplines giving them advice and in an integrative way. That's a big investment. Q. It's your understanding that even experienced manufacturers have to invest a lot to be successful in the PMTA process? A. Absolutely.); PX1785 (Altria) at 001-02) (Sept. 8, 2018 email from Paige Magness)).

Response to Proposed Finding No. 1801:

Respondents have no specific response except to note that smaller companies may take steps to reduce the burden of a PMTA submission. (RFF ¶ 96; Murillo (Altria/JLI) Tr. 3019). In any event, before the September 2020 deadline, FDA received at least a half million PMTAs for e-vapor products. (RFF ¶ 126; Murillo (Altria/JLI) Tr. 2932).

1802. Graham (NJOY) said that "many small ENDS manufacturers lack this level of capital to devote to a PMTA and/or the regulatory experience to oversee the production of a PMTA that is ultimately likely to be favorably acted upon by the FDA." (PX8005 at 004 (¶ 20) (Graham (NJOY), Decl.)).

Response to Proposed Finding No. 1802:

Respondents have no specific response except to note that smaller companies may take steps to reduce the burden of a PMTA submission. (RFF ¶ 96; Murillo (Altria/JLI) Tr. 3019). In

any event, before the September 2020 deadline, FDA received at least a half million PMTAs for e-vapor products. (RFF ¶ 126; Murillo (Altria/JLI) Tr. 2932).

b) Open Systems and Smaller E-Cigarette Competitors Are Especially Likely to Have Difficulty Navigating the PMTA Process

1803. Begley testified that he continues to believe that open system products "will be challenged" to get PMTA approval because the FDA looks at product performance and whether a product performs consistently, and the "consumer's ability to continue to change" open-systems will make it "hard" for the FDA to assess open system product performance, e.g., open systems devices have "a wide range of settings" that users can change to use a variety of different e-liquids from "hundreds of open system e-vapor or e-liquid manufacturers," and users can buy "certain coils . . . to customize the [open tank] device." (PX7022 (Begley (Altria), Dep. at 135-37); *see* PX7020 (King (PMI), Dep. at 105-07) [redacted]

Response to Proposed Finding No. 1803:

Respondents have no specific response except to note that before the September 2020 deadline, FDA received at least a half million PMTAs for e-vapor products. (RFF ¶ 126; Murillo (Altria/JLI) Tr. 2932).

1804. Open tank systems are "likely to face some regulatory hurdles" because they have the "potential to be tampered with or misused, and the use of interchangeable elements can vary device performance and vapor chemistry in unknown ways." (PX9000 (Altria) at 019 (Nov. 2017 Investor Day remarks)).

Response to Proposed Finding No. 1804:

The Proposed Finding is incomplete and misleading without additional context. In the Investor Day remarks, while Begley made the statement cited by Complaint Counsel, he also stated that "open systems represent a large e-vapor segment and an excellent learning opportunity" and gave as an example Avail Vapor, LLC, which he noted "manufactures its own liquids in a state-of-the-art ISO-certified clean room. It also has a full-service analytical science laboratory to support regulatory compliance." (PX9000 (Altria) at 019).

2. Access to Shelf Space Is a Barrier to Entry and Expansion

1805. Dr. Rothman concluded that because advertising of nicotine products is restricted in the US, shelf space is an important way for e-cigarette suppliers to reach consumers. (PX7048 (Rothman, Trial Dep. at 013); *see also* CCFF ¶ 1818, below); PX7004 (Willard (Altria), IHT at 31-33 ("I think over the last many years, I think, given the harm caused by tobacco products, there has been a series of rules that have been created that limit the advertising vehicles that tobacco companies can use to reach consumers. . . . Q. Mr. Willard, is the restriction on sort of the mass media advertising, is that one reason why shelf space is so important? A. Yeah, I would say that shelf space is a more important vehicle because of the restrictions around some of the other communication vehicles."); PX7005 (Danaher (JLI), IHT at 137-38) ("[W]e believe that we need to be placed where cigarettes are available […] [M]ost cigarette smokers are used to their weekly or maybe even daily habit of going into their local convenience store, their local place where they purchase their tobacco . . ."); PX7025 (Burns (JLI), Dep. at 28) ("[A]mount of shelf space and location of that shelf space was perceived to be important."); PX7022 (Begley (Altria), Dep. at 215)).

Response to Proposed Finding No. 1805:

The Proposed Finding is incomplete and misleading without additional context. *First*, the record is clear that products do not necessarily require premium shelf space in order to succeed, as shelf space is just one tool to market and promote e-vapor products. (RFF ¶¶ 415, 1661; Huckabee (Reynolds) Tr. 474). For example, "[JLI] was able to grow [its] brand, particularly regionally, early on without national shelf space," (Huckabee (Reynolds) Tr. 474), as was JTI's Logic product, (PX7037 Huckabee (Reynolds) Dep. at 115; *see also* PX7009 Burns (JLI) IHT at 191-92 (noting JUUL went from "less than 1 percent of the combined cigarette/e-cig market to 7 to 8 percent, and [it was] doing that with less than optimal space")). And retailers are incentivized to give growing products premium shelf space. (RFF ¶ 1663; PX7009 Burns (JLI) IHT at 77-78 (explaining that "if you have increasing consumer demand, retailers are going to make space available to buy the product")).

Second, shelf space visibility alone is not sufficient to make a product successful. (RFF ¶¶ 420, 431, 440-41, 457; Begley (Altria) Tr. 1114 ("[I]f you don't have a product that consumers like, it doesn't really matter how visible it is."); *see also* [redacted]

[redacted]). For example, Nu Mark's products failed notwithstanding access to premium shelf space. (RFF ¶¶ 431-59).

Third, when Altria withdrew its products, it freed up shelf space for other manufacturers. (RFF ¶¶ 1366, 1653-54, 1657). JLI's immediate reaction is telling in this regard: One employee commented, "[l]ots of great back bar space is going to be up for grabs. We are moving quickly on the chains to make sure we get that." (PX2272 (JLI) at 001). Robbins, JLI's Chief Growth Officer, responded: "Exactly right… thanks for sharing! Opportunity for us to gain some of that empty space." (PX2272 (JLI) at 001 (ellipsis in original)). Professor Murphy explained these market dynamics and the benefits for consumer choice at trial. (RFF ¶¶ 1658-59; Murphy Tr. 3130, 3134 ("[O]ne of the things that happens when a firm leaves the market is resources are re-allocated to other uses and often re-allocated within the same marketplace. . . . [W]hen products leave, particularly unsuccessful products, they typically will be replaced. And in this case, it looks like they were.")). Professor Murphy stated that the biggest winners of Altria's withdrawal were "the people that got on the shelf, the people who moved onto the bottom of the shelf. That is, the people who made it onto the shelf who wouldn't have been there before . . . ." (Murphy Tr. 3139-40).

Retailers were pleased with this outcome as it created opportunities for more attractive products. (RFF ¶¶ 1022, 1100, 1366). And post-transaction, competition for shelf space has remained vigorous. (RFF ¶¶ 1340-41; PX8006 Kloss (Wawa) Decl. at 003-05 ¶¶ 13-15, 22 (explaining category leadership has been dynamic, manufacturers have increased promotional activity, the market for shelf space remains competitive, and NJOY is now a leading supplier in Wawa, alongside JUUL); *see also* [redacted].

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 1818, Respondents incorporate their response to that Proposed Finding herein.

1806. Closed-system e-cigarettes are typically sold in convenience stores. (*See* CCFF ¶¶ 368-78, above).

Response to Proposed Finding No. 1806:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 368-78, Respondents incorporate their responses to those Proposed Findings herein.

1807. [redacted] (*in camera*); Myers (Altria) Tr. 3355; PX7003 (Quigley (Altria), IHT at 49-50) ("[R]etailers have . . . metal racks, we call them fixtures, and that's where you store the product and where you merchandise the price and you hang a piece of signage."); PX7009 (Burns (JLI), IHT at 191) ("[T]he header is not shelf space, but it's actually where you put your brand logo up above . . .")).

Response to Proposed Finding No. 1807:

Respondents have no specific response.

1808. Higher placement of the header on the fixture is "best visible space in a store." (PX7003 (Quigley (Altria), IHT at 53); PX7038 (Myers (Altria), Dep. at 198) ("Q. Can you explain what it means to be the number one position at the top of the fixture? A. It varies by account what we consider number one, but in this case, in their stores, based on their category size, we choose where we would like to have our products located and where the signage would go for them. In this case, it's at the top of the fixture . . . . we had signage in a position that it could be easily seen, so that the trial offers could be communicated, communicate price, those reasons.")).

Response to Proposed Finding No. 1808:

The Proposed Finding is incomplete and misleading without additional context. The record is clear that products do not necessarily require premium shelf space in order to succeed, as shelf space is just one tool to market and promote e-vapor products. (RFF ¶¶ 415, 1661). In addition, retailers are incentivized to give growing products premium shelf space. (RFF ¶ 1663). [redacted]

[redacted]

Moreover, shelf space visibility alone is not sufficient to make a product successful. (RFF ¶¶ 420, 431, 440-41, 457; Begley (Altria) Tr. 1114 ("[I]f you don't have a product that consumers like, it doesn't really matter how visible it is."); *see also* [redacted]). For example, Nu Mark's products failed notwithstanding access to premium shelf space. (RFF ¶¶ 431-59).

1809. "Convenience stores typically display tobacco products on dedicated shelves behind the cash register, also referred to as the fixture or the back bar." (PX8011 at 003 (¶ 13) (Eldridge (ITG), Decl.); Farrell (NJOY) Tr. 252-53 ("all e-cigarette products and tobacco products in general, they are sold either behind the counter, on shelving fixtures, or in restricted access counter displays that are on the counter that customers approach. . . . Q. And the shelves behind the counter you referred to, are those also known by the term "back bar"? A. Yes."); PX7044 (Stout (7-Eleven), Dep. at 43); PX7004 (Willard (Altria), IHT at 23-24)).

Response to Proposed Finding No. 1809:

Respondents have no specific response.

1810. Shelving units where e-cigarettes are placed can be called "innovative tobacco sets" or "ITP fixtures" or other tobacco product fixtures ("OTP fixtures"). (PX7029 (Farrell (NJOY), Dep. at 169)).

Response to Proposed Finding No. 1810:

Respondents have no specific response.

1811. Shelf space in convenience stores in an important marketing tool for e-cigarettes. (King (PMI) Tr. 2362-63 (". . . [T]he majority of all nicotine products are sold through convenience stores in the U.S. . . . [T]he convenience store universe is the biggest source for e-cigarettes . . . . [G]etting distribution and being able to put it on the shelves can greatly facilitate the success of a product. I mean, obviously you have to have consumers know that the product is there, and so having the visibility and the ability to put it on the shelves is one aspect that would enhance success in any commercialization of e-cigarette or otherwise."); Begley (Altria) Tr. 1007 (*in camera*); PX7016 (Jupe (Altria), Dep. at 118-19) (testifying that "I do believe it's common sense to say, if your brand is not on the shelf, it doesn't do very well for you, right?"); PX7025 (Burns (JLI), Dep. at 28-30); PX1618 (Altria) 001-05 (Nu Mark Retail Offer); PX8008 at 024 (¶ 46) (Huckabee (Reynolds), Decl.); PX8003 at 004 (¶ 24) (Wexler (Turning Point), Decl.)).

Response to Proposed Finding No. 1811:

The Proposed Finding is incomplete and misleading without additional context. The record is clear that products do not necessarily require premium shelf space in order to succeed, as shelf space is just one tool to market and promote e-vapor products. (RFF ¶¶ 415, 1661). In the paragraph of his declaration cited by Complaint Counsel, Huckabee stated that sellers have "certain other communications channels through which they can create awareness and promote brands," and that "[c]ertain ENDS brands in particular have demonstrated the ability to grow even with limited shelf space and point of sales materials." (PX8008 Huckabee (Reynolds) Decl. at 024 ¶ 46). In addition, retailers are incentivized to give growing products premium shelf space. (RFF ¶ 1663). [redacted]

Moreover, shelf space visibility alone is not sufficient to make a product successful. (RFF ¶¶ 420, 431, 440-41, 457; Begley (Altria) Tr. 1114 ("[I]f you don't have a product that consumers like, it doesn't really matter how visible it is."); *see also* [redacted]). For example, Nu Mark's products failed notwithstanding access to premium shelf space. (RFF ¶¶ 431-59).

1812. [redacted] (Farrell (NJOY) Tr. 254-56, 273, 319 (*in camera*); Huckabee (Reynolds) Tr. 392 ("[T]he brand would have the primary positioning in a convenience store, significant square footage, and typically the -- the top of a fixture in an outlet."); PX7025 (Burns (JLI), Dep. at 76-78 ("Depending on the store format, there's a perception that . . . there is certain shelf space that is going to be more attractive based on how consumers look at the shelf. For example, if you're at eye level looking behind the cashier, that's where your eyes would focus. If you're on the bottom level behind the cashier, in fact, from the counter, you might not even be able to see your product if it's in the bottom shelving section of the shelf."); *see also* PX7022 (Begley (Altria), Dep. at 214-16); Begley (Altria) Tr. 1007) (*in camera*)).

Response to Proposed Finding No. 1812:

The Proposed Finding is incomplete and misleading without additional context. *First*, the record is clear that products do not necessarily require premium shelf space in order to succeed, as shelf space is just one tool to market and promote e-vapor products. (RFF ¶¶ 415, 1661). The finding cites to Begley, but he explained that "[a]nd even though JUUL didn't have, you know, the visibility that we enjoyed in these stores, they somehow found a way, because of the quality of their product, to do very well." (PX7022 Begley (Altria) Dep. at 215-16). In addition, retailers are incentivized to give growing products premium shelf space. (RFF ¶ 1663). [redacted]

Second, shelf space visibility alone is not sufficient to make a product successful. (RFF ¶¶ 420, 431, 440-41, 457; Begley (Altria) Tr. 1114 ("[I]f you don't have a product that consumers like, it doesn't really matter how visible it is."); *see also* [redacted]).

For example, Nu Mark's products failed notwithstanding access to premium shelf space. (RFF ¶¶ 431-59).

1813. [redacted] (Farrell (NJOY) Tr. 265-270, 273 (*in camera*); Crozier (Sheetz) Tr. 1507 (*in camera*); PX1618

(Altria) at 005, 009) ([redacted]) (*in camera*); *see also* Begley (Altria) Tr. 1006-07) (*in camera*)).

Response to Proposed Finding No. 1813:

Respondents have no specific response except to note that the payment of slotting fees to obtain shelf space positioning is not sufficient to make a product competitive. (RFF ¶¶ 418-20, 431, 440-41, 457).

1814. Altria offered retailers the opportunity to join its "ITP" (Innovative Tobacco Product) program. (Schwartz (Altria) Tr. 1951; PX7013 (Brace (Altria), Dep. at 81-82)). As part of the program, retailers would agree to Nu Mark receiving dedicated retail space and Altria would fund the new shelf space. (PX7009 (Burns (JLI), IHT 036-37); PX7003 (Quigley (Altria), IHT at 50-51); PX8001 at 003 (¶ 15) (Stout (7-Eleven), Decl.) (*in camera*)). Altria advertised the ITP program to retailers with a three-year commitment. (PX4304 (Altria) 001-53)). [redacted] (Begley (Altria) Tr. 1006-07) (*in camera*); Quigley (Altria) Tr. 1982).

Response to Proposed Finding No. 1814:

Respondents have no specific response except to note that the payment of slotting fees to obtain shelf space positioning is not sufficient to make a product competitive. (RFF ¶¶ 418-20, 431, 440-41, 457). Also, Complaint Counsel erroneously attributed the first citation to the testimony of Schwartz. It was actually the testimony of Quigley. (Quigley (Altria) Tr. 1951).

1815. Altria had access to premier shelf space. (Farrell (NJOY) Tr. 275-276 ([redacted] (*in camera*)); Crozier (Sheetz) Tr. 1507 ([redacted] (*in camera*)); PX7029 (Farrell (NJOY), Dep. at 127-28); PX7029 (Farrell (NJOY), Dep. at 167-70); PX2010 (JLI) at 004 ("Altria's premier retail shelf space. That space is allocated on multi-year exclusive contracts which Altria — and other tobacco companies — own. There is no substitute for this premium placement — particularly as we work to broaden the reach of our products nationwide.") (Talking Points for Analyst Call, Dec. 20, 2018)); PX8006 at 004 (¶¶ 16-17) (Kloss (Wawa), Decl.) ([redacted]

[redacted]) (*in camera*); *see also* PX7004 (Willard (Altria), IHT at 023 ("And given the strength of some of our brands, we typically get quite good display space.")).

Response to Proposed Finding No. 1815:

Respondents have no specific response except to note that Nu Mark's products failed notwithstanding access to "premier shelf space." (RFF ¶¶ 431-59). Indeed, in the context of discussing Altria's ITP program, Begley stated that "[w]e certainly didn't get what we were hoping for in terms of performance of Elite in stores." (PX7022 Begley (Altria) Dep. at 216-17).

1816. [redacted] (Farrell (NJOY) Tr. 272-73, 276 (*in camera*); PX8003 at 005 ((¶ 028) (Wexler (Turning Point), Decl.) ("[W]e do face an uphill battle in this channel"); PX7029 (Farrell (NJOY), Dep. at 127-28, 167-69); PX8004 at 005 (¶ 26) (Farrell (NJOY), Decl.)).

Response to Proposed Finding No. 1816:

The Proposed Finding is incomplete and misleading without additional context. The record is clear that products do not necessarily require premium shelf space in order to succeed, as shelf space is just one tool to market and promote e-vapor products. (RFF ¶¶ 415, 1661). In addition, retailers are incentivized to give growing products premium shelf space. (RFF ¶ 1663). [redacted] Moreover, when Altria withdrew its products, it freed up shelf space for other manufacturers. (RFF ¶¶ 1366, 1653-54, 1657).

Notwithstanding the fact that it does not make cigarettes, NJOY has enjoyed market success, including outperforming e-vapor companies that also make cigarettes. For example, by September 2019, NJOY had captured 22.7 percent of total volume share. (RFF ¶ 1292).

1817. Tobacco companies benefit in e-cigarettes due to brand awareness. (PX7004 (Willard (Altria), IHT at 023) ("And given the strength of some of our brands, we typically get quite good display space."); PX7004 (Willard (Altria) IHT at 24, 26-27); PX8003 at 005 (¶¶ 28-29) (Wexler (Turning Point), Decl.)).

Response to Proposed Finding No. 1817:

The Proposed Finding is inaccurate. JUUL became the leading e-vapor brand even though JLI did not make any other tobacco product. (RFF ¶¶ 208-10). Similarly, notwithstanding the fact that it does not sell cigarettes, NJOY has enjoyed market success, including outperforming e-vapor companies that also make cigarettes. For example, by September 2019, NJOY had captured 22.7 percent of total volume share. (RFF ¶ 1292). By contrast, although Altria's operating companies include Philip Morris USA, "the largest cigarette company in the United States and the owner of numerous leading cigarette brands," (RFF ¶ 129), Nu Mark's Elite never achieved more than a 0.9 percent share of closed-system cartridge sales, (RFF ¶ 1467).

3. Advertising Restrictions Are a Barrier to Entry and Expansion

1818. "[R]ules that have been created that limit the advertising vehicles that tobacco companies can use to reach consumer . . . . the focus has been to restrict the use of mass communication vehicles that would reach significantly more than probably the 15 percent of adult consumers that use cigarettes. . . ." (PX7004 (Willard (Altria), IHT at 31-33); PX2233 (JLI) at 004 (Juul Employee Letter, Sept. 22, 2019) ("In this industry mass marketing is not a responsible option . . ."); PX7014 (Baculis (Altria), Dep. at 64)).

Response to Proposed Finding No. 1818:

Respondents have no specific response except to note that manufacturers have a variety of tools available to market and promote e-vapor products. (RFF ¶¶ 415, 1661). In the cited portion of her deposition, Baculis stated that "there's really a number of ways that you can [drive brand awareness]. It's all about being where the consumer is and having them see your brand when they're interested in listening. So you can do it with print . . . you can do it with radio, social media, direct mail, retail visibility." (PX7014 Baculis (Altria) Dep. at 64).

4. Retail Contracts Are Barriers to Entry and Expansion

1819. [redacted] (Begley (Altria) Tr. 1006-07 (*in camera*); Farrell (NJOY) Tr. 273, 275 ([redacted] (*in camera*); PX8000 at 004 at (¶ 22) (Crozier

(Sheetz), Decl.) (*in camera*); PX7029 (Farrell (NJOY), Dep. at 127-28); PX8008 at 020 (¶ 40) (Huckabee (Reynolds), Decl.)).

Response to Proposed Finding No. 1819:

The Proposed Finding is incomplete and misleading without additional context. The record is clear that products do not necessarily require premium shelf space in order to succeed, as shelf space is just one tool to market and promote e-vapor products. (RFF ¶¶ 415, 1661). In the cited portion of his deposition, Farrell agreed that in-store signage helped promote greater awareness of NJOY's product and increased sales. (PX7029 Farrell (NJOY) Dep. at 127). In addition, retailers are incentivized to give growing products premium shelf space. (RFF ¶ 1663). [redacted]

1820. [redacted]. (Farrell (NJOY) Tr. 265-73, 275 (*in camera*); PX7012 (Eldridge (ITG), Dep. at 199-200 (*in camera*)); PX2001 (JLI) at 001 (email discussing Altria's 3 year contracts for shelf space); PX2010 (JLI) at 004 (Talking Points for Analyst Call, Dec. 20, 2018) ("That space is allocated on multi-year exclusive contracts which Altria — and other tobacco companies — own.")).

Response to Proposed Finding No. 1820:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Though Altria's ITP program contracts with retailers were for three-year terms, retailers always had the ability to terminate their ITP program participation at will. [redacted] As Gifford testified in his IH deposition, "it's ultimately the retailer's decision what they display there. If we paid for the spot and we said we are going to put this type of product in and then we come back and put another type of product, the retailer has the right to cancel that contract," "at any time." (PX7010 Gifford (Altria) IHT at 77, 80-81).

Indeed, the evidence shows that at least one retailer did terminate its ITP participation: According to Kloss of Wawa, when Altria and JLI amended their Services Agreement, Altria asked Wawa to stop displaying JUUL products on its shelves and instead display On! pouches. (PX8006 Kloss (Wawa) Decl. at 005 ¶ 21). Instead of acceding to Altria's request, "Wawa reached out to the leading tobacco companies to renegotiate the allocation of space" at Wawa, and now will be putting Reynolds' Vuse products in the top display position. (PX8006 Kloss (Wawa) Decl. at 005 ¶ 22).

1821. Cigarette companies are able to negotiate top shelf space for e-cigarettes by offering promotions or rebates on cigarettes. (PX7033 (O'Hara (JLI), Dep. at 130-32; PX7012 (Eldridge (ITG), Dep. at 185-87); PX2051 (JLI) at 024 (McKinsey & Company Core Team Working Session) ("Big tobacco retail incentive programs are structured to communicate to consumers via shelf space arrangement and pricing consistency."); PX2000 (JLI) at 001 (Cover Email for Primer on Altria/RAI's Promo Plans)); PX8006 at 004 (¶ 17) (Kloss (Wawa), Decl.) (*in camera*); [redacted], Decl.); PX8004 at 003 (¶ 14) (Farrell (NJOY), Decl.); *see also* PX8008 at 023 (¶ 45) (Huckabee (Reynolds,), Decl.); PX2455 (JLI) at 001 (July 10, 2018 Email on Competitive Intel.); PX2108 (JLI) at 001 (Apr. 27, 2017 Email on Altria/RGRT Vapor Contracts)).

Response to Proposed Finding No. 1821:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In the cited section of O'Hara's deposition, while explaining the "low door count for MarkTen Elite," O'Hara said that Altria had separate contracts with retailers for combustible cigarette products and for e-cigarette products. (PX7033 O'Hara (JLI) Dep. at 133-134). Likewise, the cited McKinsey document makes clear that the referenced "retail incentive programs" relate to cigarettes and that "Altria negotiates for shelf space as 4 operating companies (cigarettes, cigars, smokeless, vapor), with no contingencies across categories . . . ." (PX2051 (JLI) at 024; *see also* PX7004 Willard (Altria) IHT at 27-28 ("The contracts are between a specific business at Altria and the retail store. So the contracts typically apply to one category. . . . [A]s a

matter of fact, in every case I'm aware of, they really focus on individual contracts within their category.")).

1822. "Combustible products are a large foot traffic driver with convenience retailers . . ." (PX7033 (O'Hara (JLI), Dep. at 131-32); King (PMI) Tr. 2363 ("[T]he majority of all nicotine products are sold through convenience stores in the U.S."); *see also* PX7004 (Willard (Altria), IHT at 26-27)).

Response to Proposed Finding No. 1822:

Respondents have no specific response.

B. PRE-EXISTING COMPETITION FROM OTHER E-CIGARETTE RIVALS HAS NOT REPLACED THE COMPETITION LOST DUE TO ALTRIA'S EXIT

1823. Altria's and JLI's pre-existing competitors have not replaced the competition that was lost when Altria exited the market because Altria was well situated to compete in e-cigarettes, and Altria's exit did not prompt more aggressive competition on the part of competitors. (*See* CCFF ¶¶ 1830-41, below).

Response to Proposed Finding No. 1823:

The Proposed Finding is inaccurate. *First*, the record shows that Altria's products did not constrain price. (RFF ¶¶ 1639-46). In addition, there is no evidence that innovation competition has decreased following Altria's exit. (RFF ¶¶ 1647-50). As discussed above, competition for shelf space increased after Altria's e-cigarette products were pulled from the market. (RFF ¶¶ 1651-64). And not surprisingly, given the poor performance of Nu Mark's e-vapor products, retailers were not disappointed when the products were withdrawn. (RFF ¶¶ 1099-100).

Second, the record evidence shows that the e-cigarette marketplace is intensely competitive, and since the transaction closed, prices have decreased, output has increased, and JLI has lost share to rivals, reducing concentration. (RFF ¶¶ 237-39, 1284-329, 1338-76). This post-transaction evidence is highly relevant to assessing competition. (RFF ¶¶ 1377-82). As a result, expansion by competitor firms has been more than sufficient to offset any alleged harm. (RFF ¶¶ 1709-16).

Finally, to the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1830-41, Respondents incorporate their responses to those Proposed Findings herein.

1824. At the time of the transaction, Altria's products were among the lowest priced e-cigarette products on the market. (*See* CCFF ¶¶ 1419-38, above). For example, when Altria launched its MarkTen Elite product, it significantly discounted Elite below JUUL. (*See* CCFF ¶¶ 1423-33, above; PX2175 (JLI) at 018 (comparing prices of JUUL, *my*blu, and MarkTen Elite)). After the transaction, consumers lost the price competition that Altria offered. (*See* CCFF ¶¶ 1532-37, above).

Response to Proposed Finding No. 1824:

The Proposed Finding is incomplete and misleading without additional context. While Altria heavily promoted Nu Mark's e-cigarettes, (RFF ¶¶ 407-30), the cited evidence provides no support for the suggestion that the promotions were run specifically to compete with JLI as opposed to e-vapor manufacturers more generally. The cited JLI document is a report by Citi that provides no insight on Altria's rationale. (PX2175 (JLI) at 018). Moreover, these promotions did not lead to any reaction on JLI's part, (RFF ¶¶ 1640-45), or to commercial success for Altria, (RFF ¶¶ 431-59). As noted, contrary to Complaint Counsel's assertion, the record shows that Altria's products did not constrain price. (RFF ¶¶ 1639-46). And Michael Brace, who served as Nu Mark's General Manager, testified that Altria's "discounting . . . was not financially sustainable." (PX7013 Brace (Altria) Dep. at 11, 84).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1419-38, 1423-33, and 1532-37, Respondents incorporate their responses to those Proposed Findings herein.

1. Reynolds, JTI, ITG, and NJOY Competed in the E-Cigarette Market Prior to Altria's Exit

1825. E-cigarette companies, including Reynolds, JTI, ITG, and NJOY, competed in the marketplace for years prior to Altria's exit. (PX4040 (Altria) at 015 ("Nu Mark 2016-2018 Strategic Plan") (listing fiscal year 2015 volume share of e-vapor market and including competing products Vuse (Reynolds), Blu (ITG), Logic (JTI), and NJOY, among others); *see also* CCFF ¶¶ 1737-48, above (describing market shares for several vapor competitors prior to Altria's exit)).

Response to Proposed Finding No. 1825:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1737-48, Respondents incorporate their responses to those Proposed Findings herein.

1826. Reynolds has four closed-system vapor products on the market, all sold under the brand name Vuse. (Huckabee (Reynolds) Tr. 377, 384). [redacted] (PX8008 at 007-10 (¶ 18) (Huckabee (Reynolds), Decl.)) (*in camera*). Prior to December 2018, and prior to Altria's exit, when setting prices for its Vuse closed-system products, Reynolds considered JUUL, MarkTen, NJOY, Logic, [redacted] to be its competitors. (Huckabee (Reynolds) Tr. 390, 408 (*in camera*)).

Response to Proposed Finding No. 1826:

Respondents have no specific response except to note that [redacted]

1827. Logic is a closed-system brand of e-cigarettes sold by JTI. (Begley (Altria) Tr. 977). Logic competed in the e-cigarette market at least by 2016. (Crozier (Sheetz) Tr. 1485-86 (when Crozier became category manager in 2016, Sheetz carried the Logic brand of e-cigarettes)).

Response to Proposed Finding No. 1827:

Respondents have no specific response.

1828. The Imperial Tobacco Group or ITG sells multiple closed-system e-vapor products under the brand name blu. (PX7012 (Eldridge (ITG), Dep. at 19, 26)). Blu is one of the oldest and most established e-vapor brands. (PX7012 (Eldridge (ITG), Dep. at 39)). ITG introduced its *my*blu device and *my*blu pods in 2017. (PX8011 at 004-05 (¶ 19) (Eldridge (ITG), Decl.)).

Response to Proposed Finding No. 1828:

Respondents have no specific response.

1829. NJOY was founded in 2007 and was one of the first U.S. companies to sell e-cigarettes. (PX8004 at 001 (¶ 5) (Farrell (NJOY), Decl.)). NJOY currently sells two e-cigarette products: a closed-system, rechargeable pod-based system called the NJOY Ace and a

closed-system disposable product called the NJOY Daily. (Farrell (NJOY) Tr. 206-07). The product now known as Ace was on the market prior to August 8, 2016. (PX7029 (Farrell (NJOY), Dep. at 45-46)). NJOY's Daily product was also on the market prior to August 8, 2016. (PX7029 (Farrell (NJOY), Dep. at 52)).

Response to Proposed Finding No. 1829:

Respondents have no specific response.

2. Altria's Exit Did Not Prompt Any Rival to Compete More Aggressively or Effectively

1830. Dr. Murphy's before-and-after analyses of closed-system e-cigarette prices, volumes, shares, and HHIs before and after Altria's exit are flawed because Dr. Murphy does not account for confounding factors (or factors other than Altria's exit) that may explain the data. (PX5001 at 031-55 (¶¶ 49-62) (Rothman Expert Report); *see also* CCFF ¶¶ 2094-2136, below).

Response to Proposed Finding No. 1830:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶¶ 28-32), and Complaint Counsel's expert, Dr. Rothman, did not conduct such an analysis to demonstrate that his hypothetical confounding is real, (RFF ¶¶ 1377-78). Moreover, no such analysis by Professor Murphy was necessary: At bottom, his review of the real-world data demonstrated that the e-vapor market is intensively competitive, (RFF ¶¶ 1338-76), such that any competitive constraint Altria afforded was easily replaced, (RFF ¶¶ 1637-64).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 2094-136, Respondents incorporate their responses to those Proposed Findings herein.

1831. Dr. Murphy's before-and-after analyses ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA's flavor ban. (*See* CCFF ¶¶ 2099-111, below).

Response to Proposed Finding No. 1831:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶¶ 28-32), and Complaint Counsel's expert, Dr. Rothman, did not conduct such an analysis to demonstrate that his hypothetical confounding is real, (RFF ¶¶ 1377-78). Moreover, no such analysis by Professor Murphy was necessary: At bottom, his review of the real-world data demonstrated that the e-vapor market is intensively competitive, (RFF ¶¶ 1338-76), such that any competitive constraint Altria afforded was easily replaced, (RFF ¶¶ 1637-64).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 2099-111, Respondents incorporate their responses to those Proposed Findings herein.

3. Altria Was One of a Few Firms Well-Positioned to Compete in the E-Cigarette Market

1832. Prior to the transaction, Altria was a significant competitor in e-cigarettes and recognized the importance of e-cigarettes to its future. (*See* CCFF ¶¶ 411-94, above).

Response to Proposed Finding No. 1832:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. The evidence shows that Nu Mark's existing products were weak competitors that were not successful commercially and were unlikely to obtain regulatory approval. (RFF ¶¶ 1501-31). The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have to obtain FDA approval before the new product could be brought to market. (RFF ¶¶ 59-61, 64-65). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 72-104, 122-26).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 411-94, Respondents incorporate their responses to those Proposed Findings herein.

1833. Prior to the transaction, Altria was well-positioned to compete on e-cigarettes now and in the future. (*See* CCFF ¶¶ 493-531, above).

Response to Proposed Finding No. 1833:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. The evidence shows that Nu Mark's existing products were weak competitors that were not successful commercially and were unlikely to obtain regulatory approval. (RFF ¶¶ 1501-31).

Altria's long history of failed innovation—both with e-vapor and other alternatives to conventional tobacco products, (RFF ¶¶ 140-91), demonstrates that there is no reason to believe that the company would have been competitive "in the future." The evidence shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have to obtain FDA approval before the new product could be brought to market. (RFF ¶¶ 59-61, 64-65). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 72-104, 122-26).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 493-531, Respondents incorporate their responses to those Proposed Findings herein.

1834. Altria is uniquely positioned to compete in the e-cigarette market because there are few other companies that possess Altria's resources and FDA expertise, including distribution, shelf space, marketing, and R&D capabilities. (*See* CCFF ¶¶ 493-531, above).

Response to Proposed Finding No. 1834:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. It ignores the testimony and evidence that (1) Altria's experience with conventional tobacco products; (2) its distribution, infrastructure, and sales team; and (3) its ability to acquire shelf space were all

meaningless without a product that appeals to consumers. (RFF ¶¶ 431-59; *see also* PX7014 Baculis (Altria) Dep. at 63 ("[N]othing can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs.")). The evidence shows that Nu Mark's products were weak competitors that were not successful commercially and were unlikely to obtain regulatory approval. (RFF ¶¶ 1501-31). The evidence further shows that Altria had not developed any new e-vapor design and that, even if Altria had ultimately finalized such a design, it would have to obtain FDA approval before the new product could be brought to market. (RFF ¶¶ 59-61, 64-65). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 72-104, 122-26).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 493-531, Respondents incorporate their responses to those Proposed Findings herein.

1835. Altria's CEO, Howard Willard, recognized that "long-term leadership won't be achieved overnight" but stated that Nu Mark 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 our company's world-class marketing, sales and distribution[,] and regulatory capabilities." (PX9045 (Altria) at 007 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018)).

Response to Proposed Finding No. 1835:

The Proposed Finding is incomplete and misleading without additional context. As of the time of the cited statement, Nu Mark had not even launched its pod-based product, Elite, and thus did not yet know how that product would perform on the market. (Schwartz (Altria) Tr. 1871). Knowing whether Elite could be successful is a critical piece of information in assessing Nu Mark's portfolio, as pod-based products came to dominate the market by 2018 and were necessary for any company seeking to compete. (RFF ¶¶ 563-65, 1325). Moreover, as of this time, Altria had not yet concluded the comprehensive assessment of Nu Mark's existing e-vapor portfolio that

took place after Willard restructured Altria's leadership in mid-May 2018. (RFF ¶¶ 579-747, 839-77). The evidence shows that, by the end of this assessment, Altria's scientists, regulatory affairs employees, and leadership concluded that Nu Mark's existing products were not capable of competing in the category and were unlikely to obtain FDA approval. (RFF ¶¶ 579-747, 839-77). As a reflection of this assessment that Nu Mark's existing portfolio was inadequate, Altria announced on October 5, 2018, that it was launching the Growth Teams to start from scratch and try to develop new e-vapor products. (RFF ¶¶ 898-916, 962-70). But whether the Growth Teams would have ever been able to develop a competitive product is inherently speculative and, even if it had, it would have taken at least five years—if everything went perfectly—for such a product to reach the market. (Garnick (Altria) Tr. 1660-61 (explaining that "base[d] on what [he] was told," a product from the Growth Teams was "five to ten years" from market introduction); PX7016 Jupe (Altria) Dep. at 341 (explaining that Growth Teams were "five to six years away from a potential product" if all deadlines were met)). It would not have made sense for Altria to commit the resources necessary to start from scratch with product development if it believed that Nu Mark's existing portfolio could be competitive. (RFF ¶¶ 898-916, 1604-11).

1836. Other market participants viewed Altria as a formidable competitor in the e-cigarettes market. (*See* CCFF ¶¶ 497-98, above).

Response to Proposed Finding No. 1836:

The Proposed Finding is incomplete and unsupported by the cited paragraphs. The cited paragraphs refer to testimony from JLI's Valani and ITG's Eldridge. The evidence shows that Valani did not view Nu Mark's products as formidable competitors; to the contrary, he thought "they were terrible products" and that "they suck." (PX7011 Valani (JLI) IHT at 134; *see also* RRFF ¶ 497).

And Eldridge admitted that to succeed in e-vapor, a company needed more than just resources; it also needed a good product. (PX7012 Eldridge (ITG) Dep. at 161). Eldridge's comments regarding Altria's prospects were not premised on meaningful knowledge about Elite's prospects of success. (*See* RRFF ¶ 498).

1837. According to a third-party survey of the e-vapor intellectual property ("IP") landscape, Altria is ranked 2nd in terms of patents with high ratings. (PX1608 (Altria) at 002 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)). Also, according to the same survey of IP in the e-vapor space, Altria had the 4th largest patent portfolio. (PX1608 (Altria) at 002 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)).

Response to Proposed Finding No. 1837:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 20), or in any deposition. Furthermore, Complaint Counsel did not present any expert testimony on what a highly rated patent is or whether such ratings necessarily translate into successful products on the market. As a result, there is no basis to conclude that a rating of patents can speak to whether the company has a product that can be successfully put on the market.

Indeed, comparing the cited document's rating of patents shows that there is no correlation between the ratings and actual market success. For example, notwithstanding its market success, the cited document lists JLI's IP as the "weakest." (PX1608 (Altria) at 015). By contrast, the cited document lists Imperial Brands as number one in terms of "issued patents with high ratings," (PX1608 (Altria) at 002), but as of September 2020, ITG's blu products were a distant fourth in pod-based vaporizer device sales, with less than five percent market share, a number that has been declining over time, (RX1217 Murphy Report ¶ 72, Fig. V.7).

1838. According to a third-party survey of the e-vapor IP landscape, Altria enjoys a relatively strong e-vapor patent portfolio in devices, liquid, and packaging when compared to big tobacco companies and JUUL. (PX1608 (Altria) at 011 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)).

Response to Proposed Finding No. 1838:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss this document at trial, (CC Exhibit Index at 20), or in any deposition. Furthermore, Complaint Counsel did not present any expert testimony on what a highly rated patent is or how that applies to developing e-vapor products. As a result, there is no basis to conclude that a rating of patents can speak to whether the company has a product that can be successfully put on the market.

Indeed, comparing the cited document's rating of patents shows that there is no correlation between the ratings and actual market success. For example, notwithstanding its market success, the cited document lists JLI's IP as "generally weak." (PX1608 (Altria) at 011). By contrast, the cited document lists Imperial Brands as number one in terms of "issued patents with high ratings," (PX1608 (Altria) at 002), but as of September 2020, ITG's blu products were a distant fourth in pod-based vaporizer device sales, with less than five percent market share, a number that has been declining over time, (RX1217 Murphy Report ¶ 72, Fig. V.7).

1839. A third-party survey of the e-vapor IP landscape in terms of issued patents indicates that Altria may have the 2nd strongest portfolio. (PX1608 (Altria) at 015 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)). The same survey indicated that JUUL is the weakest in issued patents, but JUUL is catching up and may have some good patent applications. (PX1608 (Altria) at 015 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)).

Response to Proposed Finding No. 1839:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 20), or in any deposition. Furthermore, Complaint Counsel did not present any expert testimony on what a highly rated patent is or how that applies to developing e-vapor products. As a result, there is no

basis to conclude that a rating of patents can speak to whether the company has a product that can be successfully put on the market.

Indeed, comparing the cited document's rating of patents shows that there is no correlation between the ratings and actual market success. For example, notwithstanding its market success, the cited document lists JLI's IP as the "weakest." (PX1608 (Altria) at 015). By contrast, the cited document lists Imperial Brands as having the "strongest portfolio," (PX1608 (Altria) at 015), but as of September 2020, ITG's blu products were a distant fourth in pod-based vaporizer device sales, with less than five percent market share, a number that has been declining over time, (RX1217 Murphy Report ¶ 72, Fig. V.7).

1840. Based on a third-party survey, Altria appears to have a strong e-cigarette patent portfolio related to data communications in devices, including in a claim from one of the patents of "an interface connected with the electrical hardware and operable to establish a communications link with a remote host, as well as to download software from the host or download information from the host to the system." (PX1608 (Altria) at 024 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)).

Response to Proposed Finding No. 1840:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 20), or in any deposition. Furthermore, Complaint Counsel did not present any expert testimony on what a highly rated patent is or how that applies to developing e-vapor products. As a result, there is no basis to conclude that a rating of patents can speak to whether the company has a product that can be successfully put on the market.

Indeed, comparing the cited document's rating of patents shows that there is no correlation between the ratings and actual market success. For example, notwithstanding its market success, the cited document lists JLI's IP as the "weakest." (PX1608 (Altria) at 015). By contrast, the cited document lists Imperial Brands as number one in terms of "issued patents with high ratings,"

(PX1608 (Altria) at 002), but as of September 2020, ITG's blu products were a distant fourth in pod-based vaporizer device sales, with less than five percent market share, a number that has been declining over time, (RX1217 Murphy Report ¶ 72, Fig. V.7).

1841. A third party consultant, who surveyed the e-vapor IP landscape, recommended that Altria continue to invest in R&D to maintain its lead in the e-liquid patent world. (PX1608 (Altria) at 035 ("E-Vapor IP Landscape Review," Presented to Altria Client Services, dated Sept. 2018, and prepared by yet2)).

Response to Proposed Finding No. 1841:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 20), or in any deposition. Furthermore, Complaint Counsel did not present any expert testimony on what a highly rated patent is or how that applies to developing e-vapor products. As a result, there is no basis to conclude that a rating of patents can speak to whether the company has a product that can be successfully put on the market.

Indeed, comparing the cited document's rating of patents shows that there is no correlation between the ratings and actual market success. For example, notwithstanding its market success, the cited document lists JLI's IP as the "weakest." (PX1608 (Altria) at 015). By contrast, the cited document lists Imperial Brands as number one in terms of "issued patents with high ratings," (PX1608 (Altria) at 002), but as of September 2020, ITG's blu products were a distant fourth in pod-based vaporizer device sales, with less than five percent market share, a number that has been declining over time, (RX1217 Murphy Report ¶ 72, Fig. V.7).

4. Having Altria in the Market Would Have Resulted in a More Competitive But-For World

1842. A But-For-World in which Altria continued to sell e-cigarettes would have been more competitive than the world in which Altria exited the market. (*See* CCFF ¶¶ 1408-16, above).

Response to Proposed Finding No. 1842:

The Proposed Finding is incorrect and unsupported by the cited paragraphs. The cited paragraphs reference Dr. Rothman's "significant competitor" opinion, which is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

The evidence shows that any competitive constraint afforded by Altria was readily replaced, (RFF ¶¶ 1639-64), and that competition has intensified along every relevant metric since Altria discontinued Nu Mark's e-vapor products, (RFF ¶¶ 1338-76).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1408-16, Respondents incorporate their responses to those Proposed Findings herein.

1843. Altria was an aggressive discounter in e-cigarettes before the transaction. (*See* CCFF ¶¶ 1419-35, above). Altria would have continued to discount its e-cigarettes but for the transaction. (*See* CCFF ¶¶ 1532-37, above).

Response to Proposed Finding No. 1843:

The Proposed Finding is incomplete and misleading without additional context. While the cited paragraphs focus almost entirely on Elite promotions, (CCFF ¶¶ 1419-35), the evidence is consistent that despite these aggressive discounts, Elite had dismal sales, (RFF ¶¶ 431-59). Notably, the record evidence demonstrates that JLI never changed its prices in response to the entry or exit of Nu Mark's e-vapor products. (RFF ¶¶ 1354, 1640-44).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1419-35 and 1532-37, Respondents incorporate their responses to those Proposed Findings herein.

1844. Prior to the transaction, Altria pursued significant research and development efforts to improve its existing e-cigarette products and launch new products. (*See* CCFF ¶¶ 1538-696, above). Without the transaction, Altria would have continued to improve its existing products and develop new products. (*See* CCFF ¶¶ 444-54, above; *cf.* CCFF ¶¶ 1538-87, above). Without the transaction, Altria would have continued to collaborate with PMI to develop and launch new products. (*See* CCFF ¶¶ 515-21, above; *cf.* CCFF ¶¶ 1694-96, above).

Response to Proposed Finding No. 1844:

The Proposed Finding is incomplete and misleading without additional context. Notwithstanding incentives to develop alternatives to conventional tobacco products and billions of dollars invested in innovative product development, Altria for decades had failed to develop successful innovative products that could potentially reduce the risks of smoking. (RFF ¶¶ 140-83). Altria's efforts at developing e-vapor products fared no better; Altria never successfully developed an e-vapor product internally. (RFF ¶¶ 184-91). Altria's attempts at internal product development were far from finished, as none of them were even close to design lock. (RFF ¶¶ 1553-611).

Even if Altria had finalized a new design, it would have to obtain FDA approval before the new product could be brought to market. (RFF ¶¶ 59-61, 64-65). As a result, whether any new Altria design would have reached the market is highly speculative and, even if a new design ultimately obtained FDA approval, it would have been years before the product would have reached the market. (RFF ¶¶ 72-104, 122-26).

As to collaboration between Altria and PMI, there are numerous reasons why this was unlikely to result in any new e-vapor product anytime soon. (*See* RRFF ¶¶ 1588-716). *First*, while the noncompete with JLI generally prohibited Altria from commercializing new e-vapor products in the United States or engaging in research and development related to e-vapor, (Jupe (Altria) Tr. 2192-94), even absent the noncompete, [redacted]

[redacted]

[redacted])).

Second, Complaint Counsel has not shown and cannot show that Altria and JLI would have reached an agreement to extend the JRDTA but for Altria's investment in JLI. [redacted]

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 444-54, 515-21, and 1538-696, Respondents incorporate their responses to those Proposed Findings herein.

1845. Dr. Rothman evaluated the incentives and abilities of Altria to continue competing in the e-cigarette market and concluded that Altria would have been a significant competitor in the e-cigarettes market absent the transaction. (PX7048 (Rothman, Trial Dep. at 29-34); PX5000 at 043-75 (¶¶ 91-129), 075-77 (¶¶ 131-33) (Rothman Expert Report)).

Response to Proposed Finding No. 1845:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Dr. Rothman purported to undertake such an evaluation. However, his "significant competitor" opinion is not based on any known or replicable methodology, (RFF ¶¶ 1482-500), and is contrary to the evidence showing Altria was not and would not be a significant competitor, (RFF ¶¶ 1501-636).

1846. Dr. Rothman calibrated a model of e-cigarette competition to estimate the loss of consumer surplus from Altria's exit for two scenarios. (PX7048 (Rothman, Trial Dep. at 68-70); PX5000 at 043-044 (¶ 92), 146-150 (Appendix E) (Rothman Expert Report)). In the first scenario, Dr. Rothman assumes Altria would have maintained its 10 percent share, and in the second scenario, he assumes Altria would have grown its share to 20 percent by 2020. (PX7048 (Rothman, Trial Dep. at 68-69; PX5000 at 043-044 (¶ 92) (Rothman Expert Report)). Dr. Rothman also estimated the efficiencies that would be required to offset the harm caused by Altria's exit. (PX7048 (Rothman, Trial Dep. at 69-70; PX5000 at 043-044 (¶ 92) (Rothman Expert Report)). He estimated that efficiencies of 13.3 percent would be required if Altria otherwise would have maintained a 10 percent share and that efficiencies of 26.5 percent would be required if Altria otherwise would have grown to its share to 20 percent. (PX5000 at 043-44 (¶ 92) (Rothman Expert Report)); *see also* CCFF ¶ 1409, above).

Response to Proposed Finding No. 1846:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Dr. Rothman purported to calibrate such a model. That model does not accurately estimate the loss of consumer surplus from Altria's discontinuation of Nu Mark's products because it is based on a number of unsupported factual and economic assumptions. (RFF ¶¶ 1670-708).

In particular, Dr. Rothman's market share assumptions cannot be accepted. His 10 percent "current" market share is based on a 12-month average that obscures the fact that Altria's market share was declining that entire period. (RFF ¶¶ 1685-87). By September 2018, Nu Mark's unit share had declined to 7.5 percent. (RFF ¶ 1441). And by November 2018, Nu Mark's dollar share had declined to only 4.7 percent. (RFF ¶¶ 1442-43). His 20 percent market share is based on a forward-looking goal from a single slide in February 2018—before Altria had even been launched on the market—that soon after became clearly unrealistic, (RFF ¶¶ 1689-93).

In addition, while Dr. Rothman purported to estimate certain efficiencies that would be required to offset the amount of harm he calculated, he did not consider all possible efficiencies. For example, Dr. Rothman failed to consider efficiencies that could derive from Altria's experience and expertise in seeking and securing regulatory approval yielding an increased probability of JLI obtaining regulatory approval for its products. (RFF ¶ 1717-27).

To the extent Complaint Counsel relies on its Proposed Finding in CCFF ¶ 1409, Respondents incorporate their response to that Proposed Finding herein.

C. ENTRY BY PMI WILL NOT REPLACE THE LOST COMPETITION

1847. [redacted] (King (PMI) Tr. 2412-13 [redacted]), 2499-2500 ([redacted]) (*in camera*); PX7020 (King (PMI), Dep. at 82-83) (*in camera*); PX3106 (PMI) (*in camera*) ([redacted]

[redacted]); PX3210 (PMI) (*in camera*) ([redacted]).

Response to Proposed Finding No. 1847:

Neither this Proposed Finding nor those that follow in this section support Complaint Counsel's heading. [redacted]

Separate from the heading, the Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

Second, [redacted]

[redacted]

1. IP Entanglements Present Obstacles to PMI's Entry

1848. [redacted] (RX0873 (Altria) at 016-18 (*in camera*) ([redacted] (King (PMI) Tr. 2390-91, 2394-95, 2409-10, 2412-13, 2499-2500 (*in camera*); PX7020 (King (PMI), Dep. at 34-35, 81-82) (*in camera*)).

Response to Proposed Finding No. 1848:

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]

Second, [redacted]

Third, [redacted]

[redacted]

After that, FDA review likely will take close to two years, as it did for PMI's IQOS product. (King (PMI) Tr. 2525). And, even assuming that the PMTA were approved, it would likely take PMI at least several months to commercialize the product. (*See* RFF ¶¶ 371-72). [redacted]

1849. [redacted] (PX7020 (King (PMI), Dep. at 34-35) (*in camera*)). [redacted] (PX7020 (King (PMI), Dep. at 34-35) (*in camera*)).

Response to Proposed Finding No. 1849:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

Second, [redacted]

Third, [redacted]

[redacted] After that, FDA review will likely take close to two years, as it did for PMI's IQOS product. (*See* King (PMI) Tr. 2525). And, even assuming that the PMTA were approved, it would likely take PMI several months to commercialize the product. (RFF ¶¶ 371-

72). [redacted]

Notably, King is no longer CEO of PMI America—he retired from PMI effective August 31, 2021 and was replaced by Deepak Mishra, who became President, Americas' Region. (RX2053 (SEC) at 004).

1850. [redacted] (PX7020 (King (PMI), Dep. at 81-82) (*in camera*)).

Response to Proposed Finding No. 1850:

The Proposed Finding is incorrect, incomplete, and misleading without additional context.

First, [redacted]

Second, [redacted]

[redacted]

Third, [redacted]

After that, FDA review will likely take close to two years, as it did for PMI's IQOS product. (King (PMI) Tr. 2525). And, even assuming that the PMTA were approved, it would likely take PMI several months to commercialize the product. (RFF ¶¶ 371-72). [redacted]

[redacted]

1851. [redacted] (PX7020 (King (PMI), Dep. at 82-83) (*in camera*); *see also* King (PMI) Tr. 2499-2500 (*in camera*)). [redacted] (PX7020 (King (PMI), Dep. at 82-83) (*in camera*); *see also* King (PMI) Tr. 2499-2500 (*in camera*)).

Response to Proposed Finding No. 1851:

The Proposed Finding is in inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

[redacted]

Second, [redacted]

[redacted] After that, FDA review will likely take close to two years, as it did for PMI's IQOS product. (King (PMI) Tr. 2525). And, even assuming that the PMTA were approved, it would likely take PMI several months to commercialize the product. (RFF ¶¶ 371-72). [redacted]

1852. [redacted] (PX3106 (PMI) (*in camera*) [redacted]; PX3210 (PMI) (*in camera*) ([redacted]

[redacted] (King (PMI) Tr. 2391-92 (*in camera*)).

Response to Proposed Finding No. 1852:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]

First, [redacted]

Second, [redacted]

Third, [redacted]

1853. [redacted]

[redacted] (PX3106 (PMI) at 002) (*in camera*).

Response to Proposed Finding No. 1853:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

[redacted]

Second, [redacted]

Third, [redacted]

[redacted]

1854. [redacted] (PX3106 (PMI) at 003 (*in camera*)).

Response to Proposed Finding No. 1854:

Respondents have no specific response to the Proposed Finding except to note that [redacted]

1855. [redacted] (King (PMI) Tr. 2398 (*in camera*); PX7040 (Gifford (Altria), Dep. at 179)). [redacted] (PX3210 (PMI) at 001 (*in camera*)).

Response to Proposed Finding No. 1855:

The Proposed Finding is incomplete and misleading without additional context.

1856. (PX3210 (PMI) at 002 (*in camera*)).

Response to Proposed Finding No. 1856:

The Proposed Finding is incomplete and misleading without additional context.

[redacted]

After that, FDA review will likely take close to two years, as it did for

PMI's IQOS product. (King (PMI) Tr. 2525). And, even assuming that the PMTA were approved, it would likely take PMI several months to commercialize the product. (RFF ¶¶ 371-72).

1857. (King (PMI) Tr. 2398, 2413, 2499-2500 (*in camera*); *see also* PX7040 (Gifford (Altria), Dep. at 179-180); PX7020 (King (PMI), Dep. at 81-82) (*in camera*); PX3106 (PMI) (*in camera*) (; PX3210 (PMI) (*in camera*) ( )).

Response to Proposed Finding No. 1857:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*,

Second,

[redacted]

After that, FDA review will likely take close to two years, as it did for PMI's IQOS product. (King (PMI) Tr. 2525). And, even assuming that the PMTA were approved, it would likely take PMI several months to commercialize the product. (RFF ¶¶ 371-72). [redacted]

Third, [redacted]

[redacted]

[redacted]

2. Altria Took Steps to Block PMI From Filing a PMTA for VEEV

1858. [redacted] (PX3106 (PMI) at 002 (*in camera*) ( ); *see also* King (PMI) Tr. 2391-92, 2399-2400 (*in camera*)).

Response to Proposed Finding No. 1858:

The Proposed Finding is incorrect, incomplete, and misleading without additional context.

First, [redacted]

Second, [redacted]

Third,

1859. (RX0873 (Altria) at 012-13 (*in camera*); PX3049 (PMI) at 001 (*in camera*)); King (PMI) Tr. 2388-89 (*in camera*).)

Response to Proposed Finding No. 1859:

Respondents have no specific response except to note that

1860. (PX3044 (PMI) at 001-02 (*in camera*))). (*See* CCFF ¶¶ 1694-96, above).

Response to Proposed Finding No. 1860:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. *First*, [redacted]

Second, [redacted]

[redacted]

Third, [redacted]

[redacted]

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1694-96, Respondents incorporate their responses to those Proposed Findings herein.

1861. [redacted]

[redacted]
(PX3044 (PMI) at 001-02 (*in camera*); *see also* PX7020 (King (PMI), Dep. at 52) (*in camera*)).

Response to Proposed Finding No. 1861:

The Proposed Finding is incomplete and misleading without additional context. *First*, [redacted]

Second, [redacted]

[redacted]

1862. [redacted] (PX3049 (Altria) at 001 (*in camera*); *see also* PX7020 (King (PMI), Dep. at 52) (*in camera*)).

Response to Proposed Finding No. 1862:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

[redacted]

1863. [redacted] (PX3210 (PMI) at 001-02 (*in camera*); King (PMI) Tr. 2391-92 (*in camera*)).

Response to Proposed Finding No. 1863:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted]

[redacted]

[redacted]

3. PMI's "Go It Alone" Strategy Is Inferior to Collaboration with Altria

1864. [redacted].

Response to Proposed Finding No. 1864:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. [redacted] There is no question that PMI, which sells combustible cigarettes in over 180 markets, (King (PMI) Tr. 2337), and "hold[s] the number one or number two market share position" in "many of these markets," (RX1014 (PMI) at 006), [redacted]

First, [redacted]

Second, [redacted]

[redacted]

Altria was aware of PMI's disappointment. In communications with Altria about the JRDTA, a PMI scientist conveyed that "[h]er executives [were] commenting that [PMI was] doing too much for Altria." (PX4052 (Altria) at 001). This "was a common concern in the relationship. . . . PMI was concerned they were going to do too much and Altria not enough." (PX7026 Gardner (Altria) Dep. at 222). And according to a July 2018 email from Zane Underwood (one of the Chief Growth Officer's team members) to Liz Mountjoy (then Vice President of Corporate Strategy), K.C. Crosthwaite, then Chief Growth Officer, believed that "PMI [was] unlikely to want to renew" the JRDTA. (PX4253 (Altria) at 001; PX7034 Mountjoy (Altria) Dep. at 104; RFF ¶ 849).

[redacted]

Third, [redacted]

1865. PMI entered into the JRDTA to commercialize VEEV with Altria rather than going it alone because of Altria's many strengths in the U.S., including Altria's sales force, relationships with retailers, and regulatory affairs. (PX7020 (King (PMI), Dep. at 47-48)). According to PMI's King, having Altria commercialize VEEV in the U.S. would have sped the commercialization and make the success much more likely and faster." (PX7020 (King (PMI), Dep. at 47-48) ("we felt that with Altria's footprint, outstanding sales force, access to retail shops, all of their other supporting abilities, including government affairs, etcetera,

would help commercialization of [VEEV], and it would speed the commercialization and make the success much more likely and faster.")).

Response to Proposed Finding No. 1865:

The Proposed Finding is incomplete and misleading without additional context. [redacted], that does not address the companies' intentions after the agreement had been in force for several years. And Complaint Counsel has not demonstrated that, but for the JLI transaction, Altria would have partnered with PMI on VEEV.

First, [redacted]

Second, [redacted]

[redacted]

Altria was aware of PMI's disappointment. In communications with Altria about the JRDTA, a PMI scientist conveyed that "[h]er executives [were] commenting that [PMI was] doing too much for Altria." (PX4052 (Altria) at 001). This "was a common concern in the relationship. . . . PMI was concerned they were going to do too much and Altria not enough." (PX7026 Gardner (Altria) Dep. at 222). And according to a July 2018 email from Zane Underwood (one of the Chief Growth Officer's team members) to Liz Mountjoy (then Vice President of Corporate Strategy), K.C. Crosthwaite, then Chief Growth Officer, believed that "PMI [was] unlikely to want to renew" the JRDTA. (PX4253 (Altria) at 001; PX7034 Mountjoy (Altria) Dep. at 104; RFF ¶ 849).

[redacted]

Third, [redacted]

[redacted]

1866. While Altria has "decades of experience and a large, well-resourced sales function that bar none, [is] the best," PMI does not have a sales force or well-established relationships with convenience store chains in the U.S. (King (PMI) Tr. 2362). As a result, Altria "would have much more ability to work with retailers and others to commercialize" VEEV in the U.S. than PMI does. (King (PMI) Tr. 2362, *see also* 2384 (*in camera*)).

Response to Proposed Finding No. 1866:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

Nor is a large sales force necessary to commercialize a successful e-vapor product. To the contrary, JLI, the market leader in e-vapor as of 2018, (PX1424 (Altria) at 011), "did not have a large sales force," (PX7039 Robbins (JLI) Dep. at 93). As of January 2018, it had no more than 20 people in its sales organization. (PX7039 Robbins (JLI) Dep. at 172). But it was able to be successful by "focus[ing] on where the most cigarettes were sold, and that was in the convenience store"; it also "had a portion of sales that went through e-commerce." (PX7039 Robbins (JLI) Dep. at 93). JLI also was able to expand its sales force capabilities by engaging the services of a third party, Crossmark, which performs sales services "similar to AGDC," and is "strongest" in "grocery and drug and mass market settings." (PX7008 Cullen (JLI) IHT at 190; *see also* CCFF ¶ 1975). [redacted]

1867. [redacted] (King (PMI) Tr. 2384 (*in camera*) ([redacted]

[redacted]

Response to Proposed Finding No. 1867:

The Proposed Finding is incomplete and misleading without additional context. [redacted]

Moreover, there is no evidence that a sales force or a retail footprint as large as Altria's is necessary to commercialize a successful e-vapor product. To the contrary, JLI, the market leader in e-vapor as of 2018, (PX1424 (Altria) at 011), "did not have a large sales force," (PX7039 Robbins (JLI) Dep. at 93). As of January 2018, it had no more than 20 people in its sales organization. (PX7039 Robbins (JLI) Dep. at 172). But it was able to be successful by "focus[ing] on where the most cigarettes were sold, and that was in the convenience store"; it also "had a portion of sales that went through e-commerce." (PX7039 Robbins (JLI) Dep. at 93). JLI was also able to expand its sales force capabilities by engaging the services of a third party, Crossmark, which performs sales services "similar to AGDC," and is "strongest" in "grocery and drug and mass market settings." (PX7008 Cullen (JLI) IHT at 190; *see also* CCFF ¶ 1975). [redacted]

1868. [redacted] (King (PMI) Tr. 2385 (*in camera*) ([redacted]); *see also* PX7020 (King (PMI), Dep. at 173) (*in camera*)).

Response to Proposed Finding No. 1868:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. As an initial matter, [redacted], the evidence at trial shows that wholesalers are a significant, if not the primary, method of distribution for all retailers, including Altria and JLI. (Robbins (JLI) Tr. 3242; Begley (Altria) Tr. 1101 (explaining that McLane, a wholesale distributor, is Altria's "largest distributor partner"); Myers (Altria) Tr. 3299-300 (explaining that Altria works with two large distributors—McLane and Core-Mark—to take and fulfill the retailers' orders); PX7030 Wexler (Turning Point Brands) Dep. at 174 (explaining that Turning Point Brands does most of its business through "a trade class that's called tobacco and candy wholesalers")). In fact, for JLI, the market leader in e-vapor as of 2018, (PX1424 (Altria) at 011), "the majority of [its] sales are through third-party wholesale distribution," (Robbins (JLI) Tr. 3243).

1869. [redacted] (King (PMI) Tr. 2385 (*in camera*)).

Response to Proposed Finding No. 1869:

The Proposed Finding is incomplete and misleading without additional context. *First*, PMI intends to try to commercialize VEEV in the United States on its own and the evidence shows that PMI does not need Altria's support to do so. PMI, which sells combustible cigarettes in over 180 markets, (King (PMI) Tr. 2337), and "hold[s] the number one or number two market share position" in "many of these markets," (RX1014 (PMI) at 006), [redacted]

[redacted]

Second, there is no evidence that a sales force or a retail footprint as large as Altria's is necessary to commercialize a successful e-vapor product. To the contrary, JLI, the market leader in e-vapor as of 2018, (PX1424 (Altria) at 011), "did not have a large sales force," (PX7039 Robbins (JLI) Dep. at 93). As of January 2018, it had no more than 20 people in its sales organization. (PX7039 Robbins (JLI) Dep. at 172). But it was able to be successful by "focus[ing] on where the most cigarettes were sold, and that was in the convenience store"; it also "had a portion of sales that went through e-commerce." (PX7039 Robbins (JLI) Dep. at 93). JLI was also able to expand its sales force capabilities by engaging the services of a third party, Crossmark, which performs sales services "similar to AGDC," and is "strongest" in "grocery and drug and mass market settings." (PX7008 Cullen (JLI) IHT at 190; *see also* CCFF ¶ 1975). [redacted]

1870. [redacted]); PX7020 (King (PMI), Dep. at 63-64) ("Altria has had a number of different solutions to the FDA under the tobacco area, and they have a great deal of expertise on what it would take to get authorization for e-cigarettes. . . . PMI has now a great deal of expertise on the heat not burn area . . . However, in other areas, other products like e-cigarettes, Altria has more experience than PMI.")).

Response to Proposed Finding No. 1870:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, [redacted]

But, while Altria's services were particularly valuable to JLI given JLI's lack of regulatory experience, (RFF ¶ 1223), small size, (Valani (JLI) Tr. 930), and compressed filing deadline, (RFF ¶¶ 1256-57), PMI was better situated to pursue a PMTA on each of those dimensions: [redacted] In addition, PMI's science and research and development teams were several times larger than Altria's. (PX7026 Gardner (Altria) Dep. at 222 ("Altria, comparatively, is a very small organization. There were – our organization in R&D and regulatory sciences is very small. And PMI was several times higher, larger organization. They had a lot of resources.")). And, as to timing, PMI had been building some foundational science as it went, such as its "flavor toolbox," (PX1963 (Altria) at 005; King (PMI) Tr. 2375), and it was not subject to a fixed filing deadline, ([redacted]

XIV. RESPONDENTS' ASSERTED EFFICIENCIES DO NOT REBUT THE PRESUMPTION OF COMPETITIVE HARM

1871. Respondents claim efficiencies based on certain services that Altria agreed to provide to JLI pursuant to the Services Agreement. (*See* CCFF ¶¶ 1873-79, below). The January 2020 amendment to the Services Agreement eliminated all services other than regulatory services related to JLI's PMTA and MRTP applications. (*See* CCFF ¶¶ 1880-83, below).

Response to Proposed Finding No. 1871:

Respondents have no specific response except to note that the Amended Services Agreement also continued the provision of shelf space to JUUL products through March 31, 2020, but "the gist of" the agreement "was to support their PMTA filing and their MRTP." (PX7040 Gifford (Altria) Dep. at 32).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1873-83, Respondents incorporate their responses to those Proposed Findings herein.

1872. Respondents have not substantiated their efficiencies claims, and the evidence makes clear that JLI likely could have achieved comparable benefits without those services. (*See* CCFF ¶¶ 1884-995, below).

Response to Proposed Finding No. 1872:

The Proposed Finding is incorrect and not supported by the cited paragraphs. The evidence shows that Altria's regulatory services were critical in enabling JLI to file a high-quality and timely PMTA. (RFF ¶¶ 1215-68). JLI's need to file a high-quality and timely PMTA is "existential." (RFF ¶ 1221). If JLI does not obtain regulatory approval for JUUL, the product will have to come off the market, resulting in less e-vapor competition. (RFF ¶ 1222).

Moreover, the evidence refutes Complaint Counsel's argument that there were less-restrictive alternatives. (RFF ¶¶ 1269-83).

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1884-995, Respondents incorporate their responses to those Proposed Findings herein.

A. RESPONDENTS ASSERT EFFICIENCIES BASED ON THE SERVICES AGREEMENT

1873. From Altria's perspective, "the cost savings, economies, and other efficiencies anticipated as a result of the Proposed Transaction . . . are derived mainly from the Services Agreement." (PX0007 (Altria) at 025 (Altria Second Request Narrative Response)).

Response to Proposed Finding No. 1873:

Respondents have no specific response.

1874. The Services Agreement set forth categories of services available to JLI, but JLI "could make the decision of whether to hire Altria for that service or find another source." (PX7010 (Gifford (Altria), IHT at 55)).

Response to Proposed Finding No. 1874:

Respondents have no specific response except to note that Altria and JLI entered into at least [redacted] SOWS related to regulatory services. (RFF ¶ 1238).

1875. The Services Agreement set forth categories of services available to JLI, but "the terms of any specific services are subject to negotiation of a statement of work between [Altria and JLI]." (PX0007 (Altria) at 026 (Altria Second Request Narrative Response)).

Response to Proposed Finding No. 1875:

Respondents have no specific response except to note that Altria and JLI entered into at least [redacted] SOWS related to regulatory services. (RFF ¶ 1238).

1876. Even after agreeing to a statement of work, JLI could choose to cancel services that were being provided. (PX7010 (Gifford (Altria), IHT at 56)).

Response to Proposed Finding No. 1876:

Respondents have no specific response.

1877. Under the Services Agreement, the "time and cost of each service is set forth in each statement of work and calculated based on Altria's cost plus 3 percent." (PX0007 (Altria) at 026 (Altria Second Request Narrative Response)).

Response to Proposed Finding No. 1877:

Respondents have no specific response.

1878. In a pair of submissions to the FTC in the fall of 2019, Altria and JLI asserted efficiencies associated with the following categories of services under the Services Agreement: government and regulatory support, distribution support, fixture services, database access and direct marketing, and sales services. (PX0007 (Altria) at 029-32 (Altria Second Request Narrative Response); PX2160 (JLI) at 082-98 (JLI Second Request Narrative Response)). Respondents did not identify any statements of work for mission support or legal services at that time. (PX0007 (Altria) at 029-32; PX2160 (JLI) at 097-98).

Response to Proposed Finding No. 1878:

Respondents have no specific response.

1879. Ultimately, Respondents did not execute any statements of work related to mission support or legal services. (PX7010 (Gifford (Altria), IHT at 65-66)).

Response to Proposed Finding No. 1879:

Respondents have no specific response except to note that Altria and JLI entered into at least [redacted] SOWS related to regulatory services. (RFF ¶ 1238).

B. THE AMENDED AGREEMENT NARROWED AVAILABLE REGULATORY SERVICES AND HALTED ALL NON-REGULATORY SERVICES

1880. On January 28, 2020, Altria and JLI executed an amendment to the Services Agreement. (PX0012 (Altria/JLI) at 002).

Response to Proposed Finding No. 1880:

Respondents have no specific response.

1881. In its Form 8-K filed with the Securities and Exchange Commission on January 28, 2020, Altria explained that "[u]nder the amended terms of the Services Agreement, Altria's obligation to provide services to JUUL is limited to (i) regulatory affairs support for JUUL's pursuit of its pre-market tobacco applications (PMTA) and/or its modified risk tobacco products authorization (MRTP) and (ii) retail shelf space through March 31, 2020." (PX9028 (Altria) at 002).

Response to Proposed Finding No. 1881:

Respondents have no specific response.

1882. As a consequence of the amendments to the Services Agreement, Altria has not provided any services to JLI since January 2020 other than regulatory services and retail shelf space. (PX7040 (Gifford (Altria), Dep. at 36)).

Response to Proposed Finding No. 1882:

Respondents have no specific response except to note that the benefit to competition of these regulatory services will benefit consumers for the long term: If JLI does not obtain regulatory approval for JUUL, the product will have to come off the market, resulting in less e-vapor competition. (RFF ¶ 1222).

1883. As a consequence of the amendments to the Services Agreement, Altria's regulatory support to JLI was in fact limited to JLI's PMTA and MRTP. (PX7040 (Gifford (Altria), Dep. at 34-35)).

Response to Proposed Finding No. 1883:

Respondents have no specific response except to dispute the characterization of these services as "limited": Achieving FDA authorization is existential for JLI. (RFF ¶ 1221). If JLI does not obtain regulatory approval for JUUL, the product will have to come off the market, resulting in less e-vapor competition. (RFF ¶ 1222). [redacted]

C. RESPONDENTS' CLAIMED EFFICIENCIES ARE NOT COGNIZABLE

1884. Altria noted that "JLI is the best source" for a quantification of the benefits of the services to JLI. (PX0007 (Altria) at 032 (Altria Second Request Narrative Response)).

Response to Proposed Finding No. 1884:

The Proposed Finding is incomplete and misleading without additional context. The cited document also states that "Altria believes the benefit to JLI will be far greater than the mere cost of the services," and that "Altria estimated that the probability of JLI success in the PMTA process could be meaningfully increased as a result of a partnership with Altria." (PX0007 (Altria) at 032, 033). That Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

1885. JLI did not attempt to estimate projected savings in connection with any of the services before entering into the transaction. (PX7008 (Cullen (JLI), IHT at 20)).

Response to Proposed Finding No. 1885:

The Proposed Finding is incomplete and misleading without additional context. Cullen also explained that [redacted].

1886. As of January 2020, JLI had not estimated a bottom-line, consolidated number for all the cost savings it claimed it had achieved as a result of the transaction, nor had it attempted to do so. (PX7008 (Cullen (JLI), IHT at 19)).

Response to Proposed Finding No. 1886:

The Proposed Finding is incomplete and misleading without additional context. Cullen also explained that [redacted].

1887. O'Hara, Director of Regulatory Strategy at JLI, is not aware of anyone at JLI ever trying to estimate the value of the services provided by Altria to JLI in whole or in part, and acknowledged that "if anybody did, it would have been super speculative." (PX7033 (O'Hara (JLI), Dep. at 187-88)).

Response to Proposed Finding No. 1887:

The Proposed Finding is incomplete and misleading without additional context. O'Hara explained that it would be "highly speculative" to "put a dollar value on a qualitative KPI," *i.e.*, measure the extent to which Altria improved the *quality* of JLI's testing. (PX7033 O'Hara (JLI) Dep. at 187-88). However, achieving FDA authorization is existential for JLI. (RFF ¶ 1221). And that Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

1888. Dr. Rothman's modeling predicted that "substantial efficiencies would be required to offset the loss of consumer surplus from Altria's exit," but that ultimately "transaction-specific efficiencies . . . don't offset the—the loss of Altria." (PX7048 (Rothman, Trial Dep. at 91-92); PX5000 at 081-83 (¶¶ 141-45, 148-49) (Rothman Expert Report)).

Response to Proposed Finding No. 1888:

The Proposed Finding is incomplete and misleading without additional context. While Dr. Rothman purported to estimate certain efficiencies that would be required to offset the amount of harm he calculated, he did not consider all possible efficiencies. For example, Dr. Rothman failed to consider efficiencies that could derive from Altria's experience and expertise in seeking and securing regulatory approval yielding an increased probability of JLI obtaining regulatory approval for its products. (RFF ¶¶ 1717-27). That Altria's services assisted in both the quality of the PMTA

and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

1. Regulatory Services Are Not Cognizable

1889. JLI claimed that Altria's regulatory services would "accelerate JLI's FDA application process and advance the sophistication of JLI's science programs." (PX2160 (JLI) at 088 (JLI Second Request Narrative Response)). Specifically, it estimated that its PMTA application timeline would "improve by 17-28 months," and it expected to save "$1.5 to 2 million in regulatory-related expenses." (PX2160 (JLI) at 088). It expected to achieve these benefits by leveraging Altria's regulatory expertise, research facilities and methods, and literature review work. (PX2160 (JLI) at 088-89).

Response to Proposed Finding No. 1889:

Respondents have no specific response.

1890. Altria has pointed to an internal estimate presented in an April 2018 slide deck on Project Tree that a partnership between Altria and JLI would improve JLI's PMTA chances from 50% to 70%. (PX0007 (Altria) at 033 (Altria Second Request Narrative Response) (citing PX1409 at 003 (slide deck on Project Tree))).

Response to Proposed Finding No. 1890:

Respondents have no specific response except to note that this slide deck is not the only evidence of the value of Altria's regulatory services. To the contrary, the value of those services was substantiated by the consistent evidence offered in the record and at trial. (RFF ¶¶ 1249-64).

a) Regulatory Services Are Not Verifiable

(1) Respondents' Regulatory Claims Are Unsubstantiated

1891. Based on his review of testimony and ordinary-course documents, Dr. Rothman concluded that Respondents "have not substantiated the claim that Altria helping JLI with its PMTA application enabled [JLI] to submit its PMTA application earlier." (PX7048 (Rothman, Trial Dep. at 83); PX5000 at 085-88 (¶¶ 150-56) (Rothman Expert Report)).

Response to Proposed Finding No. 1891:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. Dr. Rothman has no expertise in PMTAs and has never before analyzed efficiencies in a case involving FDA's regulatory process. (PX7048 Rothman Trial Dep. at 93). That Altria's services

assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64). And the evidence refutes Dr. Rothman's opinion that there were less-restrictive alternatives. (RFF ¶¶ 1269-83).

1892. The document JLI cites as the source of its estimated [redacted] (PX2193 (JLI) at 006 (*in camera*)). Cullen, Director of Strategic Finance at JLI and JLI's corporate designee to testify about transaction efficiencies, acknowledged that the slide deck "preceded a lot of the PMTA work with Altria" and the ensuing regulatory statements of work. (PX7008 (Cullen (JLI), IHT at 127)). [redacted] (PX2193 (JLI) at 006 [redacted] (*in camera*)).

Response to Proposed Finding No. 1892:

The Proposed Finding is incomplete and misleading without additional context. Cullen also explained that actual value of Altria's regulatory services had actually [redacted]. Indeed, he stated that he was "not aware of any other way that [JLI] could meaningfully accelerate the timeline as quickly as having the option to engage Altria on these services." (PX7008 Cullen (JLI) IHT at 129).

Contemporaneous with the cited presentation, Altria was convinced that JLI [redacted] and identified a number of gaps that it could fill, (RFF ¶ 1255). That Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

1893. [redacted]

Response to Proposed Finding No. 1893:

The Proposed Finding is incomplete and misleading without additional context. Contemporaneous with the cited presentation, Altria was convinced that JLI [redacted] and identified a number of gaps that it could fill, (RFF ¶ 1255). That Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

1894. [redacted] but Cullen could provide no further detail on the basis of the estimate. (PX7008 (Cullen (JLI), IHT at 122) (*in camera*)).

Response to Proposed Finding No. 1894:

The Proposed Finding is incomplete and misleading without additional context. Cullen also explained that actual value of Altria's regulatory services had actually [redacted]. Indeed, he stated that he was "not aware of any other way that [JLI] could meaningfully accelerate the timeline as quickly as having the option to engage Altria on these services." (PX7008 Cullen (JLI) IHT at 129). That Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

1895. The draft slide deck JLI cites as the source of its estimated [redacted] but provides no explanation of how those estimates were generated or the extent to which such savings would benefit consumers. (PX2193 (JLI) at 006 (*in camera*)).

Response to Proposed Finding No. 1895:

The Proposed Finding is incomplete and misleading without additional context. Contemporaneous with the cited presentation, Altria was convinced that JLI [redacted] and identified a number of gaps that it could fill. (RFF ¶ 1255). That Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

JLI's need to file a high-quality and timely PMTA is existential. (RFF ¶ 1221). If JLI does not obtain regulatory approval for JUUL, the product will have to come off the market, resulting in less e-vapor competition. (RFF ¶ 1222).

1896. Cullen could not identify the support for JLI's estimate of [redacted] (PX7008 (Cullen (JLI), IHT at 127-28) (*in camera*)).

Response to Proposed Finding No. 1896:

The Proposed Finding is incomplete and misleading without additional context. In the same exchange, Cullen explained that he was "not aware of any other way that [JLI] could meaningfully accelerate the timeline as quickly as having the option to engage Altria." (PX7008 Cullen (JLI) IHT at 129).

1897. Altria's estimate that a partnership between Altria and JLI would improve JLI's PMTA chances by 20 percentage is dated April 2018 (PX1409 (Altria) at 003 (Altria slide deck on Project Tree)), at least six months before Altria performed any due diligence in connection with the transaction (*see* Garnick (Altria) Tr. 1776 (testifying that Altria "began due diligence in November, and we had no idea what due diligence would have uncovered")). The estimate was based on the judgment of Altria executives, who "didn't have a detailed assessment of [JLI's] regulatory capability." (PX7010 (Gifford (Altria), IHT at 126-27)).

Response to Proposed Finding No. 1897:

The Proposed Finding is incomplete and misleading without additional context. Gifford explained in that same exchange that "knowing what [Altria] had experienced over the past nine years in dealing with the FDA and the experience [Altria] had built up internally, we certainly believed that the success rate was greater if we were able to aid [JLI] in that process with what they had and could build independently." (PX7010 Gifford (Altria) IHT at 127). Indeed, Murillo, JLI's Chief Regulatory Officer, testified that JLI "[a]bsolutely" could not have made its PMTA filing without Altria's assistance, which was "very valuable" in improving the quality of JLI's PMTA. (Murillo (JLI) Tr. 3009).

That Altria's services assisted in both the quality of the PMTA and JLI's ability to file the application on time has been substantiated by both record evidence and testimony. (RFF ¶¶ 1249-64).

(2) Predictions about JLI's Likelihood of PMTA Success Are Speculative

(a) Respondents Have Little Insight into FDA's Internal Deliberations and Face a Range of Potential Outcomes

1898. As Murillo, Chief Regulatory Officer at JLI, testified, it is "difficult for anybody" to predict whether a PMTA submission will be successful. (PX7027 (Murillo (Altria/JLI), Dep. at 42)).

Response to Proposed Finding No. 1898:

Respondents have no specific response except to note that Murillo also explained that "you can rely on your judgment and history and what has worked before," including the IQOS PMTA, which Altria had assisted on. (PX7027 Murillo (Altria/JLI) Dep. at 42; RFF ¶ 1228).

1899. The FDA has yet to approve any e-vapor PMTA. (PX7027 (Murillo (Altria/JLI), Dep. at 43); PX7009 (Burns (JLI), IHT at 235)).

Response to Proposed Finding No. 1899:

Respondents have no specific response except to note that, since the trial and the close of the record, FDA has started to issue decisions on PMTAs. It issued its first market order authorizing an e-vapor product on October 12, 2021. (U.S. Food & Drug Admin., Marketing Granted Orders for FDA Submission Tracking Numbers (STNs): PM0000551, PM0000553, PM0000560 (Oct. 12, 2021), https://www.fda.gov/media/153010/download).

1900. Regarding the PMTA process in 2019, Burns, former CEO of JLI, testified that "given, frankly, the lack of clarity, [JLI] had to interpret the PMTA requirement and design a program which we hoped would satisfy the PMTA. But the company was in uncharted territory. And frankly, outside of the IQOS product, which is a slightly different product, there was no certainty about what the requirements were going to be." (PX7009 (Burns (JLI), IHT at 234-35)).

Response to Proposed Finding No. 1900:

The Proposed Finding is incomplete and misleading without additional context. FDA issued a final guidance document on e-cigarette PMTAs in June 2019, (RFF ¶ 82), which meant that the company was not in a place of "no certainty," (PX7009 Burns (JLI) IHT at 234). Moreover, Altria assisted on the IQOS PMTA, (RFF ¶ 1228), which gave Altria additional experience that it could bring to bear on behalf of JLI even if it was a "slightly different product," (PX7009 Burns (JLI) IHT at 234).

1901. [redacted] (PX7007 (Murillo (Altria/JLI), IHT at 80-81) (testifying that [redacted]) (*in camera*); PX7008 (Cullen (JLI), IHT at 132) ("I don't think we have a house view on a specific number."); PX7027 (Murillo (Altria/JLI), Dep. at 65-66)).

Response to Proposed Finding No. 1901:

Respondents have no specific response except to note that in the same exchange, Cullen explained that Altria's services "only improve the likelihood of [JLI's PMTA] being not just timely, but as good as it can be." (PX7008 Cullen (JLI) IHT at 132).

1902. In terms of the potential for FDA approval of JLI's PMTA submission, Murillo thinks of that potential in qualitative terms rather than quantitative terms. (PX7027 (Murillo (Altria/JLI), Dep. at 65-66)).

Response to Proposed Finding No. 1902:

Respondents have no specific response.

1903. As O'Hara testified, it would be speculative to attach a dollar value to a qualitative performance indicator, such as an improvement in lab testing due to Altria's regulatory services. (PX7033 (O'Hara (JLI), Dep. at 185-87)).

Response to Proposed Finding No. 1903:

Respondents have no specific response except to note that the issue of whether a specific dollar value may be attached to a qualitative performance indicator has no bearing on whether Altria's regulatory services provided a benefit to JLI and to competition: JLI's need to file a high-quality and timely PMTA is existential, (RFF ¶ 1221). If JLI does not obtain regulatory approval for JUUL, the product will have to come off the market, resulting in less e-vapor competition. (RFF ¶ 1222).

1904. The FDA has not given JLI any indication as to its ultimate decision with respect to any of the products in JLI's PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 40)).

Response to Proposed Finding No. 1904:

Respondents have no specific response except to note that there is no evidence that FDA comments on the strength of a PMTA before making its final decision.

1905. The FDA has not given JLI any indication as to whether any JLI products are more or less likely than others to receive PMTA approval. (PX7027 (Murillo (Altria/JLI), Dep. at 40)).

Response to Proposed Finding No. 1905:

Respondents have no specific response except to note that there is no evidence that FDA comments on the strength of a PMTA before making its final decision.

1906. The FDA indicated that JLI would receive a "deficiency letter" requesting further information in connection with JLI's PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 34-35); *see* PX0032 (Altria) at 056 (Altria Response to Interrogatory No. 13)).

Response to Proposed Finding No. 1906:

To the extent the Proposed Finding implies that a "deficiency letter" means that there is a fatal flaw in JLI's PMTA, the Proposed Finding is incomplete and misleading without additional context. As Murillo explained, a deficiency letter is "part of the process," and is simply FDA requesting additional information. (Murillo (Altria/JLI) Tr. 2222; *see also* PX0032 (Altria) at 056 (describing how "[a]n applicant's submission of a PMTA commences an iterative process with the FDA")). Notably, Altria continues to assist with JLI's responses to FDA for more information, further illustrating the significance of Altria's regulatory services. (RFF ¶¶ 1265-66; *see also* PX0032 (Altria) at 056).

1907. JLI may need to amend its PMTA submission depending on the questions it receives from the FDA. (PX7027 (Murillo (Altria/JLI), Dep. at 38); *see* PX0032 (Altria) at 056 (Altria Response to Interrogatory No. 13)).

Response to Proposed Finding No. 1907:

To the extent the Proposed Finding implies that a need to supplement means that there is a fatal flaw in JLI's PMTA, the Proposed Finding is incomplete and misleading without additional context. As the cited document explains, "[a]n applicant's submission of a PMTA commences an iterative process with the FDA." (PX0032 (Altria) at 056). Altria continues to assist with this iterative process, further illustrating the significance of Altria's regulatory services. (RFF ¶¶ 1265-66; *see also* PX0032 (Altria) at 056).

1908. Receiving a deficiency letter from the FDA can toll the PMTA review timeframe. (PX7027 (Murillo (Altria/JLI), Dep. at 39)).

Response to Proposed Finding No. 1908:

Respondents have no specific response.

1909. Ultimately, the FDA is able to adjust within its discretion the deadline for it to reach a final decision on JLI's PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 38-39)).

Response to Proposed Finding No. 1909:

Respondents have no specific response.

1910. Even if FDA were to approve an e-vapor product, Murillo believes the agency has made clear that such approval would likely be subject to a number of marketing restrictions. (PX7027 (Murillo (Altria/JLI), Dep. at 66-67)).

Response to Proposed Finding No. 1910:

Respondents have no specific response.

1911. In late-September, around the time he was considering leaving Altria for JLI, Murillo felt that the regulatory services that Altria was providing were not going to be sufficient to address JLI's challenges in securing a PMTA. (PX7007 (Murillo (Altria/JLI), IHT at 86-87)). Despite the services Altria had been providing, he had "significant concerns" that were "still deeply troubling." (PX7007 (Murillo (Altria/JLI), IHT at 86-87)).

Response to Proposed Finding No. 1911:

The Proposed Finding is incomplete and misleading without additional context. At trial, Murillo testified that Altria's regulatory services "absolutely" had an effect on the quality of JLI's PMTA and that JLI "absolutely" could not have made its PMTA filing without Altria's assistance. (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1247-64).

(b) The Prevalence of Youth Vaping Poses a Particular Risk to JLI's PMTA Submission

1912. Youth use of an e-vapor product is an example of an unintended consequence, making it relevant to the FDA's PMTA analysis, and the prevalence of youth use poses a significant risk to JLI's PMTA submission. (*See* CCFF ¶¶ 1913-17, below).

Response to Proposed Finding No. 1912:

Respondents have no specific response. To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 1913-17, Respondents incorporate their responses to those Proposed Findings herein.

1913. Altria still does not know exactly how much weight the FDA will put on the PMTA factors "adult smoker conversion" and "no unintended consequences." (Garnick (Altria) Tr. 1734).

Response to Proposed Finding No. 1913:

Respondents have no specific response except to note that Garnick also explained that "[Altria] knew that they were both important factors." (Garnick (Altria) Tr. 1734).

1914. As Murillo testified, "Certainly you would want to see as limited unintended consequences as possible" in assessing a product's likelihood of receiving PMTA approval. (Murillo (Altria/JLI) Tr. 3031).

Response to Proposed Finding No. 1914:

Respondents have no specific response except to note that Murillo also testified that "[a]ll else equal, the greater a product's ability to convert adult smokers, you would expect it to be more likely to receive PMTA approval." (Murillo (Altria/JLI) Tr. 3031).

1915. In the context of an e-vapor PMTA, youth use is an example of an unintended consequence. (Murillo (Altria/JLI) Tr. 3032). Accordingly, the risk of youth use is relevant to the PMTA analysis for an e-vapor product. (Murillo (Altria/JLI) Tr. 3032).

Response to Proposed Finding No. 1915:

Respondents have no specific response.

1916. Murillo has seen the prevalence of youth vaping "as a very significant risk" to JLI's receiving PMTA approval for the in-market Juul device. (PX7027 (Murillo (Altria/JLI), Dep. at 70-71). In fact, he testified that [redacted] (PX7007 (Murillo (Altria/JLI), IHT at 80) (*in camera*)).

Response to Proposed Finding No. 1916:

Respondents have no specific response.

1917. A December 2018 due diligence report prepared by the regulatory consulting firm, Greenleaf Health, noted that "[t]he major hurdle Tree will face in seeking approval of a PMTA for its current ENDS product is likely to be their ability to successfully address the issue of youth use and initiation." (PX1552 (Altria) at 018).

Response to Proposed Finding No. 1917:

Respondents have no specific response.

b) Regulatory Services Are Not Merger Specific

1918. JLI has acknowledged that it "did not formally analyze alternatives to using Altria's [regulatory] services." (PX0031 (JLI) at 031 (JLI Response to Interrogatory No. 11)).

Response to Proposed Finding No. 1918:

The Proposed Finding is incorrect, incomplete, and misleading without additional context. In the same Interrogatory Response, JLI explained that "[g]iven the intense time pressure faced by JLI to complete its PMTA application, JLI's need for additional resources, Altria's availability as a result of the Transaction Agreements, and Altria's vast regulatory experience in this field, the Company decided to move ahead with Altria's regulatory support services wherever it would be beneficial to JLI." (PX0031 (JLI) at 031). The evidence shows that Altria's regulatory services were critical in enabling JLI to file a high-quality and timely PMTA. (RFF ¶¶ 1215-68).

1919. JLI's Danaher did not recall any discussions at JLI in 2018 about potentially using an information firewall instead of a non-compete agreement in connection with Altria's provision of support services to JLI. (PX7042 (Danaher (JLI), Dep. at 154-55)).

Response to Proposed Finding No. 1919:

The Proposed Finding is incomplete and misleading without additional context. At the outset, it is unclear from the cited testimony whether Danaher understood the question. (PX7042 Danaher (JLI) Dep. at 154-55 ("Q. Do you remember any discussions in 2018 at JLI about potentially using an information firewall instead of a non-compete agreement? A. No. Instead of? Meaning in replace of? Q. Yes. A. On an ongoing basis after the transaction was closed? Q. Yes. A. This – you're referring to the execution of support services?")).

Moreover, the evidence refutes Complaint Counsel's argument that there were less-restrictive alternatives. (RFF ¶¶ 1269-83). In particular, relying on firewalls would have disincentivized Altria from putting its best people on the job—undermining the value of the services. (RFF ¶ 1270).

1920. Based on his review of testimony, and ordinary-course documents, Dr. Rothman concluded that "JLI's incentives to do whatever it could do to maximize the likelihood of obtaining PMTA approval were very, very high. This was an existential issue for JLI." (PX7048 (Rothman, Trial Dep. at 78-79); PX5000 at 087-88 (¶ 156) (Rothman Expert Report)).

Response to Proposed Finding No. 1920:

Respondents have no specific response except to note that in response to this "existential" threat, JLI chose to acquire services from Altria as the means of maximizing its chances of regulatory approval.

1921. As Cullen acknowledged, even if JLI had not entered the Services Agreement, it "would have [had] to in a way" move its internal timeline forward once the PMTA deadline moved forward. (PX7008 (Cullen, IHT at 124)).

Response to Proposed Finding No. 1921:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. Cullen also explained that he was "not aware of any other way that we could meaningfully accelerate the timeline as quickly as having the option to engage Altria on these services." (PX7008 Cullen (JLI) IHT at 129).

1922. By the time Altria began providing JLI with regulatory services, [redacted] (PX7007 (Murillo (Altria/JLI), IHT at 79) (*in camera*)).

Response to Proposed Finding No. 1922:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In the cited testimony, Murillo agreed that JLI had a "goal" to submit its PMTA on time. (PX7007 Murillo (Altria/JLI) IHT at 79). However, in the same exchange, Murillo explained that this was before the PMTA deadline was accelerated by more than two years. (PX7007 Murillo (Altria/JLI) IHT at 78-79; *see also* RFF ¶ 118 (explaining acceleration of deadline from 2022 to 2020)). After the deadline was accelerated, JLI was at risk of missing the deadline, (RFF ¶¶ 1257-

58), and Altria's services were critical to ensuring the timeliness of JLI's submission, (RFF ¶¶ 1256-64).

1923. In response to the PMTA deadline moving to May 2020, JLI accelerated many aspects of studies, accelerated spending, and hired extra people, consultants, and vendors. (PX7007 (Murillo (Altria/JLI), IHT at 96)).

Response to Proposed Finding No. 1923:

Respondents have no specific response except to note that Altria's regulatory services were a critical part of JLI's efforts to meet the accelerated timeline. (RFF ¶¶ 1256-64).

1924. In 2019, JLI undertook "a very broad and deep effort to very quickly shore up the [PMTA] work that was required." (PX7027 (Murillo (Altria/JLI), Dep. at 49-50)).

Response to Proposed Finding No. 1924:

Respondents have no specific response except to note that part of JLI's "broad and deep effort" was to acquire regulatory services from Altria. (PX7027 Murillo (Altria/JLI) Dep. at 49-50).

(1) Other Companies Successfully Submitted PMTAs by the September 2020 Deadline

1925. To Murillo's recollection, there are at least half a million PMTA applications pending before the FDA. (Murillo (Altria/JLI) Tr. 2932). This includes PMTAs from "a lot of small companies" that have partnered together and "pooled their resources to try to put lots of applications bundled together." (Murillo (Altria/JLI) Tr. 3018-19).

Response to Proposed Finding No. 1925:

Respondents have no specific response except to note that manufacturers must submit a separate PMTA for each SKU, and thus a single product line with different flavors and nicotine strengths could easily require a dozen or more PMTAs. (RFF ¶ 95).

1926. [redacted]

Response to Proposed Finding No. 1926:

Respondents have no specific response.

1927. Reynolds filed an e-vapor PMTA submission in 2019 that subsequently proceeded to scientific review at the FDA. (PX7007 (Murillo (Altria/JLI), IHT at 24-25)). It also filed another e-vapor PMTA submission prior to the September 9, 2020 deadline. (RX1998 (Reynolds) at 001 (press release on PMTA submissions); PX7037 (Huckabee (Reynolds), Dep. at 91-92)).

Response to Proposed Finding No. 1927:

Respondents have no specific response.

1928. Imperial filed at least one e-vapor PMTA submission prior to the September 2020 deadline (PX7012 (Eldridge (ITG), Dep. at 90)).

Response to Proposed Finding No. 1928:

Respondents have no specific response.

(2) JLI Took Numerous Stand-Alone Measures to Accelerate and Improve Its PMTA Submission

1929. During Burns tenure as CEO of JLI, the company "[h]ired a lot of people" and expanded its scientific affairs department from three to 100 people, and "put in a group of 12 to 15 people that just conducted all of [JLI's] external behavioral studies." (PX7009 (Burns (JLI), IHT at 113-16)). Never having conducted a formalized behavioral study before, JLI had conducted over 20 by the time Burns left the company. (PX7009 (Burns (JLI), IHT at 113-16)).

Response to Proposed Finding No. 1929:

The Proposed Finding is incomplete and misleading without additional context. As Murillo explained, JLI could not have hired everyone it needed with relevant experience from Altria or via external consultants. (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1930. Before engaging Altria, JLI had already done some work toward compiling a literature review for use in its PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 109)).

Response to Proposed Finding No. 1930:

The Proposed Finding is incomplete and misleading without additional context. Murillo also explained that "Altria had done a lot of [the literature review] already for vapor, and through the services at JUUL, we were able to accelerate that activity for JUUL and quickly be able to catch up." (PX7027 Murillo (Altria/JLI) Dep. at 108).

1931. During Burns' tenure as CEO of JLI, the company had "[l]iterally hundreds" of people involved in the preparation of its PMTA. (PX7009 (Burns (JLI), IHT at 70-71); *see* PX7007 (Murillo (Altria/JLI), IHT at 95 (testifying that, as of December 2019, over 100 JLI employees were working on the company's PMTA submission)).

Response to Proposed Finding No. 1931:

The Proposed Finding is incomplete and misleading without additional context. As Murillo explained, JLI could not have hired everyone it needed with relevant experience from Altria or via external consultants. (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1932. During his tenure as CEO Burns felt that JLI's Board of Directors was "incredibly supportive . . . on any resources I needed to run the company adequately," and never "pushed back in terms of allocating resources to make the company more successful." (PX7009 (Burns (JLI), IHT at 235)).

Response to Proposed Finding No. 1932:

Respondents have no specific response.

1933. One JLI stand-alone hire is Ryan Wick, a former PMI employee who had worked on the IQOS PMTA (Murillo (Altria/JLI) Tr. 3065-66), and who now works on JLI's PMTAs. (PX7027 (Murillo (Altria/JLI), Dep. at 87-88)).

Response to Proposed Finding No. 1933:

Respondents believe that Complaint Counsel meant to cite Murillo's investigational hearing transcript, not his later deposition, for reference to Ryan Wick. (PX7007 Murillo (Altria/JLI) IHT at 88).

Nevertheless, the Proposed Finding is incomplete and misleading without additional context. As Murillo explained, JLI could not have hired everyone it needed with relevant experience from Altria or via external consultants. (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1934. JLI has hired former Altria employees, including people who performed work related to JLI's PMTA submissions. (Murillo (Altria/JLI) Tr. 3063-65).

Response to Proposed Finding No. 1934:

The Proposed Finding is incomplete and misleading without additional context. As Murillo explained, JLI could not have hired everyone it needed with relevant experience from Altria: "That would be dozens and dozens of people, which would pretty much eviscerate, among other things, the chemistry and toxicology groups." (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1935. JLI hired Murillo to serve as its Chief Regulatory Officer. (Murillo (Altria/JLI) Tr. 2896; PX7027 (Murillo (Altria/JLI), Dep. at 12)). Prior to joining JLI, Murillo, as SVP of Regulatory Affairs at Altria, had performed work related to Altria's PMTA services for JLI. (Murillo (Altria/JLI) Tr. 3064; PX7027 (Murillo (Altria/JLI), Dep. at 17)). In 2019, Murillo left Altria to join JLI, where he oversaw the preparation of JLI's PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 12-13)).

Response to Proposed Finding No. 1935:

The Proposed Finding is incomplete and misleading without additional context. As Murillo himself explained, JLI could not have hired everyone it needed with relevant experience from Altria: "That would be dozens and dozens of people, which would pretty much eviscerate, among other things, the chemistry and toxicology groups." (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1936. During his time at Altria in 2019, Murillo brought his regulatory expertise to bear on his work related to Altria's PMTA services for JLI. (Murillo (Altria/JLI) Tr. 3064; PX7027 (Murillo (Altria/JLI), Dep. at 21)). Since joining JLI, he has used that same regulatory expertise as CRO. (Murillo (Altria/JLI) Tr. 3065; PX7027 (Murillo (Altria/JLI), Dep. at 21)).

Response to Proposed Finding No. 1936:

The Proposed Finding is incomplete and misleading without additional context. As Murillo himself explained, JLI could not have hired everyone it needed with relevant experience from Altria: "That would be dozens and dozens of people, which would pretty much eviscerate, among other things, the chemistry and toxicology groups." (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI)

Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1937. As CRO of JLI, Murillo reorganized JLI's Regulatory Department, which, in his view, helped the company meet the tight PMTA deadlines. (PX7027 (Murillo (Altria/JLI), Dep. at 45-46)).

Response to Proposed Finding No. 1937:

The Proposed Finding is incomplete and misleading without additional context. Murillo also explained that in the first months of 2019, while he was still at Altria, Altria helped JLI with "a complete assessment of where they stood," and "all sorts of ways to come to decisions, accelerate work, give . . . a fair amount of the work to the subject matter experts at ALCS in the area." (PX7027 Murillo (Altria/JLI) Dep. at 48).

As Valani explained, the accelerated PMTA deadline "caught [JLI] a little bit flat-footed." (PX7011 Valani (JLI) IHT at 153). As a result, it would be "very difficult to overstate" the significance of Altria's help accelerating JLI's PMTA application. (PX7008 Cullen (JLI) IHT at 123). Indeed, JLI knew of no "other way that we could meaningfully accelerate the timeline as quickly as having the option to engage Altria" to provide regulatory services. (PX7008 Cullen (JLI) IHT at 129).

1938. As CRO of JLI, Murillo believes that he helped facilitate and accelerate the preparation of JLI's PMTA submission. (Murillo (Altria/JLI) Tr. 3065; PX7027 (Murillo (Altria/JLI), Dep. at 24-25)).

Response to Proposed Finding No. 1938:

The Proposed Finding is incomplete and misleading without additional context. Murillo's complete answer to whether he "helped accelerate the preparation of JLI's PMTA submission" was that "a lot of us did, *including the Altria support team*." (Murillo (Altria/JLI) Tr. 3065 (emphasis added)).

As Valani explained, the accelerated PMTA deadline "caught [JLI] a little bit flat-footed." (PX7011 Valani (JLI) IHT at 153). As a result, it would be "very difficult to overstate" the significance of Altria's help accelerating JLI's PMTA application. (PX7008 Cullen (JLI) IHT at 123). Indeed, they knew of no "other way that we could meaningfully accelerate the timeline as quickly as having the option to engage Altria" to provide regulatory services. (PX7008 Cullen (JLI) IHT at 129).

1939. JLI also hired Elizabeth Copeland, who had worked in Altria's regulatory affairs department. (Murillo (Altria/JLI) Tr. 3063-64; PX7027 (Murillo (Altria/JLI), Dep. at 13-14). In 2019, while still at Altria, Ms. Copeland performed work related to Altria's PMTA services to JLI. (Murillo (Altria/JLI) Tr. 3064; PX7027 (Murillo (Altria/JLI), Dep. at 58)). In 2020, Ms. Copeland left Altria to join JLI, where she is now in charge of the company's regulatory submissions in the United States, including PMTAs. (Murillo (Altria/JLI) Tr. 3064; PX7027 (Murillo (Altria/JLI), Dep. at 13-14)).

Response to Proposed Finding No. 1939:

The Proposed Finding is incomplete and misleading without additional context. As an initial matter, Murillo testified that Copeland joined JLI "toward the end of 2020." (PX7027 Murillo (Altria/JLI) Dep. at 14). Complaint Counsel offers no evidence that Copeland assisted JLI with its PMTA, *as a JLI employee*, prior to its submission in July 2020.

Moreover, as Murillo explained, JLI could not have hired everyone it needed with relevant experience from Altria: "That would be dozens and dozens of people, which would pretty much eviscerate, among other things, the chemistry and toxicology groups." (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1940. JLI also hired Dr. Willie McKinney, a toxicologist who left Altria to work at JLI (Murillo (Altria/JLI) Tr. 3063; PX7027 (Murillo (Altria/JLI), Dep. at 59)). In an October 2018 email, a senior director at JLI noted that Dr. McKinney "would be a most amazing asset" and that hiring him would "make a huge difference in our capabilities." (PX1084 (Altria) at 001).

Response to Proposed Finding No. 1940:

The Proposed Finding is incomplete and misleading without additional context. Complaint Counsel chose not to discuss the cited document at trial, (CC Exhibit Index at 4), or in any deposition. Moreover, Complaint Counsel ignores that in the cited document, the JLI senior director of clinical and regulatory affairs also stated that he was "fearful there's not enough historical and scientific knowledge of the category" at JLI, and that JLI was "very weak" on the "reg side." (PX1084 (Altria) at 001).

Moreover, as Murillo explained, JLI could not have hired everyone it needed with relevant experience from Altria: "That would be dozens and dozens of people, which would pretty much eviscerate, among other things, the chemistry and toxicology groups." (Murillo (Altria/JLI) Tr. 3073). Moreover, in addition to personnel, JLI also needed "[e]quipment and methodologies and systems and . . . collective experience of now . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073; *see also* PX7008 Cullen (JLI) IHT at 129-30 (explaining that the value Altria provided was not "a person who has the secret," but "know-how, . . . equipment, it's not something as simple as a person can make or break a PMTA application process")).

1941. In the past, Altria, too, has relied on external hiring to fill gaps in PMTA capabilities. (PX7017 (Magness (Altria), Dep. at 21-23) (describing a "pretty quick ramp" of "maybe a matter of six months or so" where Altria expanded a PMTA team from eight to 22 people, relying in part on external hiring)).

Response to Proposed Finding No. 1941:

The Proposed Finding is incomplete and misleading without additional context. Magness explained that the increase in team size was not solely due to the need to prepare e-vapor PMTAs:

"I think we were trying to position our regulatory affairs capability to be able to support Altria's business plans moving forward . . . ." (PX7017 Magness (Altria) Dep. at 25-26). Magness further explained that, although her team increased in size, "it is not just the eight people or the 20 people on my team that do the PMTA. There are lots of people that provide input that goes in the PMTA," and that her group would "work with all of our partners across the broader organization to get what we need." (PX7017 Magness (Altria) Dep. at 25).

(3) Altria Was One of Many Parties That Contributed to JLI's PMTA

1942. In 2019, JLI engaged a number of outside consultants to work on its PMTA. (Murillo (Altria/JLI) Tr. 3066; Gardner (Altria) Tr. 2693-94; PX7027 (Murillo (Altria/JLI), Dep. at 49) ("Q: Okay, in 2019, what consultants did JLI bring on to work on its PMTAs? A: I mean, many.")).

Response to Proposed Finding No. 1942:

The Proposed Finding is incomplete and misleading without additional context. Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1943. JLI had a broad agreement with consultancy Pinney Associates, which included help with JLI's PMTA. (Murillo (Altria/JLI) Tr. 3066; Gardner (Altria) Tr. 2693-94; PX7027 (Murillo (Altria/JLI), Dep. at 51); *see also* PX0031 (JLI) at 011 (JLI Response to Interrogatory No. 2) (*in camera*)). By the time JLI engaged Pinney Associates in October of 2019, the consultancy had worked on harm reduction matters for other companies for some time and had significant expertise. (PX7027 (Murillo (Altria/JLI) Dep. at 49-50)).

Response to Proposed Finding No. 1943:

The Proposed Finding is incomplete and misleading without additional context. In his cited testimony, while Murillo agreed that Pinney Associates assisted with work related to

population modeling, he also noted that Pinney did so based on "the model that we had developed at Altria." (Murillo (Altria/JLI) Tr. 3067).

Moreover, Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1944. Pinney Associates contributed significantly to JLI's PMTA. (Murillo (Altria/JLI) Tr. 3066; PX7027 (Murillo (Altria/JLI), Dep. at 53)).

Response to Proposed Finding No. 1944:

The Proposed Finding is incomplete and misleading without additional context. In his cited testimony, while Murillo agreed that Pinney Associates assisted with work related to population modeling, he also noted that Pinney did so based on "the model that we had developed at Altria." (Murillo (Altria/JLI) Tr. 3067).

Moreover, Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1945. Pinney Associates assisted JLI with work related to population modeling in connection with JLI's PMTA submission. (Murillo (Altria/JLI) Tr. 3066; PX7027 (Murillo (Altria/JLI), Dep. at 52)). For example, it was involved with preparing some of the inputs to the population model in connection with JLI's PMTA submission. (Murillo (Altria/JLI) Tr. 3067; PX7027 (Murillo (Altria/JLI), Dep. at 52)). It was also involved with an assessment of the literature. (PX7027 (Murillo (Altria/JLI), Dep. at 52)).

Response to Proposed Finding No. 1945:

The Proposed Finding is incomplete and misleading without additional context. In his cited testimony, while Murillo agreed that Pinney Associates assisted with work related to

population modeling, he also noted that Pinney did so based on "the model that we had developed at Altria." (Murillo (Altria/JLI) Tr. 3067).

Moreover, Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1946. JLI engaged clinical research organizations in connection with preparing its PMTA submission. (Murillo (Altria/JLI) Tr. 3067).

Response to Proposed Finding No. 1946:

The Proposed Finding is incomplete and misleading without additional context. As Murillo explained, "you don't do every study yourself. You hire people that do studies sometimes." (Murillo (Altria/JLI) Tr. 3068). Such experience is far from demonstrating that these third-party organizations could have replaced Altria—Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1947. JLI engaged CSUR, a contract research organization that focuses on behavioral research, to conduct a number of behavioral studies for JLI's PMTA (Gardner (Altria) Tr. 2694; PX7027 (Murillo (Altria/JLI), Dep. at 55-56)), including consumer switching studies that were incorporated into JLI's PMTA (PX7027 (Murillo (Altria/JLI), Dep. at 69-70)).

Response to Proposed Finding No. 1947:

The Proposed Finding is incomplete and misleading without additional context. As Murillo explained, "you don't do every study yourself. You hire people that do studies sometimes." (Murillo (Altria/JLI) Tr. 3068). Such experience is far from demonstrating that these third-party organizations could have replaced Altria—Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI)

Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1948. JLI had a broad relationship with third party Cambridge Associates, which included assisting JLI's product engineering group with part of its PMTA work. (PX7027 (Murillo (Altria/JLI), Dep. at 55); PX0031 (JLI) at 013 (JLI Response to Interrogatory No. 2) (*in camera*)).

Response to Proposed Finding No. 1948:

The Proposed Finding is incomplete and misleading without additional context. Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1949. JLI engaged other individual consultants with specific expertise in connection with preparing its PMTA submission. (Murillo (Altria/JLI) Tr. 3067; PX7027 (Murillo (Altria/JLI), Dep. at 49-50)).

Response to Proposed Finding No. 1949:

The Proposed Finding is incomplete and misleading without additional context. Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1950. JLI engaged toxicologists as individual consultants in connection with preparing its PMTA submission. (Murillo (Altria/JLI) Tr. 3067; PX7027 (Murillo (Altria/JLI), Dep. at 49-50)).

Response to Proposed Finding No. 1950:

The Proposed Finding is incomplete and misleading without additional context. Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and stated that it would be "completely unrealistic"

for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1951. Not only did JLI directly engage third parties to support its PMTA preparation, but Altria also engaged third parties to assist with the regulatory services it provided to JLI pursuant to the Services Agreement. (Murillo (Altria/JLI) Tr. 3068; PX7010 (Gifford, IHT at 123)).

Response to Proposed Finding No. 1951:

The Proposed Finding is incomplete and misleading without additional context. As Murillo explained in the same exchange, "you don't do every study yourself. You hire people that do studies sometimes." (Murillo (Altria/JLI) Tr. 3068). Although Altria on occasion hired third parties to conduct specific testing, Altria still directed the testing and its involvement was still critical. (PX7027 Murillo (Altria/JLI) Dep. at 79-82, 90-91, 99-100).

Such experience is far from demonstrating that these third-party organizations could have replaced Altria—Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1952. For example, Altria engaged an external chemistry laboratory called Enthalpy Analytics in connection with [redacted]. (PX7027 (Murillo (Altria/JLI), Dep. at 79-80 (*in camera*)); PX2209 (JLI) at 003-04 (Statement of Work #15)). Enthalpy Analytics is capable of performing validated methods with respect to vapor products. (PX7027 (Murillo (Altria/JLI), Dep. at 80-81)). In the past, JLI has directly engaged Enthalpy Analytics for other work. (PX7027 (Murillo (Altria/JLI), Dep. at 80)).

Response to Proposed Finding No. 1952:

The Proposed Finding is incomplete and misleading without additional context. Although Altria contracted with labs to do certain testing, Altria scientists directed the testing. As Murillo explained, Enthalpy Analytics could "execute a test. You say, I would like you to execute test X based on this validated method with Product Z. Please run it." (PX7027 Murillo (Altria/JLI) Dep.

at 80). [redacted] As a result, regardless of whether Enthalpy did the actual testing, "you need the expertise of what to do with [air-liquid interface]," which Altria provided. (PX7027 Murillo (Altria/JLI) Dep. at 82).

This difference in capabilities encapsulates why JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and why it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1953. Altria also engaged a contract research organization called Battelle in connection with [redacted] (PX7027 (Murillo (Altria/JLI), Dep. at 90 (*in camera*); PX4067 at 003 (Statement of Work #20)). Battelle is capable of performing studies of various sorts, including toxicology, chemistry, and other types of product characterization. (PX7027 (Murillo (Altria/JLI), Dep. at 90-91)). [redacted] (PX7027 (Murillo (Altria/JLI), Dep. at 92) (*in camera*)).

Response to Proposed Finding No. 1953:

The Proposed Finding is incomplete and misleading without additional context. [redacted] As Murillo explained, "you don't do every study yourself. You hire people that do studies sometimes." (Murillo (Altria/JLI) Tr. 3068).

However, such experience is far from demonstrating that these third-party organizations could have replaced Altria—Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it

would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1954. Altria also engaged a third party called Eurofins Lancaster in connection with [redacted] (PX7027 (Murillo (Altria/JLI), Dep. at 99-100 (*in camera*)); PX4069 (Statement of Work #22)). Eurofins Lancaster is a staffing agency that provides laboratory technicians to companies so that the companies can "staff up and down depending on project requirements." (PX7027 (Murillo (Altria/JLI), Dep. at 99-100)). In essence, it provided "temporary help but with the expertise to run the machines that were used for this activity." (PX7027 (Murillo (Altria/JLI), Dep. at 99-100)).

Response to Proposed Finding No. 1954:

The Proposed Finding is incomplete and misleading without additional context. Murillo explained that Eurofins Lancaster is a "staffing agency," so while "ALCS had proprietary equipment and methodologies at its laboratory facility in Richmond," that equipment could in some instances be staffed by technicians from a third party. (PX7027 Murillo (Altria/JLI) Dep. at 99-100).

Such experience is far from demonstrating that these third-party organizations could have replaced Altria—Murillo agreed that JLI could not have "replaced Altria's experience and specialized know-how with consultants," (Murillo (Altria/JLI) Tr. 3073), and testified that it would be "completely unrealistic" for JLI to replace Altria's services with third parties, (Murillo (Altria/JLI) Tr. 3009; *see also* RFF ¶¶ 1278-83).

1955. The population model that Altria used in support of JLI's PMTA submission was developed not by Altria scientists alone but in collaboration with external public health scientists. (Murillo (Altria/JLI) Tr. 3006; *see also* PX7027 (Murillo (Altria/JLI), Dep. at 104) (testifying in reference to Altria's agent-based model that "Altria didn't develop it by itself. I mean, there were—it was a collaboration.")).

Response to Proposed Finding No. 1955:

The Proposed Finding is incomplete and misleading without additional context. Murillo explained that while the model was developed as part of a collaboration, the code used to run the model "was proprietary to ALCS." (PX7027 Murillo (Altria/JLI) Tr. 105).

2. Non-Regulatory Services Are Not Cognizable

1956. Based on his review of submissions, testimony, and ordinary-course documents, Dr. Rothman concluded that Respondents have not provided information to substantiate their claimed non-regulatory efficiencies. (PX7048 (Rothman, Trial Dep. at 84-85); PX5000 at 088-96 (¶¶ 157-75) (Rothman Expert Report)).

Response to Proposed Finding No. 1956:

The Proposed Finding is incomplete and misleading to the extent it implies that Dr. Rothman's conclusion is correct that Respondents have not substantiated non-regulatory efficiencies.

Dr. Rothman is not well-positioned to undertake this sort of factual evaluation. (PX7047 Murphy Dep. at 276 ("A factual question of whether, in fact, these cost savings occurred is not something I, as an economist, [am] particularly well positioned to evaluate.")). Indeed, in the cited trial deposition testimony, counsel for JLI objected that "[t]here is no foundation that this witness has any expertise in the benefits that can be derived from the various services that were provided under this agreement." (PX7048 Rothman Trial Dep. at 84-85).

a) Fixture Services Are Not Cognizable

1957. Before the amended Services Agreement terminated all non-regulatory services, Altria had agreed to make its ITP shelf space available to JLI for lease, and to support JLI's efforts to improve point-of-sale prominence, such as higher shelf placement and more facings. (PX2160 (JLI) at 086-87). JLI claimed that Altria's fixture services would increase sales volume of JLI's products. (PX2160 (JLI) at 086-87).

Response to Proposed Finding No. 1957:

Respondents have no specific response.

1958. Altria provided shelf space to JLI that had been allocated in part to Nu Mark's e-vapor products. (PX7010 (Gifford, IHT at 77-78)).

Response to Proposed Finding No. 1958:

Respondents have no specific response except to note that this service was terminated as of March 31, 2020, pursuant to the Amended Services Agreement. (RFF ¶ 1134).

1959. A June 2019 internal JLI status update on Altria's fixture services indicated that "ITP Resets are behind the original schedule," and projected finishing 2019 at roughly 55% of its expectations in terms of facings. (PX2197 (JLI) at 004, 009; *see also* PX2203 (JLI) at 001 (Jul. 28, 2019 Email update on Altria services) (noting "fixture progress delays" and that ITP effort "slowed down and remains flat."); PX7008 (Cullen (JLI), IHT at 98-99) ("The Altria shelving resets were occurring at a pace slower than had originally been projected.")).

Response to Proposed Finding No. 1959:

Respondents have no specific response.

1960. JLI claimed that as of July 2019, approximately 17,900 ITP stores had been reset with JLI products (PX2160 (JLI) at 086 (JLI Second Request Narrative Response)), but the document cited for support was withheld for privilege (PX2203 (JLI) at 008; PX7008 (Cullen (JLI), IHT at 96-97) (*in camera*)).

Response to Proposed Finding No. 1960:

Respondents have no specific response except to note that support for the claim that as of [redacted]

1961. JLI estimated a revenue increase of $100 million per year due to Altria's ITP space "along with other investments in JUUL-only chains and other channels" (PX2160 (JLI) at 86 (JLI Second Request Narrative Response)), but the document cited for support was withheld for privilege (PX2203 (JLI) at 008; PX7008 (Cullen (JLI), IHT at 108-09). Moreover, the projection includes retail chains that were not covered by Altria's fixture services. (PX7008 (Cullen (JLI), IHT at 109)).

Response to Proposed Finding No. 1961:

Respondents have no specific response except to note that support for JLI's estimated revenue increase of $100 million per year due to Altria's ITP space and other investments in JUUL-only chains and other channels can be found in PX2189 (JLI) at 006 and 012.

1962. JLI's claim that "[s]hifts in back bar placement from bottom to top shelf alone could result in an estimated 10% life in sales volume" (PX2160 (JLI) at 086 (JLI Second Request Narrative Response)) was based on "very preliminary interviews of some chains" (PX2188 (JLI) at 007 (draft McKinsey deck on fixture services), and Cullen was unable to identify further support (PX7008 (Cullen (JLI), IHT at 112-13)).

Response to Proposed Finding No. 1962:

Respondents have no specific response except to note that McKinsey was a third party that provided discovery in this case, but Complaint Counsel did not otherwise seek discovery from McKinsey as to this evidence.

1963. JLI claimed that "moving from less than eight to more than eight facings in retail locations could result in an estimated sales lift of 2-3%" (PX2160 (JLI) at 086-87 (JLI Second Request Narrative Response)), but the document cited lists the source for that estimate simply as "[e]xpert interviews" (PX2188 (JLI) at 014 (draft McKinsey deck), and Cullen was unable to provide further support (PX7008 (Cullen (JLI), IHT at 113-14)).

Response to Proposed Finding No. 1963:

Respondents have no specific response except to note that McKinsey was a third party that provided discovery in this case, but Complaint Counsel did not otherwise seek discovery from McKinsey as to this evidence.

1964. JLI claimed that utilizing Altria's field sales team for fixture services would represent approximately 16-20% in cost savings (PX2160 (JLI) at 087 (JLI Second Request Narrative Response)), but the document it cited for support is unrelated to fixture services (PX2186 (JLI) (flash report on sales)), and Cullen could not provide further detail (PX7008 (Cullen (JLI), IHT at 114-15)).

Response to Proposed Finding No. 1964:

Support for the estimate that utilizing Altria's field sales team for fixture services would represent approximately 16-20% in cost savings can be found in PX2189 (JLI) at 077. (*See also*

PX2189 (JLI) at 014 (describing AGDC's "significant in-store presence . . . [to] help ensure JUUL product availability and pricing accuracy" and AGDC's "sales analytics and trade marketing support programs [that] could improve understanding of product execution and results")).

1965. As of March 2018, JLI was planning stand-alone investments in in-store fixtures and placement to drive sales. (PX2040 (JLI) at 004 (March 2018 presentation script); PX7005 (Danaher, IHT at 74-76)).

Response to Proposed Finding No. 1965:

Respondents have no specific response.

1966. JLI grew its sales on a stand-alone basis from September 2017 through November 2018 (PX2062 (JLI) at 006 (sales and marketing deck dated November 2018); *see also* PX7005 (Burns (JLI), IHT at 191-92) (noting that JLI "would have had other space that would . . . allow us to compete incredibly well," and that JLI was "doing that through 2018")).

Response to Proposed Finding No. 1966:

Respondents have no specific response except to note that Complaint Counsel appears to be citing PX7009, not PX7005, in the Proposed Finding.

b) Sales Services Are Not Cognizable

1967. Before the amended Services Agreement terminated all non-regulatory services, Altria had agreed to a range of sales services, from making Altria salespeople available to assist JLI on out-of-stock distribution gaps, "light merchandising," executing pre-orders, and "surveying and photographing the vapor category," to inviting JLI to an Altria trade show. (PX2160 (JLI) at 096-97).

Response to Proposed Finding No. 1967:

Respondents have no specific response.

1968. One reason that Altria proposed amending the Services Agreement was that "you had confusion around the retailer, who they should talk to depending on a given topic," because JLI was "using [Altria's] sales force on an ad hoc basis" in addition to using its own sales force. (PX7010 (Gifford (Altria), IHT at 231-32)).

Response to Proposed Finding No. 1968:

Respondents have no specific response.

1969. At the time of the transaction, Altria had not anticipated the challenge of retailer confusion in connection with its sales services. (PX7010 (Gifford (Altria), IHT at 232)). Gifford testified that Altria "certainly expected [JLI] to engage with a lot more of our resources available to us," adding that Altria "had a well oiled machine with our sales force organization" but that JLI "basically would just use them on an ad hoc basis." (PX7010 (Gifford (Altria), IHT at 231-32)).

Response to Proposed Finding No. 1969:

Respondents have no specific response.

1970. In support of a claim that Altria's sales services "will result in $36 million in additional revenue net of the Territory Sales Manager costs," JLI cites to a draft slide deck prepared by third-party consultant McKinsey. (PX2160 (JLI) at 096 (JLI Second Request Narrative Response) (citing PX2189 (JLI) at 006 (draft McKinsey deck)). However, the slide deck does not identify the basis of the estimate, and Cullen could not provide further detail. (PX2189 (JLI) at 006; PX7008 (Cullen (JLI), IHT at 188-89)).

Response to Proposed Finding No. 1970:

Respondents have no specific response except to note that Cullen testified that he assumed "McKinsey would have some analysis to support it." (PX7008 Cullen (JLI) IHT at 188).

1971. In support of a claim that "JLI has experienced a 10% reduction in [out-of-stock issues], which corresponds to a $3 million benefit," JLI cites to a draft document that does not identify the basis for the claim (PX2160 (JLI) at 096 (JLI Second Request Narrative Response) (citing PX2210 (JLI) (direct mail and inserts summary)). Cullen acknowledged that the cited document "does not appear to support the claim related to reduction and out of stock," and could not provide further detail. (PX7008 (Cullen (JLI), IHT at 199-201)).

Response to Proposed Finding No. 1971:

[redacted]

1972. As of early-2018, JLI was investing in expanding its sales force. (PX2040 (JLI) at 015 (March 2018 presentation script); PX7005 (Danaher, IHT at 76-77)). This included territory sales managers, who would be "based in their local market," would "visit retail establishments . . . to make sure that [JLI's] product was properly positioned based on the detail parameters, that it was stocked appropriately, et cetera." (PX7005 (Danaher (JLI), IHT at 76-77)). It also included "people who would be overseeing different B2B sales" and "would just be part of the order process flow management." (PX7005 (Danaher (JLI), IHT at 76-77)).

Response to Proposed Finding No. 1972:

Respondents have no specific response except to note that Complaint Counsel appears to be citing PX2040 (JLI) at 004, not 015, in the Proposed Finding.

1973. According to a November 2018 JLI sales and marketing deck, JLI was planning a further investment of "$100 million in merchandising assets & execution to support brand building [in] 2019." (PX2062 (JLI) at 022).

Response to Proposed Finding No. 1973:

Respondents have no specific response.

1974. [redacted]

Response to Proposed Finding No. 1974:

Respondents have no specific response except to note that JLI executed five statements of work with Altria in 2019 for Altria's sales services at an estimated cost of $13.8 million. (PX2160 (JLI) at 096).

1975. Crossmark is an example of "a third party that could perform some services similar to [Altria]," and "in some settings where they are both present could be considered an alternative." (PX7008 (Cullen (JLI), IHT at 190-91); *see also* PX2189 (JLI) at 008, 010 (draft McKinsey deck). Crossmark is a "third-party merchandising services provider and offers a variety of services," indeed, "[t]heir business is sales services." (PX7008 (Cullen (JLI), IHT at 190-91)).

Response to Proposed Finding No. 1975:

Respondents have no specific response except to note that Cullen further testified that Crossmark could not fully replace Altria because "their channel presence is not . . . a perfect overlap with where Altria and JUUL and tobacco products are sold," as they are historically strongest "in grocery and drug and mass market settings." (PX7008 Cullen (JLI) IHT at 190).

c) Database and Direct Marketing Services Are Not Cognizable

1976. Before the amended Services Agreement terminated all non-regulatory services, Altria had agreed to use its database containing contact information for adult smokers to circulate

coupons for JLI products by direct mail and via Email, and to place JLI product inserts in packs of certain Altria brand cigarettes. (PX2160 (JLI) at 93-94).

Response to Proposed Finding No. 1976:

Respondents have no specific response.

1977. JLI directed that one of the statements of work for a direct mail campaign in 2019 be cancelled. (PX0007 (Altria) at 030).

Response to Proposed Finding No. 1977:

Respondents have no specific response except to note that other direct mail campaigns went forward in 2019. (PX2160 (JLI) at 093-94).

1978. In terms of the Email campaigns, JLI noted that "delivery failures, difficulty passing spam filters, and low open rates have caused the campaign to be placed on hold." (PX2160 (JLI) at 094).

Response to Proposed Finding No. 1978:

Respondents have no specific response.

1979. A test Email campaign in early 2019 resulted in "deliverability [that] was very poor," and as of July 2019 the campaign "was still struggling with deliverability." (PX7008 (Cullen (JLI), IHT at 168-69). Any cost savings or revenue increases associated with the Email campaign were "not as meaningful as [JLI] would have hoped" and no further Email campaigns were planned for 2020. (PX7008 (Cullen (JLI), IHT at 168-69)).

Response to Proposed Finding No. 1979:

Respondents have no specific response.

1980. JLI expected Altria to execute three direct mail campaigns in 2019 at a total cost of $6.6 million. (PX2160 (JLI) at 092-93 (JLI Second Request Narrative Response)). For the first campaign, JLI did not attempt to account for the purchases that would not have occurred but for the coupons. (PX2160 (JLI) at 092). For the other two campaigns, JLI cited projected revenues that assumed two-thirds of redemptions would be new users rather than existing ones but did not provide the basis for that assumption. (PX2160 (JLI) at 092-93 (citing PX2210 (JLI) at 002 (direct mail and inserts summary))).

Response to Proposed Finding No. 1980:

Respondents have no specific response except to note that Complaint Counsel raised PX2210 with JLI's designee to discuss efficiencies related to the transaction, Cullen, but did not

inquire about the assumption that two-third of redemptions would be new adult users. (See PX7008 Cullen (JLI) IHT at 199).

1981. A July 2019 internal JLI status update on Altria's services references "[d]eterioration of direct marketing relationship," noting "[s]everal issues, but the biggest is smoker database," and adding that Altria was "trying to restrict us to non-Altria (~5M of 19M) rather than giving access to the benefit of the entire smoker database due to potential conflicts of interest." (PX2203 (JLI) at 002; *see* PX7008 (Cullen (JLI), IHT at 150-51)).

Response to Proposed Finding No. 1981:

Respondents have no specific response.

1982. JLI claims that Altria launched two waves of inserts in 2019. (PX2160 (JLI) at 093 (JLI Second Request Narrative Response)). According to the cited document, the first wave resulted in a redemption rate of .007% (PX2210 (JLI) at 004 (direct mail and inserts summary)), which JLI referred to as "sub-par" (PX2203 (JLI) at 007 (status update on Altria services)). JLI's projections for the second wave assumed that two-thirds of redemptions would be new rather than existing users but did not provide the basis for that assumption. (PX2210 (JLI) at 002 (direct mail and inserts summary)).

Response to Proposed Finding No. 1982:

Respondents have no specific response except to note that Complaint Counsel appears to be citing PX2210 (JLI) at 004, not 002, in the last sentence of the Proposed Finding.

1983. Altria did not agree to initiate any direct mail campaigns in 2020. (PX7008 (Cullen (JLI), IHT at 152-53)).

Response to Proposed Finding No. 1983:

Respondents have no specific response.

1984. JLI was able to improve its promotional efforts on a stand-alone basis, for example in the fall of 2018. (PX7009 (Burns (JLI), IHT at 153) (noting for fall 2018 promotional efforts that "every promotion across the key metrics was better")).

Response to Proposed Finding No. 1984:

Respondents have no specific response.

d) Distribution Services Are Not Cognizable

1985. Before the amended Services Agreement terminated all non-regulatory services, Altria had agreed to provide JLI with pooled distribution services in certain geographies, including

warehouse storage and last-mile freight. (PX2160 (JLI) at 082-85). JLI claims that these services have resulted in cost savings, reduced delivery times, and more consistent lead times. (PX2160 (JLI) at 82-84).

Response to Proposed Finding No. 1985:

Respondents have no specific response.

1986. In February of 2020, Gifford confirmed that "[m]ost of the services under the distribution support were on a pilot basis," and that "unwinding it has been fairly simple." (PX7010 (Gifford (Altria), IHT at 66-67)).

Response to Proposed Finding No. 1986:

Respondents have no specific response.

1987. Cullen was unable to provide a bottom-line figure for JLI's cost savings achieved as a result of Altria's distribution services in 2019. (PX7008 (Cullen (JLI), IHT at 87)).

Response to Proposed Finding No. 1987:

Respondents have no specific response except to note that Cullen did discuss, at length, the efficiencies gained by utilizing Altria's distribution services. (*See e.g.,* PX7008 Cullen (JLI) IHT at 33-36, 47-48, 52, 61-62).

1988. JLI claims that Altria's ability to distribute new products was "faster and more effective" than JLI's, but cites no support related to JLI's capabilities. (PX2160 (JLI) at 083 (JLI Second Request Narrative Response)). For Altria's capabilities, JLI cites a draft McKinsey slide deck that does not identify its sources of information. (PX2160 (JLI) at 083 (citing PX2188 (JLI) at 005)).

Response to Proposed Finding No. 1988:

Respondents have no specific response except to dispute the implied attack on the credibility of the document. McKinsey was a third party that provided discovery in this case, but Complaint Counsel did not otherwise seek discovery from McKinsey as to this evidence.

1989. JLI claims that distribution services related to Altria's warehouse in Richmond, Virginia, estimated to cost $50,000 per year, represented "a significant improvement over rates available" from third-party logistics companies, but does not cite any support for this claim. (PX2160 (JLI) at 083 (JLI Second Request Narrative Response)). An internal JLI Email from March 2019 indicates a cost estimate associated with this Altria service of $54,000-$127,000. (PX2196 (JLI) at 001).

Response to Proposed Finding No. 1989:

The Proposed Finding is incomplete and misleading without additional context. JLI's estimated cost of $50,000 for distribution services related to Altria's warehouse in Richmond, Virginia, is based on cost estimates tracked by JLI throughout 2019, after this particular service was actually implemented. (PX2208 (JLI) at 003; *see also* PX2198 (JLI) at 027). The internal email that Complaint Counsel cites represents an estimate of potential cost that was considered before the relevant Statement of Work was actually executed. (PX2196 (JLI) at 001).

1990. JLI claims annual savings of $1.2 million related to pooled distribution services in California and Texas (PX2160 (JLI) at 085, 103 (JLI Second Request Narrative Response)), but the document cited for support does not mention the $1.2 million figure (PX2244 (JLI) at 002 (Altria services tracker)). By contrast, a March 2019 JLI Email indicates a benefit of "$200k-$1.2M annually" (PX2196 (JLI) at 001). The statements of work underlying these services were only effective for 6-8 months in 2019. (PX2160 (JLI) at 085).

Response to Proposed Finding No. 1990:

The Proposed Finding is incomplete and misleading without additional context. *First*, JLI utilized Altria's pooled distribution services not only in California and Texas, but also in Arizona, Nevada, Louisiana, and Oklahoma. (PX2160 (JLI) at 084). *Second*, JLI cites to PX2196 and PX2244 to support its estimate of $1.2 million in annual savings related to Altria's pooled distribution services. (PX2160 (JLI) at 084, 103; PX2196 (JLI) at 001 (estimating benefits up to $1.2 million at a ~30% savings over current arrangement with DCL); PX2244 (JLI) at 002 ("[P]ooled distribution went live on 4/29[/2019] and exceed[s] reliability and cost expectation in [the] first two months. . . . Further upside on savings as this strategy is implemented across the US (savings, secure transport and service).")).

1991. In connection with its savings estimates related to pooled distribution in California and Texas, an internal JLI tracking spreadsheet indicated savings closer to $300,000 through September 2019. (PX2213 (JLI); *see* PX7008 (Cullen (JLI), IHT at 55-57)).

Response to Proposed Finding No. 1991:

The Proposed Finding is incomplete and misleading without additional context. *First*, JLI utilized Altria's pooled distribution services not only in California and Texas, but also in Arizona, Nevada, Louisiana, and Oklahoma. (PX2160 (JLI) at 084). *Second*, the spreadsheet Complaint Counsel cites, PX2213, was used by JLI to support the per weight shipping cost savings associated with Altria's pooled distribution services, not the estimated total annual savings. (PX2160 (JLI) at 084 (stating that "JLI has reduced its shipping costs on these routes from ~$1.15 per weight to ~59 cents per weight . . . and to ~42 cents per weight" depending on geography)). PX2213 covers the time period May 2019 to September 2019 only and does not even indicate whether all relevant shipments from that time period are included. (PX2213 (JLI); *see also* PX7008 Cullen (JLI) IHT at 55-56 ("I didn't prepare this, but what this appears to analyze is a summary of the shipments made . . . .")).

1992. Cullen is not aware whether JLI sought quotes from logistics companies other than its incumbent servicers as potential alternatives to Altria's services related to public warehouses in California and Texas. (PX7008 (Cullen (JLI), IHT at 57-58)).

Response to Proposed Finding No. 1992:

Respondents have no specific response.

1993. In 2018, JLI made stand-alone investments in expanding points of distribution. (PX7005 (Danaher, IHT at 90)).

Response to Proposed Finding No. 1993:

Respondents have no specific response.

1994. A June 2019 internal JLI Email indicates that JLI secured a new contract with its third-party logistics company that "delivers $200-250k/month savings." (PX2219 (JLI) at 001).

Response to Proposed Finding No. 1994:

Respondents have no specific response.

1995. JLI does not indicate the extent to which any of its claimed cost savings from Altria's distribution services have been passed on to consumers. (PX2160 (JLI) at 083-85 (JLI Second Request Narrative Response)). Nor does it quantify any reduced delivery time or improved lead-time consistency in terms of their benefit to consumers. (PX2160 (JLI) at 083-85).

Response to Proposed Finding No. 1995:

Respondents have no specific response.

XV. WITNESS BACKGROUNDS

A. LAY WITNESSES WHO TESTIFIED AT TRIAL

1. Respondents' Executives and Former Executives

Jody Begley of Altria (Begley Tr. 960-1134)

1996. Jody Begley is currently the Executive Vice President and Chief Operating Officer of Altria. (Begley (Altria) Tr. 961). He has held this position since September 2020. (Begley (Altria) Tr. 961). Begley's previous position at Altria was Senior Vice President for Tobacco Products, a position he held from June 2018 to September 2020. (Begley (Altria) Tr. 961).

Response to Proposed Finding No. 1996:

Respondents have no specific response.

1997. Begley served as President and General Manager at Nu Mark from July of 2015 to May 31, 2018. (Begley (Altria) Tr. 961). Nu Mark was one of Altria's operating units and was responsible for competing in the e-vapor space. (Begley (Altria) Tr. 961-62). In that position, he was involved in setting Nu Mark's strategic initiatives and financial targets. (Begley (Altria) Tr. 962-63).

Response to Proposed Finding No. 1997:

Respondents have no specific response.

1998. Begley owns more than $2 million worth of shares in Altria stock. (PX7022 (Begley (Altria), Dep. at 64-65)).

Response to Proposed Finding No. 1998:

Respondents have no specific response.

Dr. William Gardner of Altria (Gardner Tr. 2554-2695, 3075-3096)

1999. Dr. William Gardner is an associate fellow in the scientific strategy and advocacy group in regulatory affairs at Altria and held that position since April 2021. (Gardner (Altria) Tr. 2554-55). He has worked for Altria for 20 years. (Gardner (Altria) Tr. 2555). In his current position, Dr. Gardner is the lead scientist working on oral reduced-risk products. (Gardner (Altria) Tr. 2554-55). He helps in product development and to develop and execute regulatory applications. (Gardner (Altria) Tr. 2554-55).

Response to Proposed Finding No. 1999:

Respondents have no specific response.

2000. The FDA's assessment of conversion potential in PMTA applications is not an area of Dr. Gardner's expertise, and he was not responsible for assessing the conversion potential of Altria's e-vapor products. (Gardner (Altria) Tr. 2640).

Response to Proposed Finding No. 2000:

The Proposed Finding is incomplete and misleading without additional context. Dr. Gardner is "familiar" with FDA's assessment of conversion potential and is currently "responsible for making sure that [assessing conversion potential] is done" for oral products. (Gardner (Altria) Tr. 2640). Dr. Gardner testified that he agreed with the consensus of the regulatory scientists at Altria that Nu Mark's products were not successfully converting adult smokers. (Gardner (Altria) Tr. 2585-90).

2001. Dr. Gardner is not an expert in nicotine satisfaction or abuse liability. (Gardner (Altria) Tr. 2642-43)).

Response to Proposed Finding No. 2001:

The Proposed Finding is incomplete and misleading without additional context. In the cited testimony, Dr. Gardner also explained that "I am aware that for e-vapor products, nicotine salts are a critical part of nicotine satisfaction." (Gardner (Altria) Tr. 2642).

2002. Dr. Gardner was not involved in Altria's pharmacokinetic studies, at home studies, or actual use studies involving its e-vapor products. (Gardner (Altria) Tr. 2643).

Response to Proposed Finding No. 2002:

The Proposed Finding is incomplete and misleading without additional context. Dr. Gardner testified that although he did not personally conduct the studies, he was "aware" of the results of those studies and "[b]ased on the information I received, the MarkTen cigalike products had inadequate conversion potential." (Gardner (Altria) Tr. 2643-44).

2003. Dr. Gardner owns shares of Altria stock. (PX7026 (Gardner (Altria), Dep. at 235-36)). He has received Altria stock as part of his compensation for about 10 years. (PX7026 (Gardner (Altria), Dep. at 235-36)).

Response to Proposed Finding No. 2003:

Respondents have no specific response.

Murray Garnick of Altria (Garnick Tr. 1575-1830)

2004. Murray Garnick currently serves as Executive Vice President and General Counsel of Altria. (Garnick (Altria) Tr. 1575). He also leads the Regulatory Affairs Group at Altria. (Garnick (Altria) Tr. 1575). He became General Counsel and Head of Regulatory Affairs in July 2017. (Garnick (Altria) Tr. 1578). Garnick was previously Head of Litigation of Altria from 2008 to 2016. (Garnick (Altria) Tr. 1576).

Response to Proposed Finding No. 2004:

Respondents have no specific response.

2005. In June of 2018, Garnick took over the Regulatory Sciences Group that is composed of mostly scientists who conduct toxicological and other analyses to support Altria's allegations to the FDA. (Garnick (Altria) Tr. 1578). Altria recently combined the non-scientists in the Regulatory Affairs group and with the Regulatory Sciences group into one group under Garnick. (Garnick (Altria) Tr. 1578-79).

Response to Proposed Finding No. 2005:

Respondents have no specific response.

2006. Garnick participated in 2018 in the negotiations with JLI related to Altria acquiring an ownership interest in JLI. (Garnick (Altria) Tr. 1579). In 2018, Garnick also led the team that was responsible for preparing PMTAs for Altria's e-vapor products. (Garnick (Altria) Tr. 1579).

Response to Proposed Finding No. 2006:

Respondents have no specific response.

2007. Garnick does not make business decisions for Altria, and he was not one of the decision-makers about which e-vapor pipeline products Altria would pursue. (Garnick (Altria) Tr. 15879-80, 1584). He does not have firsthand knowledge of the profitability of Altria's e-vapor products. (Garnick (Altria) Tr. 1580).

Response to Proposed Finding No. 2007:

Respondents have no specific response except to note that, in his role as head of Regulatory Affairs and Sciences, Garnick was part of Altria's comprehensive assessment of Nu Mark's existing e-vapor portfolio that led the company to conclude by summer 2018 that none of the products could obtain regulatory approval. (RFF ¶¶ 693-700).

2008. [redacted] (PX7000 Garnick (Altria), IHT at 165) (*in camera*)).

Response to Proposed Finding No. 2008:

Respondents have no specific response.

Billy Gifford of Altria (Gifford Tr. 2706-2894)

2009. Billy Gifford is the CEO of Altria Group, Inc. (Gifford (Altria) Tr. 2706). Gifford started his professional work experience in accounting and joined PM USA, a predecessor company to Altria, in 1994. (Gifford (Altria) Tr. 2706-07). Gifford became CEO in April 2020, taking over from Willard. (Gifford (Altria) Tr. 2707, 2708). Prior to serving as CEO, Gifford served as Chief Financial Officer of Altria. (Gifford (Altria) Tr. 2707).

Response to Proposed Finding No. 2009:

Respondents have no specific response except to note that PM USA still exists today as an operating company of Altria. (RFF ¶ 129).

2010. Gifford was involved in the negotiations with JLI, when Altria acquired an ownership interest in JLI. (Gifford (Altria) Tr. 2761-62).

Response to Proposed Finding No. 2010:

Respondents have no specific response.

2011. Gifford was designated by Altria to discuss efficiencies in connection with the transaction in response to Complaint Counsel's subpoena directed to Altria. (PX7010 (Gifford (Altria), IHT at 36-37 (referring to PX0005 at 001-003 (FTC Subpoena Ad Testificandum addressed to Altria, dated Dec. 3, 2019)).

Response to Proposed Finding No. 2011:

Respondents have no specific response.

2012. Gifford owns stock in Altria. (PX7040 (Gifford (Altria), Dep. at 183)).

Response to Proposed Finding No. 2012:

Respondents have no specific response.

Richard Jupe of Altria (Jupe Tr. 2111-2334)

2013. Richard Jupe is currently the Vice President of Product Development at Altria Client Services, a position he has held since 2012. (Jupe (Altria) Tr. 2112). Jupe's product development group provided services to Nu Mark. (Jupe (Altria) Tr. 2113-14). Jupe assumed product development responsibilities for e-vapor products around the third quarter of 2017. (Jupe (Altria) Tr. 2114).

Response to Proposed Finding No. 2013:

Respondents have no specific response.

2014. Jupe's product development group was accountable for the design, development, and specifications of e-vapor products. (Jupe (Altria) Tr. 2115). The group was accountable for "writing all the requirements for manufacturing as well as providing the products to Altria's regulatory affairs and regulatory sciences group for demonstration through the FSA pathways." (Jupe (Altria) Tr. 2115).

Response to Proposed Finding No. 2014:

Respondents have no specific response.

Jose Luis (Joe) Murillo of JLI (Murillo Tr. 2895-3074)

2015. Jose Luis Murillo, known as Joe to his colleagues, is the Chief Regulatory Officer at JLI. (Murillo (JLI) Tr. 2896). Before that, Murillo was Senior Vice President of Regulatory Affairs at Altria Client Services. (Murillo (JLI) Tr. 2896).

Response to Proposed Finding No. 2015:

Respondents have no specific response.

2016. JLI hired Murillo from Altria in October 2019. (PX7027 (Murillo (JLI), Dep. at 16)). He joined JLI in October 2019. (Murillo (JLI) Tr. 2988, 3046). Murillo holds a J.D. from Columbia University. (Murillo (JLI) Tr. 2897). He joined Philip Morris Companies, a predecessor of Altria, in 1995. (Murillo (JLI) Tr. 2897).

Response to Proposed Finding No. 2016:

Respondents have no specific response.

2017. In 2012, Murillo became the first President and General Manager of Nu Mark. (Murillo (JLI) Tr. 2898). In his positions at Altria, Murillo's work dealt with FDA regulations related to e-cigarettes. (Murillo (JLI) Tr. 2900).

Response to Proposed Finding No. 2017:

Respondents have no specific response.

2018. As of January 2021, Murillo still owned approximately [redacted] of stock in Altria. (PX7027 (Murillo (JLI), Dep. at 25-26) (*in camera*)).

Response to Proposed Finding No. 2018:

Respondents have no specific response.

Frederick Scott Myers of Altria (Myers Tr. 3296-3399)

2019. Frederick Scott Myers, known as Scott to his colleagues, is the current President and CEO of the Altria Group Distribution Company. (Myers (Altria) Tr. 3297-98). The Altria Group Distribution Company is the sales and distribution arm that represents and provides services for Altria's operating companies. (Myers (Altria) Tr. 3297-98). His group handles finished goods after they are manufactured and through to wholesalers and retailers, and selling Altria's trade programs and representing Altria brands at retail trade partners. (Myers (Altria) Tr. 3297-98). Myers has been working at Altria his entire professional career and started as a territory sales manager. (Myers (Altria) Tr. 3297).

Response to Proposed Finding No. 2019:

Respondents have no specific response.

2020. In early 2018, Myers was the Vice President at Altria's Western Region. (Myers (Altria) Tr. 3314-15). In this role, he talked to retailers about the MarkTen Elite launch and related marketing initiatives. (Myers (Altria) Tr. 3315-16).

Response to Proposed Finding No. 2020:

Respondents have no specific response.

2021. As Vice President of the Western Region, Myers did not develop or approve any trade programs for Nu Mark. (Myers (Altria) Tr. 3376-78).

Response to Proposed Finding No. 2021:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context. In the cited testimony, Myers explained that although he "wasn't the one that wrote the document or those types of things," he "was a major stakeholder in the development of those programs." (Myers (Altria) Tr. 3376). Specifically, Myers "provide[d] perspective on trade program ideas, on how well our customers would receive them." (Myers (Altria) Tr. 3376).

2022. As Vice President of the Western Region, Myers did not do any analysis for Nu Mark. (Myers (Altria) Tr. 3378). Myers measured success of Nu Mark's products largely on the feedback he received from trade partners. (Myers (Altria) Tr. 3378).

Response to Proposed Finding No. 2022:

Respondents have no specific response except to note that Myers testified to receiving negative feedback from trade partners as to the performance of MarkTen products. (RFF ¶¶ 452-53, 462, 473, 477, 484-85, 674, 743(o), 1020, 1100).

2023. Myers had no role in determining the initial selling quantities of MarkTen Elite, and he never had a role in deciding what e-vapor products Altria would bring to market. (Myers (Altria) Tr. 3379-80).

Response to Proposed Finding No. 2023:

Respondents have no specific response.

2024. When Myers was Vice President of the Western Region, he did not know how many of the selling issues MarkTen Elite had were due to a leaking gasket. (Myers (Altria) Tr. 3381).

Response to Proposed Finding No. 2024:

Respondents have no specific response except to note that trade partners raised the leaking issue to Myers, who "certainly felt" it had done damage to the MarkTen Elite brand. (Myers (Altria) Tr. 3328-29; *see also* RFF ¶¶ 462, 473, 477).

2025. In October 2018, Myers became Vice President of Customer Service. (Myers (Altria) Tr. 3374). As Vice President of Customer Service, Myers had less than two months of responsibility for Altria's e-vapor products. (Myers (Altria) Tr. 3374-75).

Response to Proposed Finding No. 2025:

Respondents have no specific response.

2026. Myers did not have any design responsibilities for Altria's e-vapor products, nor did he have any responsibilities in acquiring new e-vapor products for Altria. (Myers (Altria) Tr. 3379).

Response to Proposed Finding No. 2026:

Respondents have no specific response.

2027. Myers never had any direct dealings with PMI regarding e-vapor products. (Myers (Altria) Tr. 3379).

Response to Proposed Finding No. 2027:

Respondents have no specific response.

2028. Myers never attended any Altria Board of Directors meetings where e-vapor products were discussed. (Myers (Altria) Tr. 3380).

Response to Proposed Finding No. 2028:

Respondents have no specific response.

2029. Myers has no expertise on obtaining PMTAs. (Myers (Altria) Tr. 3379).

Response to Proposed Finding No. 2029:

Respondents have no specific response.

2030. As of February 2021, Myers owned approximately $5 to 6 million of Altria stock. (Myers (Altria) Tr. 3381).

Response to Proposed Finding No. 2030:

Respondents have no specific response.

Joseph O'Hara of JLI (O'Hara Tr. 491-655)

2031. Joseph O'Hara is the Director of Regulatory Strategy for JLI, a position he has held since May 2020. (O'Hara (JLI) Tr. 492-93). He began working at JLI in December 2017 as a

Senior Manager of Strategic Finance, serving in this role until December 2018 when he became Senior Manager of Corporate Strategy and later Director of Youth Prevention Strategies. (O'Hara (JLI) Tr. 492-93).

Response to Proposed Finding No. 2031:

Respondents have no specific response.

2032. In his role as Senior Manager of Strategic Finance, O'Hara was responsible for competitive analysis and competitive intelligence. (O'Hara (JLI) Tr. 493-94). He advised members of JLI's senior leadership team and sometimes JLI board members on competition in the e-vapor space. (O'Hara (JLI) Tr. 495).

Response to Proposed Finding No. 2032:

Respondents have no specific response except to note that O'Hara testified that his work was primarily with people employed by the company, but he did occasionally talk to board members. (O'Hara (JLI) Tr. 495).

Nick Pritzker of JLI (Pritzker Tr. 659-898)

2033. Nick Pritzker is an investor in JLI through his family investment business, Tao Capital. (Pritzker (JLI) Tr. 660). Tao Capital first invested in JLI in 2011. (Pritzker (JLI) Tr. 660). Pritzker's family investment entity received a portion of the $12.8 billion that Altria paid to acquire a 35 percent interest in JLI. (Pritzker (JLI) Tr. 662).

Response to Proposed Finding No. 2033:

Respondents have no specific response except to note that Pritzker testified that a family entity, Tao LLC, invested in JLI in 2011. (Pritzker (JLI) Tr. 660).

2034. Pritzker is a member of JLI's Board of Directors. (Pritzker (JLI) Tr. 660).

Response to Proposed Finding No. 2034:

Respondents have no specific response.

2035. Pritzker was a member of the negotiating team for the transaction on behalf of JLI. (Pritzker (JLI) Tr. 661). During these negotiations, Pritzker was a member of the Strategic Committee of the JLI Board that was formed to engage in negotiations with Altria. (Pritzker (JLI) Tr. 661).

Response to Proposed Finding No. 2035:

Respondents have no specific response.

2036. [redacted]

Response to Proposed Finding No. 2036:

Respondents object to the Proposed Finding as it relies on an exhibit, PX2536, that is not listed on JX0002 or JX0003 and therefore is not part of the record. The Proposed Finding is further not supported by the cited pages of PX7042.

Brian Quigley formerly of Altria (Quigley Tr. 1924-2098)

2037. Brian Quigley is currently the Chief Operating Officer for Respira Technologies, a medical device company. (Quigley (Altria) Tr. 1924-25). He has been with Respira since July of 2020. (Quigley (Altria) Tr. 1925). Previously, Quigley had a consulting company called Green Sky Strategy, and prior to that Quigley worked at Altria. (Quigley (Altria) Tr. 1925).

Response to Proposed Finding No. 2037:

Respondents have no specific response.

2038. Quigley worked for Altria for approximately 16 years. (Quigley (Altria) Tr. 1925). Quigley was named President and CEO of Nu Mark around June 2018. (Quigley (Altria) Tr. 1937). He worked for Altria at the time Altria acquired a 35 percent interest in JLI. (Quigley (Altria) Tr. 1925). The last position Quigley held at Altria was the Senior Vice President of Marketing and Commerce. (Quigley (Altria) Tr. 1925).

Response to Proposed Finding No. 2038:

Respondents have no specific response.

2039. Quigley currently serves as a member of the Board of Directors of Lexaria. (Quigley (Altria) Tr. 1925-26). He became a board member in 2019. (Quigley (Altria) Tr. 1926). Lexaria Nicotine is one of the companies associated with Lexaria Bioscience and in which Altria is a partial owner. (Quigley (Altria) Tr. 1926). Lexaria Nicotine's business is to license technology to companies that are selling products in the nicotine space, including reduced-risk nicotine products. (Quigley (Altria) Tr. 1926-27). When Quigley was at

Altria, Altria held an investment in Lexaria Nicotine that would give Altria an option to acquire technology. (Quigley (Altria) Tr. 1927).

Response to Proposed Finding No. 2039:

Respondents have no specific response except to note that (1) Quigley testified he was not involved in Lexaria's nicotine business (Quigley (Altria) Tr. 1927), and (2) Complaint Counsel has introduced no evidence Lexaria is or was capable of innovating in the e-vapor segment.

Charles (Bob) Robbins of JLI (Robbins Tr. 3238-3284)

2040. Charles Robert Robbins is employed by JLI and goes by the name of Bob. (Robbins (JLI) Tr. 3239). Robbins joined JLI in September 2017 and is the Chief Growth Officer, a position he has held since March 2020. (Robbins (JLI) Tr. 3239). As Chief Growth Officer, Robbins oversees sales and marketing in all of the markets where JLI sells product. (Robbins (JLI) Tr. 3240).

Response to Proposed Finding No. 2040:

Respondents have no specific response.

2041. Robbins has also served as Chief Sales Officer for JLI from the time he was hired and for approximately a year. (Robbins (JLI) Tr. 3240). In that role he managed JLI's wholesale and retail partners. (Robbins (JLI) Tr. 3240). After serving as Chief Sales Officer, Robbins was President of the Americas until March 2020. (Robbins (JLI) Tr. 3240).

Response to Proposed Finding No. 2041:

Respondents have no specific response.

Craig Schwartz formerly of Altria (Schwartz Tr. 1841-1923)

2042. Craig Schwartz is retired from Altria; he retired on December 31, 2018. (Schwartz (Altria) Tr. 1842). Schwartz retired from the position of Senior Vice President of Operations for Nu Mark, an operating company under Altria created to develop alternative tobacco products. (Schwartz (Altria) Tr. 1843-44). Schwartz served for five years as Senior Vice President of Operations. (Schwartz (Altria) Tr. 1845). Prior to becoming SVP for Nu Mark, Schwartz was responsible for operations at the smokable or cigar and cigarette division of Altria. (Schwartz (Altria) Tr. 1846). When he retired, Schwartz received a severance package through March 2020. (Schwartz (Altria) Tr. 1843).

Response to Proposed Finding No. 2042:

Respondents have no specific response.

2043. As Senior Vice President of Operations for Nu Mark, Schwartz's role was to secure supply chain, to build a manufacturing and organizational base, to manufacture and bring to market products consistent with specifications, and to run a compliant manufacturing and sales process. (Schwartz (Altria) Tr. 1844).

Response to Proposed Finding No. 2043:

Respondents have no specific response.

2044. Schwartz served on the leadership team at Nu Mark. (Schwartz (Altria) Tr. 1846-47). Schwartz had input on Nu Mark's 3-year strategic plan. (Schwartz (Altria) Tr. 1847-48).

Schwartz's responsibilities for the strategic plan included calculating the cost base for the product, capacity planning, new product planning, manufacturing base issues, and generally all strategic decisions that would go into making a product. (Schwartz (Altria) Tr. 1847-48).

Response to Proposed Finding No. 2044:

Respondents have no specific response.

Riaz Valani of JLI (Valani Tr. 899-959)

2045. Riaz Valani is an investor in JLI through his venture capital business, Global Asset Capital ("GAC"). (Valani (JLI) Tr. 899). He was one of the initial investors in the company that is now JLI. (Valani (JLI) Tr. 899).

Response to Proposed Finding No. 2045:

Respondents have no specific response.

2046. After Pax Labs spun off non-vapor products and became JLI in 2017, Valani and GAC-related entities owned more than 20 percent of JLI's shares. (PX7011 (Valani (JLI), IHT at 21-22)). As of early 2020, Valani and GAC-related entities owned around 10 percent of JLI's shares. (PX7011 (Valani (Altria), IHT at 21-22)).

Response to Proposed Finding No. 2046:

Respondents have no specific response.

2047. Valani is currently a member of JLI's Board of Directors. (Valani (JLI) Tr. 899). He has been a member of JLI's (and its predecessor entities) Board of Directors since 2007. (Valani (JLI) Tr. 899-900).

Response to Proposed Finding No. 2047:

Respondents have no specific response.

2048. Valani was involved in negotiating the Altria's acquisition of a 35 percent interest in JLI on behalf of JLI. (Valani (JLI) Tr. 901). During these negotiations with Altria, he was a member of the Strategic Committee of the JLI Board. (Valani (JLI) Tr. 901). The strategic committee was formed to engage in negotiations with Altria, and Nicholas Pritzker was the only other member. (Valani (JLI) Tr. 901).

Response to Proposed Finding No. 2048

Respondents have no specific response except to note that Valani testified that he was involved in negotiating the Altria/JLI transaction on behalf of JLI as a director, and that the

strategic committee was formed to engage in negotiations with Altria together with JLI's management. (Valani (JLI) Tr. 901).

2049. Valani's venture capital firm, Global Asset Capital, received a portion of the $12.8 billion that Altria paid to acquire a 35 percent interest in JLI. (Valani (JLI) Tr. 902).

Response to Proposed Finding No. 2049:

Respondents have no specific response.

2050. [redacted]

Response to Proposed Finding No. 2050:

Respondents object to the Proposed Finding as it relies on an exhibit, PX2536, that is not listed on JX0002 or JX0003 and therefore is not part of the record. The Proposed Finding is further not supported by the cited pages of PX7042.

Howard Willard formerly of Altria (Willard Tr. 1136-1473)

2051. Howard Willard is currently retired and spent 28 years working for Altria or its predecessor companies. (Willard (Altria) Tr. 1136). He most recently held the position of Chairman and Chief Executive Officer at Altria. (Willard (Altria) Tr. 1136). Previous to this position, Willard was Chief Operating Office at Altria. (Willard (Altria) Tr. 1137).

Response to Proposed Finding No. 2051:

Respondents have no specific response.

2052. Willard has an ongoing financial relationship with Altria. (Willard (Altria) Tr. 1137). When he departed Altria in April 2020, Willard's salary at the time was a little over $1 million per year. (Willard (Altria) Tr. 1139). Willard received 64 weeks of severance payments based on his last salary (or a little less than $100,000 per month) after leaving Altria. (Willard (Altria) Tr. 1139). He will receive a pension from Altria. (Willard (Altria) Tr. 1137).

Response to Proposed Finding No. 2052:

Respondents have no specific response.

2053. Willard owns shares of Altria common stock valued at approximately $3 million. (Willard (Altria) Tr. 1137, 1141).

Response to Proposed Finding No. 2053:

Respondents have no specific response.

2. Third-Party Witnesses

Paul Crozier of Sheetz (Crozier Tr. 1475-1565)

2054. Paul Crozier is a Category Manager at Sheetz, Inc., where he has been employed for 15 years. (Crozier (Sheetz) Tr. 1476).

Response to Proposed Finding No. 2054:

Respondents have no specific response.

2055. Sheetz, Inc., is a convenience store chain operating in six mid-Atlantic states, offering food, made-to-order food, cigarettes, tobacco, and gasoline. (Crozier (Sheetz) Tr. 1476-77). Sheetz has about 615 stores and all of them are company owned. (Crozier (Sheetz) Tr. 1476-77).

Response to Proposed Finding No. 2055:

Respondents have no specific response.

2056. Crozier has been a Category Manager since July 2016, and he currently manages the cigarettes and tobacco category, as well as lottery tickets. (Crozier Tr. (Sheetz) 1476). Crozier's responsibilities include electronic cigarettes. (Crozier (Sheetz) Tr. 1478).

Response to Proposed Finding No. 2056:

Respondents have no specific response.

2057. As a Category Manager, Crozier has profit and loss responsibility for all tobacco sales, lottery sales, including budgeting, picking new items, resets, running promotions, working with vendors on promotions, and conveying promotions to the public. (Crozier (Sheetz) Tr. 1477). Crozier is responsible for setting and achieving sales and margin goals on a monthly and yearly basis. (Crozier (Sheetz) Tr. 1478).

Response to Proposed Finding No. 2057:

Respondents have no specific response.

2058. Crozier is a board member of the trade association National Association of Tobacco Outlets. (Crozier (Sheetz) Tr. 1477).

Response to Proposed Finding No. 2058:

Respondents have no specific response.

Andrew Farrell of NJOY, LLC (Farrell Tr. 198-367)

2059. Andrew Farrell is Chief Revenue Officer of NJOY, LLC, a position he has held since May 2019. (Farrell (NJOY) Tr. 199-200). He has worked for NJOY since August 2018. (Farrell (NJOY) Tr. 199). He started in the position of Executive Vice President of Key Accounts, and his position title later shifted to Chief Partnerships Officer. (Farrell (NJOY) Tr. 201).

Response to Proposed Finding No. 2059:

Respondents have no specific response.

2060. NJOY is a manufacturer of e-cigarettes. (Farrell (NJOY) Tr. 200). NJOY currently sells a closed-system, rechargeable, pod-based e-cigarette system called the NJOY Ace, and a closed system disposable e-cigarette product called NJOY Daily. (Farrell (NJOY) Tr. 206-207). In 2018, NJOY also sold Loop, PFT, and King, which were are all closed-system e-cigarette products. (Farrell (NJOY) Tr. 206-207).

Response to Proposed Finding No. 2060:

Respondents have no specific response except to note that NJOY discontinued the Loop, PFT, and King for independent business reasons, and that the Loop and King products were cig-a-likes. (RFF ¶ 251).

2061. Farrell's responsibilities as Chief Revenue Officer are primarily to manage and implement NJOY's retail sales strategy. (Farrell (NJOY) Tr. 200). He reports to the Chief Operating Officer of NJOY. (Farrell (NJOY) Tr. 200). As Executive Vice President of Key Accounts (later Chief Partnerships Officer), Farrell's responsibilities were to manage business relationships with key brick-and-mortar retail accounts. (Farrell (NJOY) Tr. 201).

Response to Proposed Finding No. 2061:

Respondents have no specific response.

Lamar Wade Huckabee of R.J. Reynolds Tobacco (Huckabee Tr. 368-489)

2062. Lamar Wade Huckabee is employed by R.J. Reynolds Tobacco ("Reynolds"), where he is the Senior Vice President and General Manager of Traditional Categories. (Huckabee (Reynolds) Tr. 370). He has held those roles for two years. (Huckabee (Reynolds) Tr. 371). Huckabee is also the Senior Vice President at Reynolds American, Incorporated, and at Santa Fe Natural Tobacco Company. (Huckabee (Reynolds) Tr. 371). Huckabee started at Reynolds in April of 2016 and has worked for the company for five years. (Huckabee (Reynolds) Tr. 370).

Response to Proposed Finding No. 2062:

Respondents have no specific response except to note that there is also a Senior Vice President at Reynolds with responsibility for "new" categories such as e-vapor and oral tobacco, (Huckabee (Reynolds) Tr. 472-73), who did not testify.

2063. Reynolds is the second largest U.S. tobacco products sales and marketing company. (Huckabee (Reynolds) Tr. 372). Reynolds markets and distributes products in five categories: traditional cigarettes, vapor, moist tobacco, modern oral, and SNUS (a pasteurized tobacco pouch). (Huckabee (Reynolds) Tr. 372, 374). Reynolds has four vapor products currently on the market. (Huckabee (Reynolds) Tr. 377). They are all sold under the brand name Vuse, and include Vuse Alto, Vuse Ciro, Vuse Solo, and Vuse Vibe. (Huckabee (Reynolds) Tr. 377).

Response to Proposed Finding No. 2063:

Respondents have no specific response.

2064. Huckabee currently reports to the Chief Commercial Officer of Reynolds American. (Huckabee (Reynolds) Tr. 371).

Response to Proposed Finding No. 2064:

Respondents have no specific response.

2065. Huckabee's current responsibilities include primary responsibility for Reynolds' cigarette business, moist tobacco business, the SNUS category, as well as the company's revenue growth management function. (Huckabee (Reynolds) Tr. 373).

Response to Proposed Finding No. 2065:

Respondents have no specific response.

2066. In his role in revenue growth management, Huckabee's team designs and builds price pack architecture, promotional plans, and pricing strategies across Reynolds' product categories, including the vapor category. (Huckabee (Reynolds) Tr. 374-75, 379-80). Huckabee receives competitive intelligence materials covering vapor products in his management

role. (Huckabee (Reynolds) Tr. 376). Huckabee has held his management role in revenue growth, both informally and formally, for three years. (Huckabee (Reynolds) Tr. 376). The company began focusing the revenue management activities on vapor products during the last year. (Huckabee (Reynolds) Tr. 376-377).

Response to Proposed Finding No. 2066:

Respondents have no specific response.

2067. Huckabee is also a part of Reynolds' marketing leadership team. (Huckabee (Reynolds) Tr. 380).

Response to Proposed Finding No. 2067:

Respondents have no specific response.

2068. Before he became Senior Vice President, Huckabee was Vice President of Strategy and Planning. (Huckabee (Reynolds) Tr. 380). In this vice president role, he had primary accountability to supply materials to the senior leadership team, and in this role he received materials on competitors' products research, sales performance, volume performance, and share trends. (Huckabee (Reynolds) Tr. 381).

Response to Proposed Finding No. 2068:

Respondents have no specific response.

Martin King of PMI (King Tr. 2335-2550)

2069. Martin King is employed by Philip Morris International and is the Chief Executive Officer of PMI America. (King (PMI) Tr. 2336-38). He has been CEO of PMI America since May 1, 2020, and has worked for PMI for 30 years. (King (PMI) Tr. 2339-40). Over his years with PMI, King has served as Chief Financial Officer of PMI, President of the Asia region, President of the Latin America/Canada region, Senior Vice President of Worldwide Operations, as well as other positions. (King (PMI) Tr. 2340). As CEO of PMI America King reports to Jacek Olczak, the CEO of PMI. (King (PMI) Tr. 2339).

Response to Proposed Finding No. 2069:

Respondents have no specific response except to note that effective August 31, 2021, King retired from PMI America. (RX2053 (PMI) at 004). King's retirement was announced in a report filed with the Securities and Exchange Commission on June 16, 2021, later in the same day that King's trial testimony concluded. (RX2053 (PMI) at 006).

2070. King holds an M.B.A. from the Darden School of the University of Virginia and a B.A. from Harvard University. (King (PMI) Tr. 2341).

Response to Proposed Finding No. 2070:

Respondents have no specific response.

2071. PMI is an international company that manufactures and sell various nicotine-containing products, including cigarettes and heated tobacco products, as well as e-cigarettes. (King (PMI) Tr. 2337). In 2008, PMI split from its former parent, Altria, with PMI focusing on international markets and Altria focusing on the U.S. markets. (King (PMI) Tr. 2337). PMI and Altria jointly own the famous Philip Morris brands such as Marlboro, with PMI owning trademarks for countries other than the U.S., and Altria owning the trademarks in the U.S. (King (PMI) Tr. 2337-38).

Response to Proposed Finding No. 2071:

Respondents have no specific response.

2072. PMI America is an entity created about a year ago to focus on the U.S. market for PMI, including the commercialization of PMI's IQOS heat-not-burn product in the U.S., which was licensed to Altria, and to represent PMI in the U.S. in the company's regulatory proceedings, including with the FDA. (King (PMI) Tr. 2338).

Response to Proposed Finding No. 2072:

Respondents have no specific response.

2073. PMI sells a pod-based closed system vapor product called VEEV, which utilizes PMI's proprietary MESH technology. (King (PMI) Tr. 2344). Veev has been launched in a number of countries, including the UK, New Zealand, and several markets in the EU. (King (PMI) Tr. 2344, 2354-55). PMI is currently seeking FDA authorization to sell Veev in the U.S. (King (PMI) Tr. 2355). Prior to Altria's transaction with JLI, PMI was planning for Altria to launch Veev in the U.S. (King (PMI) Tr. 2357).

Response to Proposed Finding No. 2073:

The Proposed Finding is inaccurate, incomplete, and misleading without additional context.

First, although PMI intends to seek FDA authorization to sell VEEV in the United States, [redacted].

Second, although King testified that PMI's "original plan[]" was for Altria to commercialize VEEV in the United States, (PX7020 King (PMI) Dep. at 45), that does not address the companies' intentions after the agreement had been in force for several years. The evidence shows that VEEV was not ready for commercialization anywhere until late 2020, [redacted]. (CCFF ¶ 1647; King (PMI) Tr. 2355; [redacted]

2074. As CEO of PMI America, King is responsible for the commercialization of next-generation or reduced-rick products and noncombustible products that have been scientifically verified in the U.S. (King (PMI) Tr. 2338-39). He also has responsibility for bringing additional products to the U.S. from PMI's noncombustible portfolio around the world, including working on the regulatory environment. (King (PMI) Tr. 2338-39). This portfolio includes e-cigarettes. (King (PMI) Tr. 2339).

Response to Proposed Finding No. 2074:

Respondents have no specific response except to note that effective as of August 31, 2021, King retired from PMI America. (RX2053 (PMI) at 004). King's retirement was announced in a report filed with the Securities and Exchange Commission on June 16, 2021, later in the same day that King's trial testimony concluded. (RX2053 (PMI) at 006).

B. EXPERT WITNESSES WHO TESTIFIED AT TRIAL

1. Complaint Counsel's Expert Witness

a) Dr. Dov Rothman (PX7048 (Trial Dep.))

(1) Background

2075. Dr. Rothman is the managing principal at Analysis Group, a consulting group, and an instructor at University of California at Berkeley and at Harvard University. (PX7048 (Rothman, Trial Dep. at 7)). He was previously an assistant professor at Columbia University. (PX7048 (Rothman, Trial Dep. at 7)).

Response to Proposed Finding No. 2075:

Respondents have no specific response except to note that Dr. Rothman's CV does not list him as an instructor at University of California at Berkeley and says only that he "has taught a course . . . in the economics department at Harvard University." (PX5000 Rothman Report at A-1).

2076. Dr. Rothman has a Ph.D. degree in economics from the University of California at Berkeley, an MPhil degree from Cambridge University, and an undergraduate degree from the University of California at Berkeley. (PX7048 (Rothman, Trial Dep. at 7)).

Response to Proposed Finding No. 2076:

The Proposed Finding is partially incorrect. Dr. Rothman's Ph.D degree from the University of California at Berkeley is in business administration, not economics. (PX5000 Rothman Report at A-1).

2077. Dr. Rothman is a member of the American Economic Association, and he has published in Antitrust Law Journal, Journal of Competition Law and Economics, and Health Economics. (PX7048 (Rothman, Trial Dep. at 7)). Dr. Rothman has published on the subject of antitrust analysis and is a senior editor of the Antitrust Law Journal. (PX7048 (Rothman, Trial Dep. at 7-8)). Dr. Rothman has served as an expert as well as a consulting economist on many antitrust matters over a number of years, including work for the Department of Justice, the FTC, and private parties. (PX7048 (Rothman, Trial, Dep. at 8)).

Response to Proposed Finding No. 2077:

Respondents have no specific response except to note that Dr. Rothman has only testified twice in federal court, and both times were on behalf of the FTC. (PX7046 Rothman Dep. at 135-36).

2. Respondents' Expert Witness

a) Dr. Kevin Murphy (Murphy Tr. 3098-3237)

(1) Background

2078. Dr. Murphy is a professor of economics at the University of Chicago where he teaches in both the Graduate School of Business and the Department of Economics. (Murphy Tr. 3099).

Response to Proposed Finding No. 2078:

Respondents have no specific response except to note that Professor Murphy has a Ph.D in economics from the University of Chicago, and has also received the John Bates Clark Medal in 1997 and was named a MacArthur Fellow in September 2005. (RX1217 Murphy Report at 0132-33).

2079. Dr. Murphy charged an hourly rate of $1,500 for his work on this case, and he personally spent about 60 hours working on the matter. (Murphy Tr. 3170-71).

Response to Proposed Finding No. 2079:

Respondents have no specific response.

2080. Dr. Murphy is not an expert on the development of e-vapor products. (Murphy Tr. 3171).

Response to Proposed Finding No. 2080:

Respondents have no specific response except to note that neither is Dr. Rothman. (PX7046 Rothman Dep. at 52 ("I would not characterize myself as an expert in the e-cigarette industry beyond characterizing myself as an . . . economics expert who has now spent a substantial amount of time evaluating a transaction in the e-cigarette industry.")).

2081. Dr. Murphy is not an expert on nicotine satisfaction. (Murphy Tr. 3171).

Response to Proposed Finding No. 2081:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy does not profess to address nicotine satisfaction from a scientific perspective,

he testified that as "an economist [he] can say . . . those [products] that had nicotine salts tended to be far more successful than those that did not," which suggested they were attractive to consumers. (Murphy Tr. 3138). Notably, Dr. Rothman does not profess to be an expert on nicotine satisfaction. (PX5000 Rothman Report at A-1-4 (containing no identification of Dr. Rothman as an expert on nicotine satisfaction)).

2082. Dr. Murphy is not an expert on the biological side of the science of nicotine satisfaction. (Murphy Tr. 3171).

Response to Proposed Finding No. 2082:

Respondents have no specific response except to note that neither is Dr. Rothman. (PX5000 Rothman Report at A-1-4 (containing no identification of Dr. Rothman as an expert on the biological side of the science of nicotine satisfaction)).

2083. Dr. Murphy is not an expert on nicotine conversion studies and has not written any papers on e-vapor products regarding nicotine conversion. (Murphy Tr. 3171).

Response to Proposed Finding No. 2083:

Respondents have no specific response except to note that neither is Dr. Rothman and Dr. Rothman has written no such papers. (PX5000 Rothman Report at A-1-4 (listing no papers by Dr. Rothman on e-vapor products)).

2084. Dr. Murphy is not an expert on the FDA's regulation of e-vapor products. (Murphy, Tr. 3171-72).

Response to Proposed Finding No. 2084:

Respondents have no specific response except to note that neither is Dr. Rothman. (PX7046 Rothman Dep. at 52).

2085. Dr. Murphy is not an expert on the PMTA approval process. (Murphy Tr. 3172).

Response to Proposed Finding No. 2085:

Respondents have no specific response except to note that neither is Dr. Rothman. (PX7046 Rothman Dep. at 52).

(2) Dr. Murphy Failed to Do Quantitative Analyses to Define the Relevant Market

2086. In his report, Dr. Murphy, did not express an opinion on what the appropriate relevant product market is in this case. (Murphy Tr. 3176). Dr. Murphy, did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products. (Murphy Tr. 3177; RX1217 at 086 (¶ 122) (Murphy Expert Report)).

Response to Proposed Finding No. 2086:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy "d[id] not reach an opinion on whether the relevant market includes both open-system and closed-system e-cigarette products or only closed-system products, or whether there are separate relevant markets for cig-a-likes and pod-based vaporizers," (RX1217 Murphy Report ¶ 122), he did address Dr. Rothman's market definition analysis. As Dr. Murphy testified at trial, Dr. Rothman made a "critical mistake[]" by failing to consider varying degrees of substitutability between different categories of e-vapor products. (Murphy Tr. 3235; *see also* RX1217 Murphy Report ¶ 98 ("Dr. Rothman's market definition analysis ignores or understates important competitive constraints on JUUL from other competitive products while at the same time overstating the significance of the competitive interaction between the JUUL and MarkTen as well as MarkTen Elite products"); RFF ¶¶ 1383-86).

Moreover, despite Complaint Counsel having the burden, (RCoL ¶ 55), Dr. Rothman provided "no empirical analysis to support his exclusion of open systems from his relevant product market." (RX1217 Murphy Report ¶ 109).

2087. Dr. Murphy did not reach an opinion on whether there are separate relevant markets for cigalikes and pod-based products. (Murphy Tr. 3179).

Response to Proposed Finding No. 2087:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not reach an opinion that there are separate relevant markets for cig-a-likes and pod-based products, he explained that "there is considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." (RX1217 Murphy Report ¶ 113; *see also* RFF ¶ 1386).

Moreover, "although Complaint Counsel bears the burden on this issue, Dr. Rothman did not use the hypothetical monopolist test to analyze whether there are distinct submarkets within closed-system e-cigarettes" either. (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical analysis examining whether pod-based products would quality as a separate market is contrary to the "smallest market principle" of the Horizontal Merger Guidelines. (RFF ¶ 1417).

2088. Dr. Murphy's report does not include an analysis comparing the prices of pod-based devices to cigalike devices. (Murphy Tr. 3176). Additionally, Dr. Murphy's, report does not include an analysis comparing the prices of cigalike cartridges versus the prices of pod-based cartridges. (Murphy (Respondents' Expert) Tr. 3176).

Response to Proposed Finding No. 2088:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not perform this specific analysis, he performed a regression analysis that led him to conclude that "diversion from cig-a-likes to pod-based vaporizers was far less than proportional to shares within a closed-system e-cigarette market," suggesting that the two are in separate markets and undermining Dr. Rothman's assumption of proportional diversion in his analyses. (RX1217 Murphy Report ¶ 116).

Moreover, despite Complaint Counsel having the burden to define the relevant product market, (RCoL ¶ 55), Dr. Rothman also performed no such analysis and ignored evidence

suggesting that the cig-a-likes and pod-based products are in fact priced separately, (RFF ¶¶ 1404-06).

2089. Nowhere in his report does Dr. Murphy test whether a market consisting of only cigalikes passed the Hypothetical Monopolist test. (Murphy Tr. 3180-3181). Dr. Murphy does not discuss anywhere in his report whether a hypothetical monopolist of cigalikes could profitably impose a SSNIP. (Murphy Tr. 3181).

Response to Proposed Finding No. 2089:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not conduct a hypothetical monopolist test addressing only cig-a-likes, he explained that his regression demonstrated "a very high diversion ratio, that, if you wanted to do a hypothetical monopolist test, would tell you that that [*i.e.*, cig-a-likes apart from pod-based products] would constitute a relevant market." (PX7047 Murphy Dep. at 100).

Moreover, despite Complaint Counsel having the burden to define the relevant product market, (RCoL ¶ 55), Dr. Rothman also performed no such analysis and thus did not determine whether a hypothetical monopolist of cig-a-likes could profitably impose a SSNIP, (RFF ¶¶ 1416-17).

2090. Nowhere in his report does Dr. Murphy test whether a market consisting of only pod-based products pass the Hypothetical Monopolist Test. (Murphy Tr. 3182). Dr. Murphy did not use the hypothetical monopolist test to evaluate a market of pod-based products as a candidate market. (Murphy Tr. 3182).

Response to Proposed Finding No. 2090:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not conduct a hypothetical monopolist test addressing only pod-based products, he explained that "one of the most important conclusions in [his] report is the conclusion that cig-a-likes and pod-based products are not close substitutes," suggesting it "would [be] best [to] consider[] those and model[] those independently." (PX7047 Murphy Dep. at 95).

Moreover, "although Complaint Counsel bears the burden on this issue, (RCoL ¶ 55), Dr. Rothman did not use the hypothetical monopolist test to analyze whether pod-based products qualify as a separate market, (RFF ¶ 1416). Dr. Rothman's failure to conduct an empirical analysis examining whether pod-based products would qualify as a separate market is contrary to the "smallest market principle" of the Horizontal Merger Guidelines. (RFF ¶ 1417).

2091. Dr. Murphy did not offer an opinion in his report that a market consisting of all closed-system e-cigarettes failed the Hypothetical Monopolist Test. (Murphy Tr. 3182).

Response to Proposed Finding No. 2091:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. While Dr. Murphy did not offer such an opinion, it is irrelevant: "Dr. Rothman did not use the hypothetical monopolist test to analyze whether there are distinct submarkets *within* closed-system e-cigarettes," (RFF ¶ 1416 (emphasis added)), despite the fact that Complaint Counsel bears the burden to define the relevant product market, (RCoL ¶ 55). In light of the "smallest market principle," Dr. Rothman should have analyzed whether a smaller market of pod-based products or cig-a-likes passed the hypothetical monopolist test. (RFF ¶ 1416-17).

2092. Dr. Murphy's report does not include a critical elasticity analysis or an analysis where he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (Murphy Tr. 3188).

Response to Proposed Finding No. 2092:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. While Professor Murphy did not perform such an analysis, a critical elasticity analysis is just one way to implement the hypothetical monopolist test. (PX9098 Horizontal Merger Guidelines at 015; *see also* PX7047 Murphy Dep. at 55-57). Moreover, Professor Murphy explained that his regression analysis allowed him to reach the same conclusion that a critical elasticity analysis would. (PX7047 Murphy Dep. at 95-96 (explaining that while he did not label his analysis as an

application of the HMT, he did "utilize an analysis based on alternative market definitions," which demonstrated "that cig-a-likes and pod-based products are not close substitutes and, therefore, that it is very important to analyze those separately")).

2093. Dr. Murphy's report does not include any critical loss analysis. (Murphy Tr. 3188). Nowhere in his report does Dr. Murphy compare the predicted loss from a hypothetical monopolist imposing a SSNIP in a candidate market with the critical loss for the hypothetical monopolist. (Murphy Tr. 3189).

Response to Proposed Finding No. 2093:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not perform such an analysis, he explained that his regression analysis allowed him to reach the same conclusion that a critical loss analysis would. (PX7047 Murphy Dep. at 95-96 (explaining that while he did not label his analysis as an application of the HMT, he did "utilize an analysis based on alternative market definitions," which demonstrated "that cig-a-likes and pod-based products are not close substitutes and, therefore, that it is very important to analyze those separately")).

(3) Dr. Murphy's Post-Transaction Market Analysis Is Flawed and Irrelevant and Does not Demonstrate That the Market Was Not Harmed Competitively By Altria's Exit

2094. Dr. Murphy's post-transaction market analysis does not demonstrate that the market was not harmed competitively by Altria's exit. (*See* CCFF ¶¶ 2095-122, below).

Response to Proposed Finding No. 2094:

Respondents object to the Proposed Finding and above sub-heading as incorrect and unsupported by the paragraphs that follow or the evidence presented at trial.

To the extent Complaint Counsel relies on its Proposed Findings in CCFF ¶¶ 2095-122, Respondents incorporate their responses to those Proposed Findings herein.

2095. Dr. Murphy did not do any analysis in his report of whether cigalike device or cartridge prices rose or fell after Altria exited the e-vapor business. (Murphy Tr. 3192).

Response to Proposed Finding No. 2095:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, he "focus[ed] on pod-based vaporizers as the demand for cig-a-likes declined dramatically throughout [January 2018 to September 2020] such that the share of cig-a-likes by September 2020 was only 5 percent of all closed system e-cigarette cartridge unit volumes based on IRI data and . . . cig-a-likes were not a significant competitive constraint on JLI and other pod-based vaporizers." (RX1217 Murphy Report ¶ 62 & n.143; *see also* RX1217 Murphy Report ¶ 41, Figs. IV.2, IV.3 (demonstrating similar shift in device sales as in cartridge sales)).

Moreover, although Complaint Counsel bears the burden to prove a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman also did not analyze whether cig-a-like device or cartridge prices rose or fell after Altria exited the e-vapor business, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)).

2096. Dr. Murphy does not analyze the average industry price for cigalike devices in his report. (Murphy Tr. 3191). Figure V.1 from Dr. Murphy's report does not include cigalike device prices. (Murphy Tr. 3191; *see* RX1217 at 047-48 (¶ 62, Fig. V.1) (Murphy Expert Report)). Figure V.1 of Respondents' Expert's, Dr. Murphy's, report simply plots the average price over time for pod-based devices. (Murphy Tr. 3195-96; *see* RX1217 at 047-48 (¶ 62, Fig. V.1) (Murphy Expert Report)).

Response to Proposed Finding No. 2096:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, he "focus[ed] on pod-based vaporizers as the demand for cig-a-likes declined dramatically throughout [January 2018 to September 2020] such that the share of cig-a-likes by September 2020 was only 5 percent of all closed system e-cigarette cartridge unit volumes based on IRI data and . . . cig-a-likes were not a significant competitive constraint on JLI and other pod-based vaporizers." (RX1217 Murphy Report ¶ 62 & n.143; *see also* RX1217 Murphy Report ¶ 41, Figs. IV.2, IV.3 (demonstrating similar shift in device sales as in cartridge sales)).

Moreover, although Complaint Counsel bears the burden to prove a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman also did not analyze the average industry price for cig-a-like devices, (PX5000 Rothman Report (containing no such analysis); PX5001 Rothman Rebuttal (containing no such analysis)).

2097. Figure V.1 in Dr. Murphy's expert report shows that the average industry price for pod-based devices was decreasing prior to Elite exiting the market in November 2018. (Murphy Tr. 3189-90; RX1217 at 047-48 (¶ 62, Fig. V.1) (Murphy Expert Report)).

Response to Proposed Finding No. 2097:

The Proposed Finding is incomplete and misleading without additional context. Professor Murphy's analysis showed that the average industry price for pod-based devices decreased more rapidly in the period after Elite exited the market than during the period that Elite was on the market. (RFF ¶¶ 1350-51). Indeed, competitors such as NJOY and Reynolds introduced their 99-cent device promotions—which in turn put pressure on JLI to lower its device price—only after the transaction. (RFF ¶ 1350). As a result, the post-transaction sharp declines in price are not simply the continuation of a trend that existed prior to Altria's exit. (RFF ¶ 1350).

2098. Nowhere in his expert report does Dr. Murphy analyze the average industry price for cigalike cartridges. (Murphy Tr. 3191-92). Figure V.2 in Dr. Murphy's expert report does not incorporate any data for the prices of cigalike cartridges. (Murphy Tr. 3191; *see* RX1217 at 048-49 (¶ 63, Fig. V.2) (Murphy Expert Report)).

Response to Proposed Finding No. 2098:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, he "focus[ed] on pod-based vaporizers as the demand for cig-a-likes declined dramatically throughout [January 2018 to September 2020] such that the share of cig-a-likes by September 2020 was only 5 percent of all closed system e-cigarette cartridge unit volumes based on IRI data and . . . cig-a-likes were not a significant competitive constraint on JLI and other pod-based vaporizers." (RX1217 Murphy Report ¶ 62 & n.143).

Moreover, although Complaint Counsel bears the burden to prove a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman also did not analyze the average industry price for cig-a-like cartridges, (PX5000 Rothman Report (containing no such analysis); PX5001 Rothman Rebuttal (containing no such analysis)).

(a) Flaws in Analyses of Pod-Based Cartridges

2099. Dr. Murphy did not perform any econometric analysis of why prices for pod-based cartridges were declining after Altria's exit from e-cigarettes. (Murphy Tr. 3192). Dr. Murphy did not do an attribution analysis to determine why pod-based cartridge prices declined in the months after Altria exited e-cigarettes. (Murphy Tr. 3192-94).

Response to Proposed Finding No. 2099:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not perform such specific analyses, he testified that he "ha[s] no reason to believe that [the average price of pod-based cartridges] would have been substantially different than what we saw" had Altria's products remained on the market. (Murphy Tr. 3195; *see also* RFF ¶ 1355). This is consistent with his opinion that the post-transaction data combined with pre-transaction evidence of Altria's lackluster performance demonstrates that Altria's absence has had no adverse effect on the competitiveness of the e-cigarette market. (RFF ¶¶ 1379-80).

Moreover, although Complaint Counsel bears the burden to prove a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman also performed no such econometric or attribution analyses, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction); *see also* PX5000 Rothman Report (containing no such analyses); PX5001 Rothman Rebuttal (containing no such analyses)).

2100. Dr. Murphy did not analyze the effect of negative press surrounding vaping on the price of pod-based cartridges. (Murphy Tr. 3194).

Response to Proposed Finding No. 2100:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. While Professor Murphy did no such analysis, neither did Dr. Rothman, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)), although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28). Moreover, as Professor Murphy explained, consistent with the "razor/razorblade pricing dynamic, e-cigarette manufacturers compete on price mostly by discounting the prices of their devices." (RX1217 Murphy Report ¶ 44). As a result, cartridge prices declined less in comparison to device prices, although cartridge prices have still declined since the transaction. (RX1217 Murphy Report ¶ 63).

2101. Dr. Murphy did not analyze the impact of changes in the minimum age to purchase nicotine products on the price for pod-based cartridges. (Murphy Tr. 3194).

Response to Proposed Finding No. 2101:

The Proposed Finding is misleading, incomplete, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶¶ 28-32), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 93-94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, as Professor Murphy explained, consistent with the "razor/razorblade pricing dynamic, e-cigarette manufacturers compete on price mostly by discounting the prices of their devices." (RX1217 Murphy Report ¶ 44). As a result, although cartridge prices declined less in comparison to device prices, cartridge prices have still declined since the transaction. (RX1217 Murphy Report ¶ 63, Fig. V.2).

2102. Dr. Murphy did not analyze the impact of the FDA's flavor ban on the prices for pod-based cartridges. (Murphy Tr. 3194).

Response to Proposed Finding No. 2102:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, as Professor Murphy explained, consistent with the "razor/razorblade pricing dynamic, e-cigarette manufacturers compete on price mostly by discounting the prices of their devices." (RX1217 Murphy Report ¶ 44). As a result, cartridge prices declined less in comparison to device prices, although cartridge prices have still declined since the transaction. (RX1217 Murphy Report ¶ 63, Fig. V.2).

2103. Dr. Murphy agrees that the pricing data he presents in Figure V.2 of his report doesn't rule out the possibility that pod-based cartridge prices would have fallen further if Altria hadn't discontinued its e-cigarette products. (Murphy Tr. 3194; *see* RX1217 at 048-49 (¶ 63, Fig. V.2) (Murphy Expert Report)).

Response to Proposed Finding No. 2103:

This Proposed Finding is incomplete and misleading without additional context. While Professor Murphy testified that the data in Figure V.2 "alone" does not rule out the possibility that prices could have fallen further had Altria's products remained in the market, he went on to opine that "all the other evidence we've looked at would say that's very much inconsistent with the broader evidence." (Murphy Tr. 3194; *see also* Murphy Tr. 3195 (testifying that he had "no reason to believe" that prices for pod-based cartridges would be "substantially different" had Altria remained in the market)).

2104. Dr. Murphy did not run any regressions to determine why prices for pod-based cartridges fell in the time period from November 2018 to September 2020. (Murphy Tr. 3195).

Response to Proposed Finding No. 2104:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, as Professor Murphy explained, consistent with the "razor/razorblade pricing dynamic, e-cigarette manufacturers compete on price mostly by discounting the prices of their devices." (RX1217 Murphy Report ¶ 44). As a result, cartridge prices declined less in comparison to device prices, although cartridge prices have still declined since the transaction. (RX1217 Murphy Report ¶ 63, Fig. V.2).

2105. Dr. Murphy did not include any regression analyses in his report to explain why sales volumes of pod-based cartridges were higher in 2019 than they were prior to Altria's exit. (Murphy Tr. 3197).

Response to Proposed Finding No. 2105:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, given that cartridge sales should increase when a manufacturer successfully "'seed[s]' the market with inexpensive" devices, (RX1217 Murphy Report ¶ 69), and manufacturers like [redacted], it makes sense that sales volumes of pod-based cartridges increased in 2019.

2106. Dr. Murphy did not attempt to calculate what the average price of pod-based cartridges would have been had Altria stayed in the market. (Murphy Tr. 3195).

Response to Proposed Finding No. 2106:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Indeed, the evidence demonstrated that JLI did not base its pricing decisions on whether Altria was or was not in the market. (RFF ¶¶ 1639-46).

(b) Flaws in Analyses of Pod-Based Devices:

2107. Dr. Murphy did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (Murphy Tr. 3196).

Response to Proposed Finding No. 2107:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, the evidence in the record demonstrated that [redacted]. Professor Murphy testified that "aggressive competition among the various producers of pod-based products" has led to significant price decreases. (PX7047 Murphy Dep. at 203; *see also* RFF ¶¶ 1346-55).

2108. Dr. Murphy did not do an econometric analysis of the impact of negative press surrounding vaping on the price for pod-based devices. (Murphy Tr. 3196).

Response to Proposed Finding No. 2108:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, the evidence in the record demonstrated that [redacted]. Professor Murphy testified that "aggressive competition among the various producers of pod-based products" has led to significant price decreases. (PX7047 Murphy Dep. at 203; *see also* RFF ¶¶ 1346-55).

2109. Dr. Murphy did not analyze the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes on the price of pod-based devices. (Murphy Tr. 3196).

Response to Proposed Finding No. 2109:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, the evidence in the record demonstrated that [redacted]. Professor Murphy testified that "aggressive competition among the various

producers of pod-based products" has led to significant price decreases. (PX7047 Murphy Dep. at 203; *see also* RFF ¶¶ 1346-55).

2110. Dr. Murphy agrees that demand for pod-based product was rising before Altria discontinued its e-cigarette products. (Murphy Tr. 3197).

Response to Proposed Finding No. 2110:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, "[w]hile this growth in output was driven, at least in part, by growing demand, it was made possible by competitor *expansion* and new *entries*." (RFF ¶ 1357 (citing RX1217 Murphy Report ¶ 64) (emphases in original); *see also* RFF ¶¶ 1364-66 (explaining that number of brands in convenience stores increased after Altria's exit)).

2111. Dr. Murphy did not include in his report any regression analysis to explain why sales volumes of pod-based devices are higher than they were prior to Altria's exit. (Murphy Tr. 3198).

Response to Proposed Finding No. 2111:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Although Complaint Counsel bears the burden of demonstrating a reasonable probability of anticompetitive effects, (RCoL ¶ 28), Dr. Rothman himself did no such analysis, (PX7048 Rothman Trial Dep. at 94 (agreeing that he did not analyze e-vapor prices post-dating the transaction)); as a result, neither did Professor Murphy. Moreover, given the aggressive price discounting of pod-based devices after Altria's discontinuation of its e-vapor products, (RFF ¶¶ 1284-1323), it follows that sales volumes for pod-based devices would be higher, (RX1217 Murphy Report ¶¶ 43-44 (explaining that "[c]onverting adult smokers helps drive growth in e-cigarette demand," and that aggressive discounts on devices according to the razor/razorblade model can facilitate such conversion)).

(c) Other Flaws in Murphy's Effects Analyses

2112. Dr. Murphy did not include in his report nor did he conduct any switching analysis report that identifies precisely where or what products pod users are coming from or what percentage of pod users were coming from cigarette smokers versus new users. (Murphy Tr. 3203-04).

Response to Proposed Finding No. 2112:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. While Professor Murphy did not conduct any so-called "switching analysis," he testified that "you can see, starting around this period, an attrition of cigarette smokers into the e-cigarette marketplace." (Murphy Tr. 3204; *see also* RX1217 Murphy Report ¶¶ 30-32, Fig. IV.1 (showing rise of pod-based products and noting connection between JUUL's success and adult smoker conversion)). This conclusion is consistent with Dr. Rothman's observation that "[t]he decline [in sales of traditional cigarettes] accelerated in recent years." (PX5000 Rothman Report ¶ 49, Fig. 1). It is also consistent with other evidence that JUUL was converting adult smokers. (RFF ¶¶ 233-36; *see also* RFF ¶¶ 602-03 (sales data is important part of conversion assessment of a product)).

2113. There is no analysis in Dr. Murphy's report that would indicate what percentage, if any, of pod users are coming from youth users that aren't currently smokers. (Murphy Tr. 3205).

Response to Proposed Finding No. 2113:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. During his trial testimony, Professor Murphy acknowledged that because his analysis "is based on sales data," it does not provide "direct evidence . . . who the users are." (Murphy Tr. 3205). However, he testified that, based on his knowledge of the marketplace, he believed the rise of pod-based products was due to "attrition of cigarette smokers into the e-cigarette marketplace." (Murphy Tr. 3204; *see also* RX1217 Murphy Report ¶¶ 30-32, Fig. IV.1 (showing rise of pod-based products and noting connection between JUUL's success and adult smoker conversion)).

This conclusion is consistent with Dr. Rothman's observation that "[t]he decline [in sales of traditional cigarettes] accelerated in recent years." (PX5000 Rothman Report ¶ 49, Fig. 1). And it is consistent with other evidence that JUUL was converting adult smokers. (RFF ¶¶ 233-36; *see also* RFF ¶¶ 602-03 (sales data is important part of conversion assessment of a product)).

2114. Dr. Murphy did not offer an opinion that Reynolds' 99 cent promotion for Vuse Alto was induced by Altria's exit from the e-vapor business. (Murphy Tr. 3206).

Response to Proposed Finding No. 2114:

The Proposed Finding is incomplete and misleading without additional context. Professor Murphy testified that companies do not undertake actions "randomly": "[I]f the withdrawal of Altria's products created an opportunity for people, they would take advantage of it the way they take advantage of other opportunities, and that's the dynamic nature of the marketplace . . . ." (Murphy Tr. 3207). While he agreed with Complaint Counsel's question that it is not possible to quantify what "fraction of Reynolds' sales expansion was in response to Altria's exit," he explained that "[t]hey would only have had to do a small fraction, a very small fraction, to be able to offset Elite's withdrawal." (Murphy Tr. 3208; *see also* RFF ¶¶ 1711-13).

2115. In his report, Dr. Murphy does not discuss Altria's joint research, development, and technology sharing agreement with Philip Morris, International (PMI). (Murphy Tr. 3220-21). Respondents' expert's, Dr. Murphy's, report does not include any analysis of Altria's R&D relationship with PMI. (Murphy Tr. 3221).

Response to Proposed Finding No. 2115:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, his "analysis focuse[d] on existing e-cigarette products," because "[g]iven the regulatory backdrop in the e-cigarette industry, . . . the hypothetical launch of new products by Altria would involve a multi-year process and there is no economic basis to suggest those hypothetical products would be a competitive constraint on current pricing or output decisions, nor has Dr. Rothman offered any economic analysis or evidence to support such a

suggestion." (RX1217 Murphy Report ¶ 18 n.22). Altria and PMI's joint research, development, and technology sharing agreement and their R&D relationship did not result in any existing e-cigarette products, except for limited sales of Apex in e-commerce, which Professor Murphy included in his report. (RX1217 Murphy Report ¶ 34).

2116. In his report, Dr. Murphy only analyzed e-vapor products that were actually sold in the U.S. marketplace. (Murphy (Respondents' Expert) Tr. 3225). In his report, Respondents' expert, Dr. Murphy, did not consider any e-vapor products that Altria had in development at the time of the transaction. (Murphy Tr. 3225).

Response to Proposed Finding No. 2116:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, his "analysis focuse[d] on existing e-cigarette products," because "[g]iven the regulatory backdrop in the e-cigarette industry, . . . the hypothetical launch of new products by Altria would involve a multi-year process and there is no economic basis to suggest those hypothetical products would be a competitive constraint on current pricing or output decisions, nor has Dr. Rothman offered any economic analysis or evidence to support such a suggestion." (RX1217 Murphy Report ¶ 18 n.22).

2117. Dr. Murphy does not recall if his report discusses the work that Altria was doing before it exited the market on an updated version of Elite – Elite 2.0. (Murphy Tr. 3225). Dr. Murphy does not recall if Elite 2.0 contained nicotine salts. (PX7047 (Murphy (Respondents' Expert), Dep. at 27)).

Response to Proposed Finding No. 2117:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained, his "analysis focuse[d] on existing e-cigarette products," because "[g]iven the regulatory backdrop in the e-cigarette industry, . . . the hypothetical launch of new products by Altria would involve a multi-year process and there is no economic basis to suggest those hypothetical products would be a competitive constraint on current pricing or output decisions, nor has Dr. Rothman offered any economic analysis or evidence to support such a

suggestion." (RX1217 Murphy Report ¶ 18 n.22). Given that Professor Murphy limited his opinions in this way, it is unreasonable to criticize him for not recalling particular features of hypothetical future products. The evidence is undisputed that the design of Elite 2.0 was not finalized and could not have reached the market until it had obtained FDA clearance, a process that would have taken years. (RFF ¶¶ 1600-02).

2118. Dr. Murphy does not recall if in his report he discussed products that PMI had in development. (Murphy Tr. 3227). CEO of PMI America King's deposition testimony is not cited as something that Dr. Murphy relied upon in his report. (PX7047 (Murphy (Respondents' Expert), Dep. at 24-26)). In his report, Dr. Murphy does not discuss Altria's joint research, development, and technology sharing agreement with Philip Morris, International (PMI). (Murphy Tr. 3220-21). Dr. Murphy does not recall reviewing any materials discussing PMI's MESH technology. (PX7047 (Murphy (Respondents' Expert), Dep. at 22)). Dr. Murphy is not aware that PMI's VEEV product is currently being sold outside the U.S. and does not recall Altria's plans to commercialize VEEV in the U.S. (PX7047 (Murphy (Respondents' Expert), Dep. at 23)). Dr. Murphy does not recall mentioning the VEEV product in his report. (PX7047 (Murphy (Respondents' Expert), Dep. at 23-24)).

Response to Proposed Finding No. 2118:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained in his report, his "analysis focuse[d] on existing e-cigarette products," because "[g]iven the regulatory backdrop in the e-cigarette industry, . . . the hypothetical launch of new products by Altria would involve a multi-year process and there is no economic basis to suggest those hypothetical products would be a competitive constraint on current pricing or output decisions, nor has Dr. Rothman offered any economic analysis or evidence to support such a suggestion." (RX1217 Murphy Report ¶ 18 n.22). Given that Professor Murphy limited his opinions in this way, it is unreasonable to criticize him for not recalling particular features of hypothetical future products, or products that were not introduced or able to be introduced in the United States. [redacted]

[redacted].

2119. In his report, Dr. Murphy did not compare the profitability of Altria's e-vapor business to other e-vapor competitors at the time of Altria's exit. (Murphy Tr. 3230). In his report, Dr. Murphy did not compare the profitability of Altria's e-vapor business to Reynolds' e-vapor business at the time of Altria's exit. (Murphy Tr. 3230). Dr. Murphy did not compare the profitability of Altria's e-vapor business to NJOY's e-vapor business at the time of Altria's exit. (Murphy Tr. 3230-3231).

Response to Proposed Finding No. 2119:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not make such profitability comparisons, he "looked at . . . the differences between the products and where . . . [the] companies were positioned," which demonstrated that "Altria's position was relatively inferior." (Murphy Tr. 3230-31; *see also* RX1217 Murphy Report ¶ 161 ("While other competitors, including NJOY and Reynolds, were also engaged in heavy promotion by discounting their device prices, they had greater success in the marketplace than Altria did with its MarkTen Elite product."); *see also* Begley (Altria) Tr. 1088 (explaining that "if [Altria wasn't] successful with a pod-based product, [it was] not going to achieve" its projections); RFF ¶¶ 1324-37 (describing the continued decline of cig-a-likes and success of pod-based products with nicotine salts)).

2120. Prior to his trial testimony, Dr. Murphy did not review any portions of the trial testimony of Mr. Wade Huckabee from Reynolds. (Murphy Tr. 3232).

Response to Proposed Finding No. 2120:

The Proposed Finding is incomplete, misleading without additional context, and irrelevant. Professor Murphy testified that he did not "recall" reviewing Huckabee's trial testimony. (Murphy Tr. 3232). And it is not clear whether Dr. Rothman reviewed Huckabee's trial testimony either—Dr. Rothman testified that he had only reviewed parts of trial testimony by fact witnesses.

(PX7048 Rothman Trial Dep. at 145 (stating that he has reviewed "[s]ome of the trial testimony," "but not all of it")).

2121. Dr. Murphy does not address Altria's intellectual property portfolio in his report. (PX7047 (Murphy (Respondents' Expert), Dep. at 31)).

Response to Proposed Finding No. 2121:

The Proposed Finding is incomplete and misleading without additional context. As Professor Murphy explained in his report, his "analysis focuse[d] on existing e-cigarette products," because "[g]iven the regulatory backdrop in the e-cigarette industry, . . . the hypothetical launch of new products by Altria would involve a multi-year process and there is no economic basis to suggest those hypothetical products would be a competitive constraint on current pricing or output decisions, nor has Dr. Rothman offered any economic analysis or evidence to support such a suggestion." (RX1217 Murphy Report ¶ 18 n.22).

2122. Dr. Murphy did not offer an opinion in this case as to whether Altria would have exited the e-vapor business but for the transaction. (Murphy Tr. 3229).

Response to Proposed Finding No. 2122:

The Proposed Finding is incomplete and misleading without additional context. Professor Murphy testified that his assignment was to "analyze[] what economic impact, if any, was there of [Altria's] decision to discontinue [its] products," (Murphy Tr. 3229), irrespective of the reason for their removal, (RX1217 Murphy Report ¶ 9). He then went on to testify that based on Nu Mark's "current profitability," "potential profitability," and "potential [for its] products to be successful in the future," it "painted a pretty bleak future" of its potential for success. (Murphy Tr. 3230; *see also* Begley (Altria) Tr. 1088 (explaining that "if [Altria wasn't] successful with a pod-based product, [it was] not going to achieve" its projections); RFF ¶¶ 1324-37 (describing the continued decline of cig-a-likes and success of pod-based products with nicotine salts)).

(4) Dr. Murphy Failed to Investigate, Quantify, or Demonstrate That Any Sales Expansion By Third Parties Post-Altria's Exit Was in Fact in Response to Altria's Exit

2123. Dr. Murphy did not quantify in his report the extent to which Reynolds' sales expansion was in response to Altria's exit. (Murphy Tr. 3207-08).

Response to Proposed Finding No. 2123:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy did not make such a quantification, he also testified that companies do not undertake actions "randomly": "[I]f the withdrawal of Altria's products created an opportunity for people, they would take advantage of it the way they take advantage of other opportunities, and that's the dynamic nature of the marketplace . . . ." (Murphy Tr. 3207). While he agreed with Complaint Counsel's question that it is not possible to quantify what "fraction of Reynolds' sales expansion was in response to Altria's exit," he explained that "[t]hey would only have had to do a small fraction, a very small fraction, to be able to offset Elite's withdrawal." (Murphy Tr. 3208; *see also* RFF ¶¶ 1711-13).

2124. Dr. Murphy did not offer an opinion in his report that NJOY's expansion in sales was in response to Altria's exit from e-cigarettes. (Murphy Tr. 3208).

Response to Proposed Finding No. 2124:

The Proposed Finding is incomplete and misleading without additional context. While Professor Murphy testified that he did not make such a quantification, he also testified that NJOY would have responded to Altria's exit "like . . . firms do": In other words, "Altria's withdrawal . . . would have created an opening for them to expand their sales more, and by freeing up shelf space would have facilitated that expansion." (Murphy Tr. 3208-09). While it is not possible to quantify what fraction of NJOY's sales expansion was in response to Altria's exit, NJOY (and Reynolds) expanded more than what was necessary to offset harm predicted by Dr. Rothman's model. (RFF ¶¶ 1711-13).

(5) Dr. Murphy Failed to Demonstrate That the Transaction between Altria and JLI Gave Rise to Any Regulatory Benefits

2125. Respondents' expert, Dr. Murphy, did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria's assumed regulatory expertise. (Murphy (Respondents' Expert) Tr. 3216).

Response to Proposed Finding No. 2125:

The Proposed Finding is incomplete and misleading without additional context. Professor Murphy testified that his intent was "to quantify in some way what the magnitude of . . . [the] efficiencies would be" from Altria's regulatory services, (Murphy Tr. 3212), and he provided those quantifications in his report, (RX1217 Murphy Report ¶ 203). Professor Murphy testified that determining whether such efficiencies actually came to pass would be "outside [his] area of expertise," (Murphy Tr. 3215), and so he relied on employees with expertise at Altria and JLI to assess the impact of Altria's help. Those employees explained that Altria's regulatory services helped JLI file a timely PMTA and substantially increased the quality of the PMTA. (RFF ¶¶ 1247-64).

2126. Dr. Murphy's basis for the statement in his report "that the transaction likely gave rise to potential consumer benefits" (RX1217 at 071 (¶ 93) (Murphy Expert Report)) was statements made by people at Altria and JLI. (Murphy (Respondents' Expert) Tr. 3212). He relied on the judgment of Altria and JLI executives as support for his statement that the transaction will likely result in efficiencies. (Murphy Tr. 3212).

Response to Proposed Finding No. 2126:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent

increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2127. Dr. Murphy agrees that whether or not Altria has regulatory expertise before the FDA is a factual issue. (Murphy Tr. 3213).

Response to Proposed Finding No. 2127:

Respondents have no specific response.

2128. Dr. Murphy admits that he is not directly assessing Altria's regulatory expertise in a scientific or technical sense. (Murphy Tr. 3214). Dr. Murphy agrees that, assuming Altria does, in fact, have regulatory expertise, whether that expertise will provide JLI with an enhanced ability to secure PMTA approval is a factual issue. (Murphy Tr. 3214).

Response to Proposed Finding No. 2128:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2129. Dr. Murphy did not conduct an independent assessment of Altria's expertise in preparing PMTA applications. (Murphy Tr. 3214). Dr. Murphy does not know the number of PMTAs that Altria has filed. (Murphy Tr. 3214-15). Dr. Murphy did not perform an independent assessment of Altria's in-house resources to support PMTA applications. (Murphy Tr. 3215).

Response to Proposed Finding No. 2129:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2130. Dr. Murphy did not perform an independent assessment of whether Altria's regulatory advisory services increased the likelihood that existing JLI products can receive FDA approval. (Murphy Tr. 3215).

Response to Proposed Finding No. 2130:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2131. Dr. Murphy did not quantify the likelihood that the FDA will approve PMTA applications for any of JLI's existing products. (Murphy Tr. 3215).

Response to Proposed Finding No. 2131:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2132. Dr. Murphy did not perform an independent assessment of whether Altria's regulatory advisory services increased the speed with which existing JLI products can receive FDA approval. (Murphy Tr. 3215).

Response to Proposed Finding No. 2132:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2133. No one at Altria or JLI or their counsel provided Dr. Murphy with any estimates of the consumer benefits that would be achieved by increasing the likelihood that new JLI e-cigarette products would receive market approval. (Murphy Tr. 3215-16).

Response to Proposed Finding No. 2133:

Respondents have no specific response except to note that Professor Murphy testified such an estimate "was not an input that [he] needed for purposes of [his] analysis, so it's not something [he] requested." (Murphy Tr. 3216). Professor Murphy, "using Dr. Rothman's model," estimated the minimum increase in probability of obtaining regulatory approval necessary to offset Dr. Rothman's predicted harm, and thus did not require a specific estimate from Altria or JLI. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2134. Dr. Murphy did not do any work to verify whether the potential consumer benefits from Altria's regulatory advisory services have actually occurred. (Murphy Tr. 3216). Also, nowhere in his report does Dr. Murphy discuss any work that he did to verify whether the potential consumer benefits from Altria's regulatory advisory services are likely to occur. (Murphy Tr. 3216).

Response to Proposed Finding No. 2134:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm to due increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

2135. Respondents' expert, Dr. Murphy, did not evaluate whether JLI could achieve potential regulatory benefits through means other than the transaction with Altria. (Murphy Tr. 3217).

Response to Proposed Finding No. 2135:

Respondents have no specific response except to note that Dr. Rothman similarly "offers no economic analysis or evidence to support [his] assertion" that a transaction with a noncompete was not necessary for JLI to achieve the benefits it hoped to acquire from Altria. (RX1217 Murphy Report ¶ 205 n.290 (explaining that "it is well understood by economists and the antitrust community that the realization of . . . procompetitive benefits may reasonably require restrictions on competition")).

2136. Respondents' expert, Dr. Murphy, did not offer an opinion in his report that the transaction would, in fact, result in a one percent increase in the probability that JLI receives regulatory approval for its products. (Murphy Tr. 3218 (testifying about RX1217 at 126 (¶ 203) (Murphy Expert Report)).

Response to Proposed Finding No. 2136:

Respondents have no specific response except to note that as an economist, Professor Murphy's intent was not to conclude "whether [Altria's] expertise would lead to what magnitude of increase in probability," but instead to "try to translate that into some economic calculation." (Murphy Tr. 3218). Professor Murphy thus calculated the extent to which even minuscule increases in probability of regulatory approval as a result of Altria's regulatory services would offset Dr. Rothman's proposed harm. (RX1217 Murphy Report ¶ 203 (showing that a 1 percent increase in probability that JUUL receives regulatory approval is enough to offset either approximately 25 percent of Dr. Rothman's predicted harm due to increased prices in a closed-system market, or 25 percent of all harm in a market consisting of only pod-based products)).

C. WITNESSES WHO TESTIFIED BY DEPOSITION AND/OR INVESTIGATIONAL HEARING ONLY

1. Respondents' Employees and Former Employees

Michelle Baculis of Altria (PX7014, Dep.)

2137. Michelle Baculis is employed by Altria and currently works at United States Smokeless Tobacco. (PX7014 (Baculis (Altria), Dep. at 11)). She previously worked at Nu Mark, and her first boss at Nu Mark was Joe Murillo. (PX7014 (Baculis (Altria), Dep. at 11)). Baculis has been in brand management her entire career at Altria and its predecessor companies. (PX7014 (Baculis (Altria), Dep. at 11)). Baculis started at Altria when it was PM USA in brand management for the Parliament. (PX7014 (Baculis (Altria), Dep. at 11)).

Response to Proposed Finding No. 2137:

Respondents have no specific response.

2138. When working at Nu Mark, Baculis worked on brand management and was responsible for the in-market testing of MarkTen. (PX7014 (Baculis (Altria), Dep. at 12-13)). Later at Nu Mark, her role was focused on leading and guiding the new product development for the pipeline products. (PX7014 (Baculis (Altria), Dep. at 12-13)).

Response to Proposed Finding No. 2138:

Respondents have no specific response.

Michael Brace of Altria (PX7013, Dep.)

2139. Michael Brace is currently employed at Altria where he is the Vice President and General Manager of Marlboro. (PX7013 (Brace (Altria), Dep. at 10)). He started in this position in September 2020. (PX7013 (Brace (Altria), Dep. at 10-11)). In his current role, he leads the marketing efforts for the cigarette portfolio in the Philip Morris USA subsidiary. (PX7013 (Brace (Altria), Dep. at 10)). Prior to becoming Vice President and General Manager of Marlboro, Brace was Vice President of Region Sales in the Northeast, working with core tobacco products. (PX7013 (Brace (Altria), Dep. at 11)).

Response to Proposed Finding No. 2139:

Respondents have no specific response.

2140. Prior to February 2019, Brace was the General Manager of Nu Mark, a role he started in October 2018. (PX7013 (Brace (Altria), Dep. at 11)). As General Manager of Nu Mark, Brace lead the marketing commercialization and operation work of Nu Mark. (PX7013 (Brace (Altria), Dep. at 12)). During his time at Nu Mark, Brace reported to Quigley. (PX7013 (Brace (Altria), Dep. at 13)). Prior to serving as General Manager, Brace was the

Marketing Director of Nu Mark from November 2017 to October 2018. (PX7013 (Brace (Altria), Dep. at 15-16)).

Response to Proposed Finding No. 2140:

Respondents have no specific response.

Kevin Burns formerly of JLI (PX7025, Dep.; PX7009, IHT)

2141. Kevin Burns was formerly the Chief Executive Officer of JLI. (PX7025 (Burns (JLI), Dep. at 9); PX7009 (Burns (JLI), IHT at 7)). As CEO, Burns was responsible for day-to-day operations of the business, providing strategic direction, interfacing with the board of directors around governance and other matters, and delivering financial and other performance of the business. (PX7009 (Burns (JLI), IHT at 8)). Burns started at JLI around December 2017. (PX7009 (Burns (JLI), IHT at 43)).

Response to Proposed Finding No. 2141:

Respondents have no specific response.

2142. Burns was involved in the negotiations to sell an ownership interest in JLI to Altria. (PX7009 (Burns (JLI), IHT at 42)). He was a part of the core team along with some members of the board, the CFO, the General Counsel, and others. (PX7009 (Burns (JLI, former), IHT at 42)). Burns stepped down as CEO of JLI in 2019. (PX7009 (Burns (JLI, former), IHT at 213)).

Response to Proposed Finding No. 2142:

Respondents have no specific response.

2143. As of January 2021, Burns owned some equity in JLI, including options and restricted stock units. (PX7025 (Burns (JLI), Dep. at 182)).

Response to Proposed Finding No. 2143:

Respondents have no specific response.

K.C. Crosthwaite of JLI and formerly of Altria (PX7024, Dep.; PX7006, IHT)

2144. K.C. Crosthwaite is the Chairman and CEO of JLI. (PX7024 (Crosthwaite (JLI), Dep. at 7)).

Response to Proposed Finding No. 2144:

Respondents have no specific response.

2145. Crosthwaite was previously employed by Altria and left Altria in September of 2019. (PX7024 (Crosthwaite (JLI), Dep. at 7)). When he departed, his position at Altria was Chief Growth Officer, a position he had held since June 2018. (PX7024 (Crosthwaite (JLI), Dep. at 7, 14)). Before being named Chief Growth Officer, Crosthwaite was President and CEO of Philip Morris USA. (PX7024 (Crosthwaite (JLI), Dep. at 15)). Crosthwaite joined Philip Morris USA in 1997 as a territory sales manager. (PX7024 (Crosthwaite (JLI), Dep. at 14)).

Response to Proposed Finding No. 2145:

Respondents have no specific response.

2146. As President and CEO of Philip Morris USA, Crosthwaite did not have any responsibility for e-vapor products or initiatives at Altria; he was responsible for the cigarettes and cigars business. (PX7024 (Crosthwaite (JLI), Dep. at 15)). Crosthwaite also held positions as Vice President for Strategy and Business Development for Altria Client Services and General Manager for Marlboro. (PX7024 (Crosthwaite (JLI), Dep. at 15, 19)).

Response to Proposed Finding No. 2146:

Respondents have no specific response except to note that Crosthwaite was "Vice President and General Manager for Marlboro," not just General Manager. (PX7024 Crosthwaite (Altria/JLI) Dep. at 19).

2147. [redacted]

Response to Proposed Finding No. 2147:

Respondents have no specific response.

Eugene Cullen of JLI (PX7008, IHT)

2148. Eugene Cullen, III started working for JLI in the summer of 2018. (PX7008 (Cullen (JLI), IHT at 8-9)). He is the Director of Strategic Finance. (PX7008 (Cullen (JLI), IHT at 9)). In this position, Cullen works on high priority projects of the executive team, typically mergers and acquisitions, corporate development, new business development, and strategic initiatives. (PX7008 (Cullen (JLI), IHT at 9)).

Response to Proposed Finding No. 2148:

Respondents have no specific response.

2149. Cullen was designated by JLI to discuss efficiencies in connection with the transaction in response to Complaint Counsel's subpoena directed to JLI. (PX7008 (Cullen (JLI), IHT at 10-11 (referring to PX0006 at 001-003 (FTC Subpoena Ad Testificandum addressed to JLI, dated Dec. 3, 2019))).

Response to Proposed Finding No. 2149:

Respondents have no specific response.

Timothy Danaher formerly of JLI (PX7042, Dep.; PX7005, IHT)

2150. Timothy Danaher joined JLI in 2015 as Vice President of Finance. (PX7042 (Danaher (JLI), Dep. at 12)). He was promoted to Chief Financial Officer in 2017, and in that role was responsible for mergers and acquisitions and investor relations. (PX7042 (Danaher (JLI), Dep. at 12-13)). Danaher transitioned out of the CFO role at JLI in October 2019. (PX7042 (Danaher (JLI), Dep. at 13)). Danaher is currently employed by NEXT Trucking as CFO. (PX7042 (Danaher (JLI), Dep. at 6)).

Response to Proposed Finding No. 2150:

Respondents have no specific response except to note that Danaher testified that he would have been "involved" in mergers and acquisitions. (PX7042 Danaher (JLI) Dep. at 13).

2151. As of February 2021, Danaher held an equity interest in JLI in the form of shares and options. (PX7042 (Danaher (JLI), Dep. at 170-71)).

Response to Proposed Finding No. 2151:

Respondents have no specific response.

Dinny Devitre of Altria (PX7001, IHT)

2152. Dinny Devitre is a member of the Board of Directors at Altria Group. (PX7001 (Devitre (Altria), IHT at 8)). He began working for Philip Morris, predecessor of Altria, in 1970. (PX7001 (Devitre (Altria), IHT at 8)). Devitre became President of Philip Morris Asia in 1984. (PX7001 (Devitre (Altria), IHT at 9-10)). In 1990, Devitre became Senior Vice President and Chief Administrative Officer of PMI, and in 1995, Head of Corporate Planning. (PX7001 (Devitre (Altria), IHT at 10-11)). Devitre left Philip Morris in 1997 for Citigroup and remained there until 2001. (PX7001 (Devitre (Altria), IHT at 11)). In 2002, Devitre returned to Altria Group and became Senior Vice President and CFO, a position he held until March 2008. (PX7001 (Devitre (Altria), IHT at 12)).

Response to Proposed Finding No. 2152:

Respondents have no specific response.

2153. In 2008, Devitre retired from Altria and became a director of the Altria board. (PX7001 (Devitre (Altria), IHT at 12)). About three years ago (as of December 6, 2019), he became Chairman of the Finance Committee of the Altria board. (PX7001 (Devitre (Altria), IHT at 13)). As an Altria board member, Devitre approved dividends, major capital expenditures, the annual budget, and certain acquisitions, and served as an informal advisor to the CEO. (PX7001 (Devitre (Altria), IHT at 14)). Devitre also serves on the innovation committee of the Altria board whose role is to look at the product innovations of the company and encourage innovations with regard to new products and research and development. (PX7001 (Devitre (Altria), IHT at 14, 16)).

Response to Proposed Finding No. 2153:

Respondents have no specific response.

Pascal Fernandez of Altria (PX7023, Dep.)

2154. Pascal Fernandez is a managing director for Altria Client Services. (PX7023 (Fernandez (Altria), Dep. at 7)). He works on a variety of projects, including innovation projects, and acts as an executive coach for next generation leaders in the company. (PX7023 (Fernandez (Altria), Dep. at 7-8)). Fernandez works on a tobacco innovation project that involves reduced harm, but he is not currently working on an e-vapor product. (PX7023 (Fernandez (Altria), Dep. at 8-9)).

Response to Proposed Finding No. 2154:

Respondents have no specific response.

2155. As of January 2021, Fernandez owned approximately $1 million in stock in Altria. (PX7023 (Fernandez (Altria), Dep. at 220)).

Response to Proposed Finding No. 2155:

Respondents have no specific response.

Maria Gogova of Altria (PX7015, Dep.)

2156. Maria Gogova is Vice President of Regulatory Sciences, a position she assumed in 2019. (PX7015 (Gogova (Altria), Dep. at 12, 26)). She joined Altria full time in 2003 in the clinical team to work on reduced risk products. (PX7015 (Gogova (Altria), Dep. at 10-11, 13-14)). Her role was to design and conduct clinical studies for future products. (PX7015 (Gogova (Altria), Dep. at 11)). Later, after 2010, she moved to the regulatory sciences group, her role was to understand and interpret FDA guidance documents and develop scientific strategies to create the framework for and evaluate reduced risk products. (PX7015 (Gogova (Altria), Dep. at 12)).

Response to Proposed Finding No. 2156:

Respondents have no specific response.

2157. Gogova evaluated products for PMTA readiness by designing and conducting product studies that would provide the information the FDA was looking for in its approval process. (PX7015 (Gogova (Altria), Dep. at 18-20)).

Response to Proposed Finding No. 2157:

Respondents have no specific response.

Paige Magness of Altria (PX7017, Dep.)

2158. Paige Magness is the Senior President of Regulatory Affairs for Altria. (PX7017 (Magness (Altria), Dep. at 18)). Magness joined Philip Morris USA in 2004. (PX7017 (Magness (Altria), Dep. at 11-12)). Magness became manager of PMTAs in 2016. (PX7017 (Magness (Altria), Dep. at 17, 19-20, 22)). Magness is a communications professional and uses her communications expertise in helping Altria to prepare its PMTA filings. (PX7017 (Magness (Altria), Dep. at 18-20)).

Response to Proposed Finding No. 2158:

Respondents have no specific response.

2159. As of January 2021, Magness owned stock in Altria. (PX7017 (Magness (Altria), Dep. at 82-83)).

Response to Proposed Finding No. 2159:

Respondents have no specific response.

Gerald Masoudi formerly of JLI (PX7035, Dep.)

2160. Gerald Masoudi joined JLI in July of 2018 as Chief Legal Officer. (PX7035 (Masoudi (JLI), Dep. at 16)). He remained in that position until July 2020 when he became counselor and advisor to the CEO of JLI, and he stayed at JLI until September 2020. (PX7035 (Masoudi (JLI, former), Dep. at 16)). He is currently a partner in the Covington and Burling law firm. (PX7035 (Masoudi (JLI, former), Dep. at 16-17)).

Response to Proposed Finding No. 2160:

Respondents have no specific response.

2161. As Chief Legal Officer, Masoudi's responsibilities related to JLI's transaction with Altria were to attend board meetings at which the transaction was discussed, work with outside counsel on the term sheets and draft agreements, answer questions on legal issues that

board members or the CEO had, participating in due diligence meetings with Altria, and attending some negotiation meetings between JLI and Altria. (PX7035 (Masoudi (JLI, former), Dep. at 21-22)).

Response to Proposed Finding No. 2161:

Respondents have no specific response.

Elizabeth Mountjoy of Altria (PX7034, Dep.)

2162. Elizabeth Mountjoy joined Altria in late 2015 as Director of Consumer Marketplace Insights supporting Nu Mark. (PX7034 (Mountjoy (Altria), Dep. at 13)). Mountjoy's role was to bring insights to Nu Mark of what consumers were thinking about and what was going on in the marketplace that could inform Nu Mark's vapor business from an innovation perspective. (PX7034 (Mountjoy (Altria), Dep. at 13)). Mountjoy reported to the head of Consumer Marketplace Insights who was Pascal Fernandez. (PX7034 (Mountjoy (Altria), Dep. at 15)). Mountjoy worked on consumer research on flavor and form for vapor products. (PX7034 (Mountjoy (Altria), Dep. at 21-23)).

Response to Proposed Finding No. 2162:

Respondents have no specific response.

2163. Mountjoy did not work much directly with the product and regulatory team. (PX7034 (Mountjoy (Altria), Dep. at 31)).

Response to Proposed Finding No. 2163:

Respondents have no specific response except to note that Mountjoy gave that answer in the context of a document from July of 2017, at which point she was running Altria's digital and marketing services group. (PX7034 Mountjoy (Altria) Dep. at 29). By 2018, Mountjoy was working in corporate strategy, at which point it was her job to have discussions with many different functions to inform her work. (PX7034 Mountjoy (Altria) Dep. at 133-36; RX0199 (Altria) at 01).

2. Third-Party Witnesses

Jeff Eldridge of ITG (PX7012, Dep.)

2164. Jeff Eldridge is Vice President, area central, at ITG Brands, LLC. ("ITG"). (PX7012 (Eldridge (ITG), Dep. at 19, 22-23)). As Vice President, Eldridge oversees the distribution and sales arm of cigarettes, cigars, and vapor products that ITG sells in 13 Midwestern states. (PX7012 (Eldridge (ITG), Dep. at 23)).

Response to Proposed Finding No. 2164:

Respondents have no specific response.

2165. ITG stands for the Imperial Tobacco Group. (PX7012 (Eldridge (ITG), Dep. at 19)). ITG is the third largest U.S. tobacco company and a subsidiary of Imperial Brands, PLC. (PX7012 (Eldridge (ITG), Dep. at 23)). ITG sells traditional tobacco products such as cigarettes and cigars, as well as e-vapor products. (PX7012 (Eldridge (ITG), Dep. at 23-24)). ITG sells multiple e-vapor products under the brand name blu. (PX7012 (Eldridge (ITG), Dep. at 26)).

Response to Proposed Finding No. 2165:

Respondents have no specific response.

Peter Gross of Goldman Sachs (PX7043, Dep.)

2166. Peter Gross is employed by Goldman Sachs and is Vice Chairman, Investment Banking. (PX7043 (Gross (Goldman Sachs), Dep. at 14)). As an investment banker, Gross has done work for and advised JLI. (PX7043 (Gross (Goldman Sachs), Dep. at 16)). Gross started working with JLI in late 2017 or early 2018, and his assignment was to help JLI negotiate an agreement with Altria where Altria would take a minority position in JLI. (PX7043 (Gross (Goldman Sachs), Dep. at 16)). Gross was involved in JLI's negotiations with Altria. (PX7043 (Gross (Goldman Sachs), Dep. at 17)).

Response to Proposed Finding No. 2166:

Respondents have no specific response except to note that the Proposed Finding is misleading to the extent it implies Gross's involvement in the negotiation went beyond "just the valuation." (PX7043 Gross (Goldman Sachs) Dep. at 32; *see also* RFF ¶ 1214; RRFF ¶ 609).

John Logan (Jack) Stout of 7-Eleven (PX7044, Dep.)

2167. John Logan (Jack) Stout started working for 7-Eleven in 2003. (PX7044 (Stout (7-Eleven), Dep. at 8, 23)). Currently he serves as the Senior Vice President for Merchandising and Demand Chain, a position he has held since 2017. (PX7044 (Stout (7-Eleven), Dep. at 23-24)). Stout is responsible for the product assortment in stores, including deciding which products the stores will carry and recommending products to the franchise stores. (PX7044 (Stout (7-Eleven), Dep. at 24)). In some cases, he is responsible for product development of things such as fresh food and private brands. (PX7044 (Stout (7-Eleven), Dep. at 24)). Stout is also responsible for negotiating the terms under which 7-Eleven's stores purchase products from national brand suppliers and maintaining the relationships with third-party distribution partners. (PX7044 (Stout (7-Eleven), Dep. at 24-25)).

Response to Proposed Finding No. 2167:

Respondents have no specific response.

2168. 7-Eleven is a convenience store chain, operating in the U.S. and the world. (PX7044 (Stout (7-Eleven), Dep. at 35); PX8001 at 001 (¶ 001) (Stout (7-Eleven), Decl.)). 7-Eleven has over 9,000 stores in the U.S., of which approximately 80% are franchised and 20% are company owned, and over 70,000 stores worldwide. (PX8001 at 001 (¶ 01) (Stout (7-Eleven), Decl.)).

Response to Proposed Finding No. 2168:

Respondents have no specific response.

James Wappler of Perella Weinberg Partners (PX7028, Dep.)

2169. James Wappler is a Partner at Perella Weinberg Partners ("PWP"). (PX7028 (Wappler (PWP), Dep. at 12)). Wappler serves as an advisor to Altria on financial and strategic matters, including mergers and acquisitions. (PX7028 (Wappler (PWP), Dep. at 13-14)). Wappler began advising Altria in 2014. (PX7028 (Wappler (PWP), Dep. at 13)).

Response to Proposed Finding No. 2169:

Respondents have no specific response.

2170. Wappler worked on Project Tree, which was Altria's investment in JLI. (PX7028 (Wappler (PWP), Dep. at 15)). He started on this project in the spring of 2017. (PX7028 (Wappler (PWP), Dep. at 15)). More than half of Wappler's work time in 2018 was dedicated to Altria. (PX7028 (Wappler (PWP), Dep. at 16)). Wappler also evaluated other potential acquisitions for Altria in the e-vapor space. (PX7028 (Wappler (PWP), Dep. at 17)).

Response to Proposed Finding No. 2170:

Respondents have no specific response.

Lawrence Wexler of Turning Point Brands (PX7030, Dep.)

2171. Lawrence Wexler is President and CEO of Turning Point Brands. (PX7030 (Wexler (Turning Point Brands), Dep. at 6)). Wexler was previously employed by Philip Morris but left the company in 1998. (PX7030 (Wexler (Turning Point Brands), Dep. at 16)).

Response to Proposed Finding No. 2171:

Respondents have no specific response.

2172. Turning Point Brands operates in three segments: smokeless tobacco products, smoking products, and NewGen (including vapor) products. (PX7030 (Wexler (Turning Point Brands), Dep. at 18-20); PX8003 (Wexler at 001 (¶ 002) (Turning Point Brands), Decl.)). The majority of the products, not including its moist snuff, that Turning Point Brands sells are manufactured by third parties. (PX7030 (Wexler (Turning Point Brands), Dep. at 18)). Turning Point Brands markets the RipTide vapor products. (PX7030 (Wexler (Turning Point Brands), Dep. at 19-20)).

Response to Proposed Finding No. 2172:

Respondents have no specific response.

RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW

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[1] Consistent with the Court's Order on Post-Trial Filings (at 4), Respondents have "use[d] the same outline headings as used by [Complaint Counsel]" in this Reply to Complaint Counsel's Proposed Conclusions of Law. As evident from the substance of Respondents' detailed responses to the individual Proposed Conclusions, Respondents do not agree with any of Complaint Counsel's headings.

I. THE FEDERAL TRADE COMMISSION HAS JURISDICTION

1. The Federal Trade Commission ("FTC or "Commission") has jurisdiction over the subject matter of this proceeding, pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18, 21(b).

Response to Proposed Conclusion of Law No. 1:

The Proposed Conclusion is incomplete. Although Respondents do not disagree that the cited legal authorities purport to provide the Commission with jurisdiction over this proceeding, the boundaries of the Commission's jurisdiction are unclear and arbitrary. The FTC and the Department of Justice ("DOJ") share responsibility for enforcing federal antitrust law, but the decision as to which agency will lead the investigation occurs in a black box devoid of public scrutiny, violating due-process and equal-protection guarantees. Due process demands some scrutiny of how the government makes such consequential decisions. *Cf. Beckles* v. *United States*, 137 S. Ct. 886, 892 (2017) ("[T]he Due Process Clause prohibits the Government" from depriving property under a law "so standardless that it invites arbitrary enforcement."). Further, arbitrary decisions as to which agency will take the lead violate equal-protection guarantees and unfairly prejudice parties subject to the lesser protections of FTC proceedings. *Cf. Zobel* v. *Williams*, 457 U.S. 55, 58-64 (1982) (drawing arbitrary lines between citizens based on length of residency in the state violates the Equal Protection Clause).

2. The Commission has jurisdiction over Respondent Altria Group, Inc. ("Altria").

Response to Proposed Conclusion of Law No. 2:

The Proposed Conclusion is incomplete for the reasons set forth in RRCoL ¶ 1.

3. Respondent Altria is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and also a person as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and in Section 7 of the Sherman Act, 15 U.S.C. § 7.

Response to Proposed Conclusion of Law No. 3:

Respondents have no specific response.

4. The Commission has jurisdiction over Respondent JUUL Labs, Inc. ("JLI").

Response to Proposed Conclusion of Law No. 4:

The Proposed Conclusion is incomplete for the reasons set forth in RRCoL ¶ 1.

5. Respondent JLI is, and at all relevant times has been, a corporation as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and also a "person" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12 and in Section 7 of the Sherman Act, 15 U.S.C. § 7.

Response to Proposed Conclusion of Law No. 5:

Respondents have no specific response.

6. Respondents Altria and JLI are, and at all relevant times have been, engaged in activities, including their agreements relevant to this proceeding, in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

Response to Proposed Conclusion of Law No. 6:

Respondents have no specific response.

7. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

Response to Proposed Conclusion of Law No. 7:

Respondents have no specific response.

8. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Section 1 of the Sherman Act. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948).

Response to Proposed Conclusion of Law No. 8:

Respondents have no specific response.

9. Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18.

Response to Proposed Conclusion of Law No. 9:

Although Respondents agree that the Proposed Conclusion accurately quotes the language of Section 7, the Proposed Conclusion is incomplete.

First, the quoted language omits relevant language from Section 7 limiting liability to acquirers. *See* 15 U.S.C. § 18 ("No person . . . shall acquire . . . ."). Courts have consistently held that this section provides no basis to find a violation by *the seller* in a transaction. *See, e.g.*, *United States* v. *Coca Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227 (9th Cir. 1978) ("By its express terms § 7 proscribes only the act of acquiring, not selling, when the forbidden effects may occur."); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967) (affirming dismissal of Section 7 claim as to seller and explaining that "§ 7 by its terms proscribes only the acquiring corporation"); *Gerlinger* v. *Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004) ("'[B]y its express terms, [S]ection 7 of the Clayton Act is directed only against the acquiring corporation.'") (quoting *Tim W. Koerner & Assocs., Inc.* v. *Aspen Labs, Inc.*, 492 F. Supp. 294, 300 (S.D. Tex. 1980), *aff'd*, 683 F.2d 416 (5th Cir. 1982)).

Second, courts have interpreted this statutory language as imposing on antitrust plaintiffs "the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" *New York* v. *Kraft General Foods, Inc.*, 926 F. Supp. 321, 358 (S.D.N.Y. 1995) (quoting *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969)); *see also United States* v. *AT&T Inc.*, 310 F. Supp. 3d 161, 194 (D.D.C. 2018) (explaining that antitrust plaintiff must show that transaction "is likely to substantially lessen competition"). As the Supreme Court has made plain, Section 7 "deals in 'probabilities,' not 'ephemeral possibilities.'" *United States* v. *Marine Bancorp., Inc.*, 418 U.S. 602, 622-23 (1974) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962)). Thus, Complaint Counsel

must show that "the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *FTC* v. *CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting *Marine Bancorp.*, 418 U.S. at 623 n.22).

Third, Section 7 requires a direct causal relationship between the challenged merger and its alleged anticompetitive effects. Put differently, Section 7 "is concerned with whether an acquisition or merger *itself* may cause antitrust injury." *Geneva Pharms. Tech. Corp.* v. *Barr Labs. Inc.*, 386 F.3d 485, 511 (2d Cir. 2004) (emphasis in original).

II. THE RELEVANT MARKET IS SALES OF CLOSED-SYSTEM E-CIGARETTES IN THE UNITED STATES

10. In defining a relevant antitrust market, courts are guided by the Supreme Court's decision in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Courts also rely heavily on the "hypothetical monopolist test" in *U.S. Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines* (2010) (hereinafter "*Horizontal Merger Guidelines*") as an analytical method for defining relevant markets. *See In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 5957363, at *13 (F.T.C. Nov. 1, 2019); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 886 (E.D. Mo. 2020); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016); *United States v. H&R Block*, 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

Response to Proposed Conclusion of Law No. 10:

The Proposed Conclusion is incomplete to the extent it omits a recognized limitation of the "hypothetical monopolist test" ("HMT"). Well-established case law and the government's own guidelines provide that the relevant market analysis begins with the narrowest relevant market. *See, e.g.*, *FTC* v. *RAG-Stiftung*, 436 F. Supp. 3d 278, 292 (D.D.C. 2020) ("Relevant market analysis is based on the 'narrowest market' principle.") (quoting *FTC* v. *Arch Coal, Inc.*, 329 F. Supp. 2d 109, 120 (D.D.C. 2004)); *FTC* v. *Peabody Energy Corp.*, 492 F. Supp. 3d 865, 886 (E.D. Mo. 2020) (explaining that a factfinder's "task is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant product market"); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines ("HMG") § 4.1.1 ("Because the

relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test."). And while "[t]he hypothetical monopolist test 'is designed to ensure that candidate markets are not overly narrow,' . . . [i]t says nothing about whether a market is overly broad." *RAG-Stiftung*, 436 F. Supp. 3d at 299 n.11 (quoting HMG § 4). Put another way, "[a]n initial candidate market might pass the hypothetical-monopolist test despite being too broad. . . . But this would not exclude the possibility that that candidate market is too broad to be a properly defined relevant [] market." *Sidibe* v. *Sutter Health*, 2019 WL 2078788, at *27 n.209 (N.D. Cal. May 9, 2019). Thus, courts eschew reliance on the HMT where it is not based on the narrowest relevant market. *See, e.g.*, *United States* v. *H & R Block, Inc.*, 833 F. Supp. 2d 36, 59 (D.D.C. 2011) (in a market defined too broadly, "the hypothetical monopolist test . . . cease[s] being useful").

11. "As the United States Supreme Court observed in [*Brown Shoe*], 'The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').'" *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 595-96 (6th Cir. 1970) (quoting *Brown Shoe*, 370 U.S. at 324). In this case, the area of effective competition is the sales of closed-system e-cigarettes in the United States. (CCFF § V).

Response to Proposed Conclusion of Law No. 11:

Respondents have no specific response to Complaint Counsel's quotation of *U.S. Steel* and *Brown Shoe*. The parties have stipulated that the relevant geographic market is the United States. (JX0004 ¶ 1). Respondents object to Complaint Counsel's description of "the area of effective competition" because, as Respondents have explained, Complaint Counsel has failed to carry its burden of establishing that the relevant product market is all closed-system e-cigarettes. (Resps.' Opening Br., Discussion, Part II.B; *see also* RFF Part XIV).

12. The United States is the relevant geographic market. (CCFF ¶ 408).

Response to Proposed Conclusion of Law No. 12:

As set forth in RRCoL ¶ 11, the parties have stipulated that the relevant geographic market is the United States. (JX0004 ¶ 1).

13. The relevant product market refers to the "product and services with which the defendants' products compete." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017), *aff'd* 855 F.3d 345 (D.C. Cir.). In other words, the relevant product market is the "line of commerce" affected by a merger. *Brown Shoe*, 370 U.S. at 324.

Response to Proposed Conclusion of Law No. 13:

The Proposed Conclusion is incomplete. "[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *FTC* v. *Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997). Within any given market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe*, 370 U.S. at 325; *see also Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (Bork, J.). For example, "Jif may compete with mayonnaise in the overall marketplace for sandwich spreads, but that does not necessarily mean both should be included in the relevant product market for antitrust purposes." *RAG-Stiftung*, 436 F. Supp. 3d at 292-93 (quotation omitted). Thus, when assessing a particular merger in any given "line of commerce," "it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." *Brown Shoe*, 370 U.S. at 325.

14. "A market's 'outer boundaries' are determined by the 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 198 (D.D.C. 2018) (quoting *Brown Shoe*, 370 U.S. at 325). Stated another way, a product market includes all goods that are "reasonable substitutes." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 25 (D.D.C. 2015) (citations omitted); *H & R Block*, 833 F. Supp. 2d at 51 (citation omitted).

Response to Proposed Conclusion of Law No. 14:

Respondents have no specific response.

15. "A relevant product market need not be defined around a *single* product." *Peabody Energy*, 492 F. Supp. 3d at 884 (emphasis in original); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) ("We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities.").

Response to Proposed Conclusion of Law No. 15:

Respondents have no specific response except to reiterate that well-established case law and the government's own guidelines adhere to the narrowest market principle. *See, e.g.*, *RAG-Stiftung*, 436 F. Supp. 3d at 292 ("Relevant market analysis is based on the 'narrowest market' principle."); *Peabody Energy Corp.*, 492 F. Supp. 3d at 886 (explaining that a factfinder's "task is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant product market"); HMG § 4.1.1 ("Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.").

16. "Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012) (quoting *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993)).

Response to Proposed Conclusion of Law No. 16:

Respondents agree with and underscore the Proposed Conclusion that products within a single relevant product market must "have the ability . . . to take significant amounts of business away *from each other*." *Polypore Int'l*, 686 F.3d at 1217 (emphasis added) (quoting *U.S. Anchor Mfg.*, 7 F.3d at 995); *see also SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978) (same); *New York* v. *Deutsche Telekom AG*, 439 F. Supp. 3d 179, 202 (S.D.N.Y. 2020) (same); *Arch Coal,* 329 F. Supp. 2d at 119 (same). That observation carries special force in this case, because of the innovation that pod-based products with nicotine salts like JUUL represented

over older cig-a-likes like Nu Mark's MarkTen. As the Commission has itself argued in a comparable context, "an innovative [product] can create a new product market for antitrust purposes" by "satisfy[ing] a previously-unsatisfied consumer demand." *FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008) (Tatel, J., concurring) (quoting FTC opening brief in the matter). "To use the Commission's example, when the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies . . . but that hardly shows that cars and horse-drawn carriages should be treated as the same product market." *Id.*

17. In defining a relevant product market, courts consider "'practical indicia' of market definition such as industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Otto Bock*, 2019 WL 5957363, at *13 (citing *Brown Shoe*, 370 U.S. at 325); *see also In re Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 9549988, at *11 (F.T.C. Nov. 5, 2010).

Response to Proposed Conclusion of Law No. 17:

Respondents have no specific response.

18. The evidence for both the "practical indicia" identified by the Supreme Court in *Brown Shoe* and the hypothetical monopolist test outlined in the *Horizontal Merger Guidelines* supports the conclusion that sales of closed-system e-cigarettes is an appropriate relevant product market. The United States is an appropriate relevant geographic market.

Response to Proposed Conclusion of Law No. 18:

Respondents object to the identified product market because Complaint Counsel has not carried its burden of establishing that sales of all closed-system e-cigarettes is an appropriate relevant product market. (*See* Resps.' Opening Br., Discussion, Part II.B; *see also* RFF Part XIV). As set forth in RRCoL ¶ 11, the parties have stipulated that the relevant geographic market is the United States. (JX0004 ¶ 1).

19. The relevant market inquiry is part of an analysis under Section 7 of the Clayton Act, 15 U.S.C. § 18; however, for Section 1 of the Sherman Act, 15 U.S.C. § 1, "[w]hen

> 'horizontal restraints involve agreements between competitors not to compete in some way, [the Supreme Court] concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.'" *In re Benco Dental Supply Co.*, Docket No. 9379, 2019 WL 5419393, at *70 (F.T.C. Oct. 15, 2019) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018)); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) ("the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition").

Response to Proposed Conclusion of Law No. 19:

The Proposed Conclusion is incomplete and thus misleading for two reasons.

First, the cases where the Supreme Court endorsed an abbreviated analysis of market definition involved *per se* treatment or a so-called "quick look" at anticompetitive effects. *See, e.g.*, *Ind. Fed'n of Dentists*, 476 U.S. at 459 ("[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of [the challenged] agreement.") (citation omitted); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648 (1980) ("An agreement to terminate the practice of giving credit . . . falls squarely within the traditional *per se* rule against price fixing."); *see also Am. Express Co.*, 138 S. Ct. at 2285 n.7 (collecting prior cases). Likewise, the decision of this Court cited by the Proposed Conclusion concerned a "horizontal group boycott of a customer," which was "*per se* unlawful." *In re Benco*, 2019 WL 5419393, at *69. The Court therefore invoked the Supreme Court's precedents involving either *per se* or "quick look" review. *See id.* at *70 (citing *Ind. Fed'n of Dentists*, *supra*; *Catalano, Inc.*, *supra*). By contrast, Complaint Counsel here has expressly forsaken a *per se* or "quick look" theory and is instead explicitly proceeding under the full rule of reason framework. (*See* Compl. ¶ 79; Tr. 64; CC Opening Br. 58 n.17). And "[a]n antitrust plaintiff . . . makes out a prima facie case under the rule of reason only upon proof of a well-defined relevant market upon which the challenged anticompetitive actions would have substantial impact." *Levine* v. *Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1553 (11th Cir. 1996) (citation omitted); *see also Se. Mo. Hosp.* v. *C.R. Bard, Inc.*, 642 F.3d 608, 613

(8th Cir. 2011) (Under the rule of reason framework, "[w]ithout a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.").

Second, to the extent the ordinary requirement to define a relevant product market for purposes of Section 1 of the Sherman Act can ever be relaxed outside the *per se* or quick look contexts—and, as discussed above, Respondents' position is it cannot be—such relaxation could only be appropriate where a plaintiff "ha[s] offered actual evidence of adverse effects on competition" arising from a horizontal restraint. *Am. Express*, 138 S. Ct. at 2285 n.7; *see also id.* at 2284 (defining detrimental effects as "reduced output, increased prices, or decreased quality in the relevant market"). Thus, even on Complaint Counsel's theory, it is only after a court has made "the finding of actual, sustained adverse effects on competition," *Ind. Fed'n of Dentists*, 476 U.S. at 461, that the court may determine that "it d[oes] not need to precisely define the relevant market to conclude that these agreements were anticompetitive," *Am. Express*, 138 S. Ct. at 2285 n.7. For the reasons explained by Respondents, Complaint Counsel has not established any anticompetitive effects here. (*See* Resps.' Opening Br., Discussion, Part II).

In sum, Complaint Counsel must define a relevant market for purposes of both its Sherman Act and its Clayton Act claims.

III. RESPONDENTS AGREED ALTRIA WOULD EXIT THE E-CIGARETTE MARKET IN EXCHANGE FOR ITS STAKE IN JLI

20. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."

Response to Proposed Conclusion of Law No. 20:

Respondents agree that the Proposed Conclusion accurately quotes the language of Section 1. The Supreme Court, however, "has never 'taken a literal approach to [that] language.'" *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *Texaco Inc.* v.

Dagher, 547 U.S. 1, 5 (2006)). "Rather, the Court has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.' " *Id.* (alteration in original) (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997)).

21. Establishing a violation of Section 1 of the Sherman Act requires proof of (1) "a contract, combination, or conspiracy—or, more simply, an agreement" that (2) "unreasonably restrain[s] trade." *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011) (citation omitted); *Benco*, 2019 WL 5419393, at *68.

Response to Proposed Conclusion of Law No. 21:

Respondents have no specific response.

22. Complaint Counsel need only establish Respondents' agreement by a preponderance of the evidence. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56, 663 (7th Cir. 2002); *In re Adventist Health Sys./West*, 117 F.T.C. 224, 297 (1994). In other words, a plaintiff need only present evidence that is sufficient to allow the fact-finder "to infer that the conspiratorial explanation is more likely than not." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (hereinafter "Areeda & Hovenkamp") ¶ 1403(b)).

Response to Proposed Conclusion of Law No. 22:

The Proposed Conclusion is incomplete. Although Respondents agree that the standard of proof is a preponderance of the evidence, that standard is "demanding . . . in the context of an antitrust case." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). Where an inference of conspiracy is equally consistent with an inference of independent conduct, "the evidence of conspiracy would not preponderate." *Re/Max Int'l, Inc.* v. *Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999). Thus, the inference of a conspiracy "must be more probable than the inference of independent action" in order to find a conspiracy. *Kreuzer* v. *Am. Acad. of Periodontology*, 735 F.2d 1479, 1488 n.14 (D.C. Cir. 1984); *see also Anderson News, L.L.C.* v. *Am. Media, Inc.*, 899 F.3d 87, 98 (2d Cir. 2018) ("[I]f the evidence is in equipoise, then . . . judgment must be granted against the plaintiff.").

A. The Totality of the Evidence Establishes Respondents' Agreement

23. "The existence of an agreement is the very essence of a section 1 claim." *Benco*, 2019 WL 5419393, at *7 (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004)).

Response to Proposed Conclusion of Law No. 23:

Respondents have no specific response.

24. An agreement may be established through either direct or circumstantial evidence, or a combination of the two. *See Benco*, 2019 WL 5419393, at *9; *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010).

Response to Proposed Conclusion of Law No. 24:

The Proposed Conclusion is incomplete. Particularly where an antitrust plaintiff's case is "based entirely on . . . circumstantial evidence, the court must be especially vigilant to [e]nsure that liberal modes of proof do not become the pretext for unfounded speculation." *Murdaugh Volkswagen, Inc.* v. *First Nat'l Bank of S.C.*, 639 F.2d 1073, 1075 (4th Cir. 1981) (citation omitted). Indeed, the Supreme Court has observed that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "The reason for this more rigorous standard is that mistaken inferences are especially costly in antitrust cases, since they could penalize desirable competitive behavior and 'chill the very conduct the antitrust laws are designed to protect.'" *Valspar Corp.* v. *E.I. Du Pont De Nemours & Co.*, 873 F.3d 185, 192 (3d Cir. 2017) (quoting *Matsushita*, 475 U.S. at 594).

25. Because it is rare for parties to an illegal agreement to commit the entirety of their agreement to writing, plaintiffs commonly prove the existence of an agreement through inferences drawn from circumstantial evidence. *See Benco*, 2019 WL 5419393, at *9; *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998); *see also In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014); *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012) ("[C]onspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators."). Circumstantial evidence often takes the form of so-called "plus factors," which are "economic actions and outcomes . . . that are largely

inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 393 (2011).

Response to Proposed Conclusion of Law No. 25:

The Proposed Conclusion is incomplete. Particularly where an antitrust plaintiff's case is "based entirely on . . . circumstantial evidence, the court must be especially vigilant to [e]nsure that liberal modes of proof do not become the pretext for unfounded speculation." *Murdaugh Volkswagen*, 639 F.2d at 1075 (citation omitted). Indeed, the Supreme Court has observed that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec.*, 475 U.S. at 588 (1986). "The reason for this more rigorous standard is that mistaken inferences are especially costly in antitrust cases, since they could penalize desirable competitive behavior and 'chill the very conduct the antitrust laws are designed to protect.'" *Valspar Corp.*, 873 F.3d at 192 (quoting *Matsushita Elec.*, 475 U.S. at 594).

In addition, the Proposed Conclusion is inaccurate and misleading to the extent it endorses reliance on so-called "plus factors" in this case. As Complaint Counsel's cited authority observes, courts have required "additional economic circumstantial evidence . . . collectively referred to as 'plus factors'" in cases "about allegations of collusive pricing" by "[f]irms in an oligopolistic industry." Kovacic, *supra*, at 395-96; *see also United States* v. *Apple Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013) ("[T]o infer a horizontal agreement *through parallel conduct*, a court may draw inferences from 'plus factors' to rule out purely interdependent decision making by rivals." (emphasis added)), *aff'd*, 791 F.3d 290 (2d Cir. 2015). "Existence of these plus factors tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors.'" *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) (quoting *In re Baby Food*, 166 F.3d at 122). "In other words, the factors serve as proxies for direct evidence of an agreement." *Id.* But the Proposed Conclusion cites no legal authority

permitting reliance on "plus factors" to fill gaps in circumstantial evidence in a case such as this one, where the plaintiff's allegations do not include parallel conduct by rivals in an oligopolistic market. Thus, Complaint Counsel's reliance on plus factors cannot bolster its circumstantial evidence of an agreement.

26. Circumstantial evidence is no less persuasive than direct evidence. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd* 791 F.3d 290 (2d Cir. 2015).

Response to Proposed Conclusion of Law No. 26:

The Proposed Conclusion is incomplete. As previously noted in RRCoL ¶¶ 24- 25, where an antitrust plaintiff's case is "based entirely on . . . circumstantial evidence, the court must be especially vigilant to [e]nsure that liberal modes of proof do not become the pretext for unfounded speculation." *Murdaugh Volkswagen*, 639 F.2d at 1075 (citation omitted). Indeed, the Supreme Court has observed that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec.*, 475 U.S. at 588 (1986). "The reason for this more rigorous standard is that mistaken inferences are especially costly in antitrust cases, since they could penalize desirable competitive behavior and 'chill the very conduct the antitrust laws are designed to protect.'" *Valspar Corp.*, 873 F.3d at 192 (quoting *Matsushita Elec.*, 475 U.S. at 594).

As a consequence of this well-established law, "[t]here is always a higher level of caution whenever the plaintiff provides solely circumstantial evidence of collusion." *U.S. Horticultural Supply, Inc.* v. *Scotts Co.*, 2009 WL 89692, at *10 n.6 (E.D. Pa. Jan. 13, 2009) (citing *In re Flat Glass*, 385 F.3d at 357 n.7), *aff'd*, 367 F. App'x 305 (3d Cir. 2010).

At bottom, "[t]he acceptable inferences which [a court] can draw from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences." *In re Baby Food*, 166 F.3d at 124 (citing *Petruzzi's IGA* v. *Darling-Delaware*, 998 F.2d 1224, 1232 (3d Cir. 1993)).

27. When evaluating the existence of an anticompetitive agreement, courts must consider the "totality of the evidence." *Apple*, 952 F. Supp. 2d at 689 (quoting *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012)); *Benco*, 2019 WL 5419393, at *9.

Response to Proposed Conclusion of Law No. 27:

Respondents have no specific response.

28. When viewing the evidence, "[t]he 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) (citation omitted). Not every detail needs to be worked out in order to prove that an agreement exists for purposes of antitrust liability. *See id.*; *Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965).

Response to Proposed Conclusion of Law No. 28:

The Proposed Conclusion is incomplete. Although the trier of fact is not required to determine whether alleged conspirators worked out immaterial aspects of an alleged agreement, an antitrust plaintiff must still prove "a unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). "In other words, there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *In the Matter of McWane, Inc*., 2013 WL 8364918, at *223 (F.T.C. May 1, 2013) (initial decision) (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Moreover, there can be no meeting of the minds when material terms of any agreement, including price and valuation, remain undecided and where any agreement was contingent upon conducting due diligence and entering into definitive transaction documents. *See, e.g.*, *Azco Biotech, Inc.* v. *Qiagen, N.V.*, 2015 WL 12516024, at *5 (S.D. Cal. July 2, 2015) (where term sheet left price open, term sheet was not an offer that could be accepted as a matter of law); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 217 (E.D.N.Y. 2003) (rejecting Section 1 claim premised on nonbinding term sheet because "the Term Sheet [was] not an

agreement": "any claim of anticompetitive conduct flowing from the Term Sheet [was] too speculative to support a cause of action under the Sherman Act").

29. An agreement exists "if a course of conduct . . . once suggested or outlined by a competitor . . . is followed by all — generally and customarily — and continuously for all practical purposes, even though there are slight variations. . . . An exchange of words is not required. Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy." *Esco*, 340 F.2d at 1008 (citation omitted); *see also In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 978 (N.D. Ohio 2015) ("No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words.") (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946)).

Response to Proposed Conclusion of Law No. 29:

The Proposed Conclusion is incomplete. To the extent an antitrust plaintiff relies solely on a course of conduct, the conduct must prove "a unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco*, 328 U.S. at 810. "In other words, there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *McWane*, 2013 WL 8364918, at *223 (quoting *Monsanto*, 465 U.S. at 764). Indeed, as *Esco* itself recognized, "the term 'agreement' . . . necessarily impl[ies] mutual consent." 340 F.2d at 1007.

30. Proof of an agreement can include evidence that competitors followed conduct "suggested or outlined by a competitor," *Esco*, 340 F.2d at 1007-08; *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977); *United States v. Foley*, 598 F.2d 1323, 1331-32 (4th Cir. 1979).

Response to Proposed Conclusion of Law No. 30:

The Proposed Conclusion is incomplete. To the extent an antitrust plaintiff relies solely on a course of conduct, the conduct must prove "a unity of purpose or a common design and understanding, or a meeting of minds." *Am. Tobacco*, 328 U.S. at 810. "In other words, there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *McWane*, 2013 WL 8364918, at *223 (quoting *Monsanto*, 465 U.S. at 764). Indeed,

as *Esco* itself recognized, "the term 'agreement' . . . necessarily impl[ies] mutual consent." 340 F.2d at 1007.

31. In *Gainesville Utilities Department v. Florida Power & Light Co.*, the totality of direct communications between high-level executives of rival utility companies led the court to find an agreement to divide the market, reasoning: "Indeed, if solid economic reasons existed for refusing service to [each other's territory], there was no reason for communicating with a competitor about the refusal, and certainly not for expressing such decisions in terms of hopeful, if not expected, reciprocity." 573 F.2d 292, 299, 301 (5th Cir. 1978).

Response to Proposed Conclusion of Law No. 31:

Respondents agree that the quoted language states a critical part of the reasoning in *Gainesville Utilities Department* and thus distinguishes that case from this one. In *Gainesville Utilities Department*, the Fifth Circuit rejected the defendant's argument that its refusal to deal with the plaintiff was the result of "solid economic reasons." 573 F.3d at 301. Specifically, the court concluded that there would have been no need for the parties to communicate with each other "if solid economic reasons existed for refusing service to [the plaintiff]." *Id.*

By contrast, in this case there *were* "solid economic reasons" for Altria's decision to discontinue the Nu Mark e-vapor products. (*See* Resps.' Opening Br., Discussion, Part I). In particular, Nu Mark had lost $600 million between 2014 and 2017 and lost a further $101 million in the first nine months of 2018. (RFF ¶¶ 1077, 1081). The company was projected to lose a further $235 million over the next three years. (RFF ¶ 1083). In addition, Altria had determined that Nu Mark's existing products could not meet the PMTA standard, and it is undisputed that new, improved products could not be launched without first going through the multi-year, onerous PMTA process in light of the Deeming Rule. (RFF Part VII).

Moreover, in contrast to *Gainesville Utilities Department*, the communications between Altria and JLI are readily explained by legitimate reasons. The parties were explicitly discussing a complex, multibillion-dollar investment by one party in the other. Far from supporting an

inference of a secret conspiratorial agreement, the communications between Altria and JLI are therefore merely proof of what is undisputed: that the parties were working toward the agreement that ultimately manifested in the transaction where Altria made a minority investment in JLI.

Finally, unlike *Gainesville Utilities Department*, the substance of the communications between Altria and JLI shows that JLI affirmatively expected and wanted Nu Mark e-vapor products to remain on the market post-deal for appropriate regulatory review by the FTC and was not aware of Altria's decision to discontinue those products. For example, Pritzker testified that he was "perfectly happy to have [Elite] stay on the market" and that he was "amazed" when Altria decided to discontinue its pod-based products "unilaterally." (RFF ¶ 1016). Indeed, the undisputed evidence—both from testimony and contemporaneous documents—demonstrates JLI was "shocked" to learn of Altria's decision and viewed the decision to pull Elite and non-traditional flavored cig-a-like products as "hostile action towards JUUL." (RFF ¶ 1013).

32. The totality of the record evidence makes it more likely than not that Respondents entered into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. (CCFF §§ VI-IX).

Response to Proposed Conclusion of Law No. 32:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. As Respondents have explained, the record shows that Altria removed Nu Mark's e-vapor products from the market for independent business reasons and not pursuant to an agreement with JLI. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A; *see also* RFF Part IX).

B. Plus Factors Confirm Respondents' Agreement

33. "Actions against interest by a participant in a conspiracy are actions that would have been economically irrational for a firm acting in a competitive market." *In re McWane, Inc.*, Docket No. 9351, 2012 WL 4101793, at *9 (F.T.C. Sept. 14, 2012).

Response to Proposed Conclusion of Law No. 33:

The Proposed Conclusion is incomplete. To the extent reliance on "plus factors" is appropriate, any given plus factor "needs to have some substance in order to tilt the balance" in favor of a finding of an agreement. *Holiday Wholesale Grocery Co.* v. *Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1272 (N.D. Ga. 2002), *aff'd sub nom. Williamson Oil Co.* v. *Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003). "Just because [a corporate defendant's] rational business interests can be recast in a suspicious light does not mean the allegations actually suggest a conspiracy was formed." *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 539 (N.D. Tex. 2014). In particular, with respect to the purported plus factor of actions against economic self-interest, courts "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest [they] be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil*, 346 F.3d at 1310.

34. Actions against unilateral economic self-interest is plus-factor evidence that supports a finding of conspiracy. *Apple*, 952 F. Supp. 2d at 690. "Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004).

Response to Proposed Conclusion of Law No. 34:

The Proposed Conclusion is incomplete. To the extent reliance on "plus factors" is appropriate, any given plus factor "needs to have some substance in order to tilt the balance" in favor of a finding of an agreement. *Holiday Wholesale Grocery Co.*, 231 F. Supp. 2d at 1272. "Just because [a corporate defendant's] rational business interests can be recast in a suspicious light does not mean the allegations actually suggest a conspiracy was formed." *In re Online Travel*,

997 F. Supp. 2d at 539. In particular, with the respect to the purported plus factor of actions against economic self-interest, courts "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest [they] be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil*, 346 F.3d at 1310.

35. For example, depriving oneself of a promising market opportunity is an action against self-interest that points towards conspiracy. *Toys "R" Us v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (finding an agreement after it was "suspicious for a manufacturer to deprive itself of a profitable sales outlet"); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.,* 988 F. Supp. 2d 696, 713 (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).

Response to Proposed Conclusion of Law No. 35:

The Proposed Conclusion is incomplete and thus misleading. Courts "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest [they] be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil*, 346 F.3d at 1310. Thus, where a company offers some evidence that a particular corporate action reflects "strategic planning as to whether and when to pursue particular business opportunities," courts "are unwilling to question such business judgment." *In re Baby Food*, 166 F.3d at 127; *see also In re Citric Acid Litig.*, 191 F.3d 1090, 1101 (9th Cir. 1999) ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute."). The Commission, too, has recognized the same principle. *See In the Matter of B.A.T. Indus., Ltd.*, 1984 WL 565384, at *11 (F.T.C. Dec. 17, 1984) (the Commission should not "substitute[e] its business acumen for that of the acquiring firm" by second-guessing its profitability determinations).

36. Toy manufacturers' decisions to forego sales to warehouse club stores, a growing and profitable sales channel, was conduct against self-interest that was indicative of an

agreement in *Toys "R" Us*, especially where each manufacturer feared its competitors would steal market share by selling to warehouse stores. 221 F.3d at 931-32, 935-36.

Response to Proposed Conclusion of Law No. 36:

The Proposed Conclusion is incomplete, misleading, and unsupported by the cited authority to the extent that it suggests that the *Toys "R" Us* court's finding that "it [was] suspicious for a manufacturer to deprive itself of a profitable sales outlet," 221 F.3d at 935, was sufficient to infer a conspiratorial agreement in that case. To the contrary, the *Toys "R" Us* court found that "the record [t]here included *[] direct evidence of communications*" that indicated a conspiratorial agreement. *Id.* (emphasis added). And the court held that absent such direct evidence—*i.e.*, if the plaintiff there had relied solely on circumstantial evidence—"*Matsushita* would require a ruling in [the company's] favor." *Id.* at 936.

Moreover, there was no evidence in *Toys "R" Us* that the manufacturers' decisions to forgo sales to warehouse club stores were made against the backdrop of a regulatory scheme that constrained their ability to compete. By contrast, the FDA's regulatory scheme *prevented* Altria from bringing any improved or newly developed products to the market in the absence of PMTA approval, which Complaint Counsel elsewhere concedes is highly uncertain and speculative. (CC Opening Br. 91). Courts may not "disregard [a defendant's] status as a regulated [entity]," because that status is a "fact of market life" and the lens through which alleged anticompetitive effects must be assessed. *See Phonetele, Inc.* v. *Am. Tel. & Tel. Co.*, 664 F.2d 716, 737 (9th Cir. 1981), *modified*, 1982 WL 11277 (9th Cir. Mar. 15, 1982); *see also Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (antitrust analysis must "careful[ly] account" for "the pervasive federal and state regulation characteristic of [an] industry") (citation omitted). Thus, the critical factual premise in *Toys "R" Us*—the inherent suspiciousness of a manufacturer "depriv[ing] itself of a profitable sales outlet"—is missing here because there was no reasonable

assurance that Altria would successfully navigate the arduous, multi-year PMTA pathway for any new products.

37. Respondent Altria's abrupt shutdown of its Nu Mark subsidiary and e-cigarette business was against its economic self-interest and indicative of an agreement. (CCFF § IX.A.1). The evidence is clear that Altria would never have exited the U.S. e-cigarette market in the absence of the JLI transaction because Altria viewed market leadership in e-cigarettes as critically important to its long-term success. (CCFF ¶¶ 93-108, 409-10, 532-44).

Response to Proposed Conclusion of Law No. 37:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record.

First, Altria's decision to discontinue Nu Mark's e-vapor products was not against its economic self-interest. The record shows that Altria removed Nu Mark's e-vapor products from the market for independent business reasons, including that Nu Mark was not a successful business. (RFF Part IX). Nu Mark had lost $600 million between 2014 and 2017 and lost a further $101 million in the first nine months of 2018. (RFF ¶¶ 1077, 1081). The company was projected to lose a further $235 million over the next three years. (RFF ¶ 1083). In addition, Altria had determined that Nu Mark's existing products could not meet the PMTA standard and that new, improved products could not be launched without first going through the multi-year, onerous PMTA process in light of the Deeming Rule. (RFF Part VII). It is not against economic self-interest to withdraw products from the market that are *losing* tens of millions each year and that do not have a pathway to profitability. The antitrust laws do not require a company to lose money in perpetuity. *Cf. United States* v. *Aetna Inc.*, 240 F. Supp. 3d 1, 89-90 (D.D.C. 2017) (finding that defendant would reenter Florida market given that it was projected to be profitable and "that one can expect firms to operate in markets where they can achieve a profit," but that defendant

would not reenter Georgia and Missouri markets because they "were operating at a clear loss, and were projected to continue to do so").

Second, the Proposed Conclusion incorrectly equates Altria's "shutdown of its Nu Mark subsidiary" with an "exit[]" from "the U.S. e-cigarette market." To the contrary, Altria set up Growth Teams in October 2018 as an alternative to Nu Mark in an attempt to develop new e-vapor products based on a determination that Nu Mark's existing e-vapor products could not be commercially successful. (*See* Resps.' Opening Br., Discussion, Part I.B.2; *see also* RFF Part IX.C.1). In particular, Altria's plan was to use the cost savings from shutting down Nu Mark to fund the Growth Teams. (RFF ¶ 1074). It is therefore incorrect for Complaint Counsel to suggest that Altria was walking away from the e-vapor category permanently.

38. Indeed, the evidence suggests that Respondents "would not have acted as they did had they not been conspiring." *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 989 (N.D. Ohio 2015) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 572 (11th Cir. 1998)).

Response to Proposed Conclusion of Law No. 38:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. As Respondents have explained, the record shows that Altria removed Nu Mark's e-vapor products from the market for independent business reasons and not pursuant to an agreement with JLI. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A; *see also* RFF Part IX).

In particular, Altria first discontinued Elite and non-traditional flavored MarkTen cig-a-like products in response to regulatory concerns about youth usage of those types of products and threats of severe regulatory sanction in the event the youth issue was not adequately addressed: It did not make sense to maintain on the market products of concern to FDA that were not converting

adult smokers, lacked nicotine salts, had technical problems (including the generation of formaldehyde, a known carcinogen, at greater rates than other e-vapor products), and would not receive FDA approval. (RFF ¶¶ 351-67, 478, 627-51, 938-51). Altria subsequently pulled Nu Mark's remaining MarkTen cig-a-like products based on a determination that those products had no pathway to profitability and thus did not merit further investment, were in a dying product segment, were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 1074-91). The record evidence further demonstrates that JLI did not view Nu Mark's existing products as competitive threats and affirmatively expected and wanted those products to stay on the market post-deal for appropriate regulatory review by the FTC. (RFF ¶¶ 748-61). As a result, JLI never insisted that Altria remove Nu Mark's products as a pre-condition to the investment; to the contrary, JLI always contemplated that Nu Mark's products would stay on the market after the investment and that any disposition of those products would take place as part of FTC review. (RFF ¶¶ 1203-07).

39. Statements suggestive of a conspiracy have also been identified as an independent "plus factor" supporting the inference of an agreement. *See McWane*, 2012 WL 4101793, at *14; *High Fructose Corn Syrup*, 295 F.3d at 662.

Response to Proposed Conclusion of Law No. 39:

The Proposed Conclusion is incomplete. To the extent reliance on "plus factors" is appropriate, any given plus factor "needs to have some substance in order to tilt the balance" in favor of a finding of an agreement. *Holiday Wholesale Grocery Co.*, 231 F. Supp. 2d at 1272. "Just because [a corporate defendant's] rational business interests can be recast in a suspicious light does not mean the allegations actually suggest a conspiracy was formed." *In re Online Travel*, 997 F. Supp. 2d at 539. Ultimately, "the 'plus factor' analysis is really a surrogate for looking at a case in its entirety," *Holiday Wholesale Grocery*, 231 F. Supp. 2d at 1272, and a court must be able to conclude based on the totality of the record that the challenged conduct is "probably not

[the] result [of] chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties," *Twombly*, 550 U.S. at 556 n.4 (quoting Areeda & Hovenkamp ¶ 1425); *see also, e.g.*, *Toys "R" Us*, 221 F.3d at 936 (noting that presence of an "abrupt shift" from past practice and "action against [] economic self-interest" plus factors would still "require a ruling in [the defendant's] favor" absent "direct evidence of communications").

40. Respondents' words and actions suggest they were acutely aware that a deal between Altria and JLI—in particular, explicitly linking Altria's purchase of economic stake in JLI with the shutdown of Altria's e-cigarette business—could raise antitrust concerns. (CCFF ¶ 730). This evidence further supports finding an agreement was more likely than not.

Response to Proposed Conclusion of Law No. 40:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. As explained in RRFF ¶ 730, the sole document cited in support of the purported "words and actions"—PX1493, a set of draft talking points prepared for Willard—reflect comments from the company's counsel and state on their face that the parties have been *unable* to reach an agreement and, in any case, that Altria was seeking changes to JLI's proposed term sheet *to ensure the parties complied with antitrust laws.* (*See* PX1493 (Altria) at 002 ("We can't agree to these terms under antitrust laws prior to receiving HSR approval, which was driving our clarifications in the term sheet.")). Complaint Counsel's attempt to draw a vague, inculpatory inference about "antitrust concerns" from a good faith attempt to follow the law would have the perverse effect of suggesting to parties that they should not seek the guidance of professional antitrust counsel in deal negotiations.

Moreover, although the draft talking points were prepared for Willard, he testified that he rarely relied on such talking points in meetings, so the document cannot be evidence of what was

actually said at any meeting with JLI. (RRFF ¶ 730). Finally, Complaint Counsel did not ask Willard or any other witness about this document, either in depositions or at trial. (RRFF ¶ 730). Thus, the Proposed Conclusion is emblematic of Complaint Counsel's approach of "first assuming a conspiracy and then explaining the evidence accordingly," *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000), which is something "a litigant may not [do]," *id.*

41. When compared to Altria's prior commitment to being a long-term, strategic competitor in the e-cigarette market, the timeline of its actions starting after July 30, 2018 strongly suggests that JLI's non-compete demand drove key decisions made by Altria's senior leadership. *See* (CCFF §§ VIII.E-M); *In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1154-55 (D. Kan. 2012) (timeline of events can support inference of conspiracy).

Response to Proposed Conclusion of Law No. 41:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. As Respondents have explained, the record shows that Altria removed its e-vapor products from the market for independent business reasons and not pursuant to an agreement with JLI. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A).

42. "Pretextual 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]."). Indeed, evidence of pretext can "strengthen an inference of joint action that is otherwise in evidence." *White v. RM Packer Co., Inc.*, 635 F.3d 571, 585 (1st Cir. 2011).

Response to Proposed Conclusion of Law No. 42:

The Proposed Conclusion is incomplete and thus misleading. The authorities cited by Complaint Counsel themselves make plain that " 'pretext' standing alone is *not* sufficient to show joint action." *White*, 635 F.3d at 585 (emphasis added). Thus, "the mere fact that a business reason

advanced by a defendant [for impugned conduct] is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy." *H. L. Moore Drug Exch.* v. *Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981). "Even if a[n] [antitrust defendant], acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation . . . , absent proof of a conspiracy . . . ." *Id.*

43. Respondent Altria's excuses, all of which are pretextual and implausible, for its action to shut down its e-cigarette business right before the JLI transaction are plus-factor evidence pointing towards conspiracy. (CCFF § IX).

Response to Proposed Conclusion of Law No. 43:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. As Respondents have explained, the record shows that Altria removed its e-vapor products from the market for independent business reasons and not pursuant to an agreement with JLI. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A; *see also* RFF Part IX). Moreover, reliance on "plus factors" is inappropriate in this case, for the reasons set forth in RRCoL ¶ 25.

44. Similarly, evidence of frequent communications between conspirators is an independent "plus factor" further supporting an inference of agreement. *See McWane*, 2012 WL 4101793, at *13 n.11 (citing *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633 (5th Cir. 1981)); *see also Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1092-93 (9th Cir. 2015); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432 (4th Cir. 2015).

Response to Proposed Conclusion of Law No. 44:

The Proposed Conclusion is incomplete and thus misleading.

First, there is nothing unusual or nefarious about frequent communications between two parties who are explicitly discussing a complex, multibillion-dollar investment by one party in the

other. Far from supporting an inference of a secret conspiratorial agreement, the communications between Altria and JLI are therefore merely proof of what is undisputed: that the parties were working toward the agreement that ultimately manifested in the transaction where Altria made a minority investment in JLI.

Second, as the authorities cited by Complaint Counsel themselves demonstrate, it is not the mere fact of interfirm communications, but rather the *content* of such communications that may in some circumstances ultimately support an inference of a conspiratorial agreement. In *Stanislaus Food*, for example, the Ninth Circuit "[c]onsidered [the impugned communications] against the backdrop of market conditions in the industry," 803 F.3d at 1093, and concluded that "it is ambiguous what the president of [one of the defendants] meant when he wrote of [the communication that plaintiffs argued showed a conspiratorial agreement]," *id*. Likewise, the Commission in *McWane* referred to "the 'objective' meaning of [an impugned] statement to the reasonable observer." 2012 WL 4101793, at *13 n.11; *see also In the Matter of McWane, Inc.*, 2013 WL 8364918, at *265 (F.T.C. May 1, 2013) (initial decision) (noting "the evidence shows some communications" but concluding that "a further inference that these communications [showed a conspiratorial agreement] is unwarranted and unjustified" in the absence of evidence about the content of the communications), *aff'd in part*, 2014 WL 445261 (F.T.C. Jan. 30, 2014). Here, there is nothing in the communications that could objectively suggest that Altria withdrew its e-vapor products in order to satisfy a demand by JLI not to compete . Rather, the bulk of the communications between Altria and JLI were focused on other issues—not the treatment of Altria's existing e-vapor products. (RFF Parts VI, VIII). And the record makes plain that Altria ultimately removed Nu Mark's e-vapor products from the market for independent business reasons and not pursuant to an agreement with JLI. (RFF Part IX).

In sum, even assuming—against common sense—that frequent communications between two parties discussing a potential investment are inherently suspicious, there are no communications between Altria and JLI that can support the inference of a secret agreement to withdraw Altria's e-vapor products before the transaction.

45. Respondents' numerous in-person meetings (sometimes without lawyers), frequent exchanges of text messages and one-on-one telephone calls provide plus-factor evidence relevant to a finding of agreement. (CCFF ¶¶ 614-24).

Response to Proposed Conclusion of Law No. 45:

The Proposed Conclusion is incorrect, incomplete, misleading, and unsupported by the record.

First, as to the law, the general rule is that "[p]roof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Petruzzi's IGA*, 998 F.2d at 1235 (quoting *Tose* v. *First Pa. Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981)). Thus, "mere proof of a meeting" cannot be enough to sustain the inference of a conspiracy. *McWane*, 2013 WL 8364918, at *253; *see also* Areeda & Hovenkamp, Antitrust Law ¶ 1417b n.4 ("The courts always conclude that the mere fact of meetings or discussions at which a conspiracy might have occurred, but without additional evidence of conspiracy, is insufficient."). So too with other forms of communication, as Respondents have explained in RRCoL ¶ 44. Complaint Counsel's Proposed Conclusion is especially misguided when an obvious, innocuous, and undisputed reason for the frequent communications exists: that the parties were working toward the agreement that ultimately manifested in the transaction where Altria made a minority investment in JLI.

Second, Complaint Counsel can point to nothing showing that an agreement for Altria to discontinue its e-vapor products pre-transaction was reached at any meeting or in the course of any communications between JLI and Altria officials. To the contrary, each and every witness with knowledge of the negotiations—Burns, Crosthwaite, Garnick, Gifford, Masoudi, Pritzker, Valani,

and Willard—swore under oath that there was no agreement between the parties that Altria would discontinue Nu Mark's e-vapor products prior to the deal. (*See* Resps.' Opening Br., Discussion, Part I.A.2; *see also* RFF ¶ 1152-60). Thus, the meetings and communications between JLI and Altria do not provide any "evidence relevant to a finding of agreement," as the Proposed Conclusion urges.

C. Respondents' Denials Are Unavailing

46. Self-serving witness denials do not preclude a conspiracy finding in an antitrust case. *See, e.g., Gainesville Utils. Dep't*, 573 F.2d at 301 n.14 (overturning denial of judgment notwithstanding the verdict relying on witness denials); *Champion Int'l*, 557 F.2d at 1273 (upholding trial court finding of an agreement to eliminate competitive bidding for timber where defendants asserted that meetings were innocent, but court found otherwise); *United States v. Capitol Service, Inc.*, 568 F. Supp. 134, 144-45 (E.D. Wis. 1983), *aff'd*, 756 F.2d 502 (7th Cir. 1985) (finding agreement despite defendants' testimony that no agreement existed); *United States v. Beachner Const. Co.*, 555 F. Supp. 1273, 1278-79 (D. Kan. 1983), *aff'd*, 729 F.2d 1278 (10th Cir. 1984) ("[A]though witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging was a way of life in the industry in Kansas.").

Response to Proposed Conclusion of Law No. 46:

The Proposed Conclusion is incomplete and thus misleading. As this Court has observed, "[a] plaintiff cannot make his case just by asking the [fact finder] to disbelieve the defendant's witnesses." *McWane*, 2013 WL 8364918, at *267 (alterations in original) (quoting *In re High Fructose Corn Syrup*, 293 F.3d at 655). That is so because "[m]ere disbelief [does] not rise to the level of positive proof of [an] agreement." *Id.* (quoting *Venzie Corp.* v. *U.S. Min. Prods. Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975)).

The cases cited in the Proposed Conclusion are not to the contrary, because in each case the testimony from defense witnesses was in conflict with other evidence that permitted the trier of fact to draw an inference of a conspiratorial agreement. *See Gainesville Utils. Dep't*, 573 F.2d at 301 n.14 (witness testimony given "little weight" because it was "in conflict with

contemporaneous documents"); *United States* v. *Champion Int'l Corp.*, 1975 WL 920, at *3 (D. Or. July 16, 1975) (narrating inculpatory facts of what was "discussed at these meetings"), *aff'd*, 557 F.2d 1270 (9th Cir. 1977); *Capitol Serv.*, 568 F. Supp. at 144 (pointing to "credible testimony" of other witnesses and "statistical evidence" as the basis for inferring an agreement).[2]

By contrast, in this case, testimony by Altria witnesses that the company made the decision to remove Nu Mark's e-vapor products from the market independent of any transaction or prospective transaction with JLI was consistent with an evidentiary record spanning many months showing that Altria was candidly grappling with very serious challenges confronting its e-vapor business. For example, by March 2018, Altria scientists had identified significant regulatory hurdles facing both MarkTen and Elite, (RFF Part III.F), and by the summer of 2018 those scientists had persuaded senior management that Nu Mark's existing products could not secure regulatory approval, (RFF Part V.C). Also during the summer of 2018, Quigley, who was not involved in the JLI negotiations, convened a meeting with senior management where he told them that because of flaws in Nu Mark's current products, Nu Mark was "limited to competing . . . in

[2] Complaint Counsel's reliance on *Beachner Construction* is misplaced. That case concerned a motion to dismiss a criminal indictment on double jeopardy grounds. The question was whether "the second indictment against Beachner Co. encompasse[d] the same conspiracy in which it was previously acquitted." *Beachner Constr. Co.*, 729 F.2d 1278, 1279 (10th Cir. 1984). "If a single conspiracy [was] found to have existed, Beachner Co. [could] not be tried twice for that offense." *Id.* at 1281. The *defendant* argued that the impugned actions were "merely subparts of but one overall, grand conspiracy existing among Kansas highway contractors to rig highway bids in the state of Kansas." 555 F. Supp. at 1275. And it was in that context that the district court—*agreeing with the defendant*—made the comment that Complaint Counsel now cites: "Although witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging was a way of life in the industry in Kansas." *Id.* at 1278. The court had no occasion to determine whether the evidence before it actually established proof of a conspiratorial agreement, as it made clear in dismissing the indictment: "[T]he court is in no way passing on the guilt or innocence of the corporation, but is determining only the issue which has been presented to the court for decision." *Id.* at 1282. Thus, *Beachner Construction* offers no support for the Proposed Conclusion regarding "a conspiracy finding."

the cig-a-like segment" and "[l]ack[ed] quality pod products," and that any new products would take five to seven years to bring to market in light of the Deeming Rule. (RFF ¶¶ 839-57). In light of these discussions, Altria decided by the fall of 2018 to pivot to a longshot investment in Growth Teams in the hopes of developing new products five to seven years in the future. (RFF Parts VII, IX.A). Soon after, FDA issued a letter and associated press statement demanding that Altria take "prompt action" with a "forceful plan[]" to address what it labeled an "epidemic" of youth use, threatened "regulatory consequences" and "criminal enforcement" if Altria failed to do so, and urged Altria to consider "[r]emoving flavored products from the market until those products [could] be reviewed by FDA." (RFF ¶¶ 917-29). The subsequent decision to pull Nu Mark's remaining cig-a-like e-vapor products was a logical final step given that those products had always lost money and were projected to lose hundreds of millions of dollars in the future and given that the company needed to fund the Growth Teams. (RFF Part IX.F).

47. "It is to be expected that [Respondents'] witnesses would deny that there was an agreement, but [such] testimony does not offset . . . compelling documentary evidence of a planned common course of action or understanding." *Advert. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 117 (1st Cir. 1956).

Response to Proposed Conclusion of Law No. 47:

The Proposed Conclusion is incomplete and thus misleading. To overcome a witness's sworn denials, "significant probative evidence" is required. *Weit* v. *Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 641 F.2d 457, 464-65 (7th Cir. 1981) (rejecting plaintiff's reliance on two inculpatory statements and "rate parallelism and an opportunity to conspire" when that evidence was met with "consistent sworn denials"); *see also City of Moundridge* v. *Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) ("Facing the sworn denial of the existence of conspiracy, it is up to plaintiff to produce significant probative evidence . . . that conspiracy existed . . . .") (brackets omitted)

(quoting *Lamb's Patio Theatre, Inc.* v. *Universal Film Exchs., Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978)).

48. Oral testimony that is in conflict with contemporaneous documentary evidence deserves little weight. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948) ("On cross-examination most of the witnesses denied that they had acted in concert . . . Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact".); *Gainesville Utils. Dep't*, 573 F.2d at 301 n.14 (Where defendants' executives testimony denying an agreement "is in conflict with contemporaneous documents we can give it little weight.").

Response to Proposed Conclusion of Law No. 48:

The Proposed Conclusion is incomplete and thus misleading. To overcome a witness's sworn denials, "significant probative evidence" is required. *Weit*, 641 F.2d at 464-65 (rejecting plaintiff's reliance on two inculpatory statements and "rate parallelism and an opportunity to conspire" when that evidence was met with "consistent sworn denials"); *see also City of Moundridge*, 429 F. Supp. 2d at 130 ("Facing the sworn denial of the existence of conspiracy, it is up to plaintiff to produce significant probative evidence . . . that conspiracy existed . . . .") (brackets omitted) (quoting *Lamb's Patio Theatre*, 582 F.2d at 1070).

49. Requiring admission of agreement would be tantamount to requiring direct evidence of conspiracy—a standard that finds no support in the law. *See, e.g.*, *Apple*, 952 F. Supp. 2d at 689 ("A plaintiff may rely on either direct or circumstantial evidence to establish that a defendant entered into an agreement in violation of the antitrust laws.").

Response to Proposed Conclusion of Law No. 49:

The Proposed Conclusion is incomplete. Particularly where an antitrust plaintiff's case is "based entirely on . . . circumstantial evidence, the court must be especially vigilant to [e]nsure that liberal modes of proof do not become the pretext for unfounded speculation." *Murdaugh Volkswagen*, 639 F.2d at 1075 (citation omitted); *see also U.S. Horticultural Supply*, 2009 WL 89692, at *10 n.6 ("There is always a higher level of caution whenever the plaintiff provides solely circumstantial evidence of collusion.") (citing *In re Flat Glass*, 385 F.3d at 357 n.7)). "The

acceptable inferences which [a court] can draw from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences." *In re Baby Food*, 166 F.3d at 124 (citing *Petruzzi's IGA*, 998 F.2d at 1232). In particular, the Supreme Court has observed that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec.*, 475 U.S. at 588. "The reason for this more rigorous standard is that mistaken inferences are especially costly in antitrust cases, since they could penalize desirable competitive behavior and 'chill the very conduct the antitrust laws are designed to protect.'" *Valspar Corp.*, 873 F.3d at 192 (quoting *Matsushita Elec.*, 475 U.S. at 594).

50. Respondents' executives' denials do not offset the body of evidence supporting an inference of agreement. *See* (CCFF § IX).

Response to Proposed Conclusion of Law No. 50:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. The sworn denials of a conspiracy by Altria and JLI executives are consistent with the documentary and other evidence in the record. (*See* Resps.' Opening Br., Discussion, Part I; *see also* RFF Parts VI, IX). In particular, there is not a single document even suggesting that Altria and JLI reached a meeting of the minds that Altria would withdraw Nu Mark's e-vapor products prior to any transaction with JLI. To the contrary, numerous contemporaneous documents are inconsistent with such an agreement. For example, the proposed August 19 term sheet and the August 22 issues list demonstrate JLI's expectation and desire that Nu Mark's existing products would stay on the market during the pendency of HSR approval. (RFF ¶¶ 834-38). Indeed, when Altria nonetheless decided to pull its Elite and non-traditional flavored products from the market in response to FDA pressure, the company viewed that decision as likely to upset, not please, JLI. In a contemporaneous document the day that decision was

announced, Garnick expressed surprise to members of Altria's deal team that "[t]he Tree folks are still talking to us even in light of the announcement we made today." (RFF ¶ 1019). JLI negotiators were indeed "shocked" to learn of Altria's decision and viewed Altria's actions with respect to Elite and non-traditional flavored cig-a-likes as a "hostile action towards JUUL." (RFF ¶ 1013).

51. In addition, a misrepresentation and a subsequent forced admission of a material fact calls the overall truthfulness of Altria executives' explanations for the company's actions into serious question. *See, e.g.*, *Impax Labs, Inc. v. FTC*, 994 F.3d 484, 499-500 (5th Cir. 2021) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (discussing the "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'")).

Response to Proposed Conclusion of Law No. 51:

The Proposed Conclusion is incorrect and thus misleading. The Supreme Court in *Sanderson Plumbing* was careful to observe that the "general principle of evidence law" cited by Complaint Counsel applies "[i]n appropriate circumstances," 530 U.S. at 147, and supports an inculpatory inference only when "combined with sufficient evidence," *id.* at 148. Thus, in situations where a witness takes steps to promptly correct mistaken testimony, such corrective action should negate an inference of bad faith or intent to mislead. *See, e.g.*, *Abusamhadaneh* v. *Taylor*, 873 F. Supp. 2d 682, 718 (E.D. Va. 2012) (noting that "courts have found that the affiant[']s willingness to promptly correct a misstatement when confronted may negate a willful intent to swear falsely") (citation omitted); *Hamdi* v. *U.S. Citizenship & Immigr. Servs.*, 2012 WL 632397, at *11 (C.D. Cal. Feb. 25, 2012) (concluding that "[a] misstatement or inaccurate answer that results from faulty memory or innocent mistake does not constitute an intentionally false statement"). In addition, Complaint Counsel has not shown that any Altria witness testified untruthfully with respect to his or her own beliefs and recollections at the time of his or her testimony.

52. During the pre-complaint investigation, several of Altria executives testified under oath that Altria did not approve the gasket change to fix the leaking issue and the new gasket couldn't be and wasn't implemented. (CCFF ¶ 1225). In February 2020, Altria also submitted a white paper to the Commission making this argument and relying on this sworn testimony. (CCFF ¶ 1224). Several months after the Altria executives denied the gasket fix, however, Altria responded to Complaint Counsel's discovery request admitting that Altria in fact "incorporated a replacement gasket into Elite and that Nu Mark distributed Elite units with the replacement gasket to its customers for sale to consumers in the fall of 2018," thereby contradicting its executives' prior sworn testimony (CCFF ¶ 1226). This reversal is relevant to a material fact and casts serious doubt on the veracity of Altria's claim that Elite's leaking issue was a major challenge to its success in the market. *See Impax*, 994 F.3d at 499-500 (citing *Sanderson Plumbing*, 530 U.S. at 147).

Response to Proposed Conclusion of Law No. 52:

The Proposed Conclusion is incomplete and misleading without additional context.

First, the Proposed Conclusion obscures the intricate chain of events with respect to the decision whether to implement the gasket. Willard initially approved a change in the Elite gasket before reversing course and rescinding that approval. (RRFF ¶¶ 1224-27; RFF ¶¶ 669-70). The direction to reverse course did not reach the manufacturing team and thus the gasket change was in fact implemented. (RFF ¶ 672). In initial testimony in these proceedings, several Altria executives testified that they did not believe that the gasket change had been made, on the incorrect assumption that Willard's subsequent reversal had been communicated to the manufacturing team. (RFF ¶ 671).

As soon as Altria learned that the gasket change had in fact been implemented, the company provided a correction to Complaint Counsel. (RFF ¶ 673). Against this backdrop, Altria's attempt to correct the record negates an inference of bad faith or intent to mislead. *See Abusamhadaneh*, 873 F. Supp. 2d at 718 (emphasizing the significance of whether a witness "promptly" and "volition[ally]" "correct[s] a misstatement").

Second, the Proposed Conclusion wrongly inflates the significance of the gasket issue. The gasket change was not going to transform Elite into a successful product because it did not remedy

Elite's lack of nicotine satisfaction. (RFF ¶ 674). By the summer and fall of 2018, retailers were less concerned about Elite's leaking and more concerned about the product itself because, in their judgment, it lacked the nicotine satisfaction that was critical to success. (RFF ¶ 674).

D. Claims of Independent Business Justification Are No Defense to an Unlawful Conspiracy

53. Whether conspiracy conduct is consistent with independent business justifications does not preclude a finding of an agreement. *Standard Oil Co. of Cal. v. Moore*, 251 F.2d 188, 211 (9th Cir. 1957) ("[I]f there is sufficient evidence to support a finding that a merchant entered into such an agreement, combination, or conspiracy, the fact that his individual refusal to deal may be explainable as a reasonable business decision is not excusatory of liability.").

Response to Proposed Conclusion of Law No. 53:

The Proposed Conclusion is not supported by the cited legal authority. As the quoted language itself shows, *Standard Oil* simply notes that once an agreement is proven, independent business justifications may not be an affirmative defense to an illegal conspiracy. That is, if there were *direct evidence* of a meeting of the minds, the fact that the conspirators could also be said to have been acting in their unilateral self-interest would not negate liability. *See* 251 F.2d at 211. By contrast, the *Standard Oil* court also held that "[e]vidence tending to show that there was a legitimate business reason for the [challenged] act . . . is always admissible in contradiction of a case *built upon circumstantial evidence*." *Id.* (emphasis added). Consistent with this principle, this Court has concluded that "[w]here there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn." *McWane*, 2013 WL 8364918, at *253 (citing *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991)).

54. "It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest." *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142 (1966).

Response to Proposed Conclusion of Law No. 54:

The Proposed Conclusion is incomplete and thus misleading. The Proposed Conclusion is true only in the limited circumstance where a conspiratorial agreement has been proved with direct evidence, as in *General Motors*. *See* 384 U.S. at 143 ("The associations explicitly entered into a joint venture to assist General Motors in policing the dealers' promises, and their joint proffer of aid was accepted and utilized by General Motors."). Put differently, the Supreme Court's observation was made "[i]n light of the fact that the existence of an agreement between the parties had been established." *In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 3912843, at *4 (E.D. Pa. July 19, 2016). For the reasons explained in RRCoL ¶ 53, if there were *direct evidence* of a meeting of the minds, the fact that the conspirators may also have been acting in their unilateral self-interest would not negate liability. By contrast, as this Court has concluded, "[w]here there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn." *McWane*, 2013 WL 8364918, at *253 (citing *Todorov*, 921 F.2d at 1456).

55. In *United States v. North Dakota Hospital Ass'n*, an agreement among hospitals not to grant discounts to Indian Health Services and "to adhere to [the hospitals'] independently developed, preexisting policies against granting [such] discounts" was nonetheless an unreasonable restraint where "the effect of defendants' agreement was to foreclose any potential competition." 640 F. Supp. 1028, 1036-37 (D.N.D. 1986).

Response to Proposed Conclusion of Law No. 55:

The Proposed Conclusion is incomplete and thus misleading. Like *General Motors* in the prior Proposed Conclusion, *North Dakota Hospital Association* involved "direct evidence of an express agreement between defendant hospitals." 640 F. Supp. at 1036. For the reasons explained in RRCoL ¶¶ 53-54, if there were *direct evidence* of a meeting of the minds, the fact that the conspirators may also have been acting in their unilateral self-interest would not negate liability. By contrast, as this Court has concluded, "[w]here there is an independent business justification

for a defendant's behavior, an inference of conspiracy is not easily drawn." *McWane*, 2013 WL 8364918, at *253 (citing *Todorov*, 921 F.2d at 1456).

56. In *Apple*, "the fact that Apple's conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices." *United States v. Apple, Inc.*, 791 F.3d 290, 317-18 (2d Cir. 2015) (citing Areeda & Hovenkamp ¶ 1413a).

Response to Proposed Conclusion of Law No. 56:

The Proposed Conclusion is incomplete and thus misleading. In *Apple*, the Second Circuit rejected Apple's argument that its independent business reasons were in fact independent. The company had argued that it had not entered into an agreement that violated Section 1 because it had "shrewdly leveraged market conditions to its own advantage." 791 F.3d at 317. But the Second Circuit disagreed, concluding that Apple's strategy "constituted a conscious commitment to the goal of raising ebook prices" through coordination with other parties. *Id.* Put differently, "the fact that Apple's conduct was in its own economic interest in no way undermine[d] the inference that it entered an agreement to raise ebook prices." *Id.* at 317-18.

By contrast, this case lacks the critical ingredient of an agreement that was found in Apple because Altria removed Nu Mark's e-vapor products from the market for independent business reasons and JLI was not aware of Altria's decision to do so. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A; *see also* RFF Part IX). For example, Pritzker testified that he was "amazed" when Altria decided to discontinue its pod-based products "unilaterally." (RFF ¶ 1016). Indeed, the undisputed evidence—both from testimony and contemporaneous documents—demonstrates JLI was "shocked" to learn of Altria's decision and viewed the decision to pull Elite and non-traditional flavored cig-a-like products as "hostile action towards JUUL." (RFF ¶ 1013). In short, and unlike *Apple*, the record shows that Altria removed Nu Mark's e-

vapor products from the market for independent business reasons and not pursuant to an agreement with JLI.

57. "[A] finding of conspiracy requires 'evidence that tends to exclude the possibility' that the defendant was 'acting independently.'" *Apple*, 791 F.3d at 315 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). "This requirement, however, '[does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct'; rather, the evidence need only be sufficient 'to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.'" *Id.* (quoting *In re Publ'n Paper Antitrust Litig.,* 690 F.3d 51, 63 (2d Cir.2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 14.03(b), at 14–25 (4th ed.2011))).

Response to Proposed Conclusion of Law No. 57:

The Proposed Conclusion is incomplete and thus misleading. Although Respondents agree that Complaint Counsel must exclude the possibility of independent business reasons on a preponderance of the evidence, that standard is "demanding . . . in the context of an antitrust case." *In re Baby Food*, 166 F.3d at 118. Where an inference of conspiracy is equally consistent with an inference of independent conduct, "the evidence of conspiracy would not preponderate." *Re/Max Int'l*, 173 F.3d at 1009. Thus, the inference of a conspiracy "must be more probable than the inference of independent action" in order to find a conspiracy. *Kreuzer*, 735 F.2d at 1488 n.14; *see also Anderson News*, 899 F.3d at 98 ("[I]f the evidence is in equipoise, then . . . judgment must be granted against the plaintiff.").

58. Respondent Altria's claim that shutting down its e-cigarette business was in its economic interests (while contradicted by the documentary evidence and testimony) does not prevent a finding of a horizontal agreement.

Response to Proposed Conclusion of Law No. 58:

The Proposed Conclusion should be disregarded because it violates the Court's Order on Post-Trial Filings (at 2) requiring that "[a]ll legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority."

In addition, for the reasons Respondents' have explained, this Proposed Conclusion is inaccurate because the record demonstrates that Altria removed Nu Mark's e-vapor products from the market for independent business reasons—based on business judgments about the company's economic interests—thus precluding the finding of a horizontal agreement. (*See* Resps.' Opening Br., Discussion, Part I.B; Resps.' Reply Br., Part III.A.2; *see also* RFF Part IX). In particular, Altria first discontinued Elite and non-traditional flavored MarkTen cig-a-like products in response to regulatory concerns about youth usage of those types of products and threats of severe regulatory sanction in the event the youth issue was not adequately addressed: It did not make sense in light of FDA's concerns to maintain on the market products of concern to FDA that were not converting adult smokers, lacked nicotine salts, had technical problems (including the generation of formaldehyde, a known carcinogen, at greater rates than other e-vapor products), and would not receive FDA approval. (RFF ¶¶ 351-67, 478, 627-51, 938-51). Altria subsequently pulled Nu Mark's remaining MarkTen cig-a-like products based on a determination that those products had no pathway to profitability and thus did not merit further investment, were in a dying product segment, were not converting adult smokers, had technical problems, and would not receive FDA approval. (RFF ¶¶ 1074-91).

IV. RESPONDENTS' AGREEMENT IS UNLAWFUL UNDER SECTION 5 OF THE FTC ACT AS IT VIOLATES SECTION 1 OF THE SHERMAN ACT

59. As the Supreme Court has explained, "the inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679, 691 (1978); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986); *Chicago Board of Trade v .United States*, 246 U.S. 231, 238 (1918). Under the rule of reason framework, the antitrust plaintiff "must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

Response to Proposed Conclusion of Law No. 59:

The Proposed Conclusion is incomplete. As the Supreme Court made clear in *American Express*, under the rule of reason, Complaint Counsel must prove "the challenged restraint has a *substantial anticompetitive effect* that harms consumers in the relevant market." *Am. Express Co.*, 138 S. Ct. at 2284 (emphasis added). This is "no slight burden," and "courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect." *NCAA* v. *Alston*, 141 S. Ct. 2141, 2160-61 (2021) (citing amicus brief with approval).

60. In analyzing an alleged violation of Section 1 under the rule of reason, courts use a burden-shifting framework. *Impax Labs. Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021) (citing *Ohio v. Am. Express Co.*, -- U.S. --, 138 S. Ct. 2274, 2284 (2018)). First, the "initial burden is on the FTC to show anticompetitive effects." *Id.* If the FTC succeeds, the burden shifts to Respondents to "demonstrate that the restraint produced procompetitive benefits." *Id.* If Respondents "successfully prove procompetitive benefits, then the FTC can demonstrate that any procompetitive effects could be achieved through less anticompetitive means." *Id.* Finally, if the FTC "fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint." *Impax*, 994 F.3d at 492 (citing *Apani Sw., Inc. v. Coca-Cola Enters., Inc.,* 300 F.2d 620, 627 (5th Cir. 2002)). "If the anticompetitive harm outweighs the procompetitive benefits, then the agreement is illegal." *Id.* This framework "do[es] not represent a rote checklist, nor may [it] be employed as an inflexible substitute for careful analysis." *Alston*, 141 S. Ct. at 2160.

Response to Proposed Conclusion of Law No. 60:

The Proposed Conclusion is incorrect to the extent that it contemplates a fourth prong to the rule of reason analysis—*i.e.*, a balancing of anticompetitive and procompetitive effects even if the FTC fails to demonstrate a less restrictive alternative to achieve the procompetitive benefits under the third prong of the rule of reason analysis. As the Supreme Court has recently described the appropriate inquiry, there are only three discrete stages in the rule of reason framework. *See Alston*, 141 S. Ct. at 2160 ("a three-step, burden-shifting framework") (quoting *Am. Express Co.*, 138 S. Ct. at 2284). In neither *Alston* nor *American Express* did the Supreme Court contemplate

a fourth stage of additional balancing, as suggested by the Proposed Conclusion. Tellingly, as its authority for the proposed fourth stage of balancing, Complaint Counsel cites only the Fifth Circuit's *Impax* decision, not any decision by the Supreme Court. *See* 994 F.3d. at 492. And *Impax* itself relies on nearly two-decade-old circuit precedent that does not even mention a burden-shifting framework—and certainly not a discrete fourth stage of final balancing. *See id.* (citing *Apani Sw.*, 300 F.3d at 627).

Meanwhile, other courts of appeals have followed the Supreme Court and engaged in a three-step analysis without balancing as a fourth step. *See, e.g.*, *Aya Healthcare Servs.* v. *AMN Healthcare*, Inc., 9 F.4th 1102, 1111 (9th Cir. 2021) ("[W]e apply a three-step, burden-shifting framework."); *US Airways, Inc.* v. *Sabre Holdings Corp.*, 938 F.3d 43, 55 (2d Cir. 2019) ("Application of the rule of reason involves a three-step burden-shifting analysis."). And even before the Supreme Court's decision in *American Express*, other courts of appeals dismissed claims where plaintiffs failed to carry their burden at the third step without conducting a separate balancing inquiry as a fourth step. *See, e.g.*, *O'Bannon* v. *NCAA*, 802 F.3d 1049, 1074, 1076-79 (9th Cir. 2015) (vacating judgment where district court erred at the "final inquiry" by concluding that plaintiffs' proposal was "a substantially less restrictive alternative restraint"); *Virgin Atl. Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001) (affirming summary judgment in favor of defendants where the court found "nothing in the record in which [the plaintiff] suggests an alternative program that would achieve the same procompetitive effect").

As other courts have explained, Complaint Counsel's approach misconstrues the purpose of the burden-shifting framework and its relationship to "balancing." To be sure, "[a] restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126,

1136 (N.D. Cal. 2014) (quoting *Tanaka* v. *Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)). But "[c]ourts typically rely on a burden-shifting framework to conduct this balancing." *Id.* Thus, the burden-shifting framework is not a precursor to conducting the rule of reason's balancing inquiry, but rather a tool a designed to operationalize it. Once a court determines that a plaintiff has failed to establish a less restrictive alternative at the third step of the burden-shifting framework, it has already conducted a balancing analysis establishing the reasonableness of the challenged restraint.

Finally, the Proposed Conclusion is also misleading to the extent that it suggests that Complaint Counsel would prevail were the Court to engage in any balancing as a "fourth step" of the rule of reason analysis. Even if the Court engages in a fourth and final step of analysis, the result is the same: Complaint Counsel has failed to meet its burden to show anticompetitive effects.

A. Respondents' Agreement Caused Anticompetitive Harm

61. Agreements among horizontal competitors not to compete are considered the *"bête noir"* of antitrust law. *Impax*, 994 F.3d at 493 (citing Joshua P. Davis & Ryan J. McEwan, *Deactivating* Actavis*: The Clash Between the Supreme Court and (Some) Lower Courts*, 67 RUTGERS U.L. REV. 557, 559 (2015)).

Response to Proposed Conclusion of Law No. 61:

The Proposed Conclusion is incomplete. In characterizing certain agreements among horizontal competitors as the "*bête noir* of antitrust law," the Davis and McEwan article was speaking of *per se* agreements, not those subject to the rule of reason. *See* Davis & McEwan, *supra* at 559 n.7 (citing *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 768 (1984), for the proposition that "[c]ertain agreements . . . are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused"). Complaint Counsel is proceeding in this case only under the rule of reason framework. (*See* Compl. ¶ 79; Tr. 64.)

62. Indeed, market allocation agreements are more pernicious than price-fixing schemes because the former eliminates *all* forms of competition on every dimension. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, C.J.); *Impax*, 994 F.3d at 493. Here, Altria's shutdown of its e-cigarette business pursuant to the agreement harmed consumers by instantly eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space.(CCFF §§ VIII.M, X.A-D). In sum, the agreement caused substantial anticompetitive harm because it replaced the "possibility of competition [from Altria] with the certainty of none." *See Impax*, 994 F.3d at 495.

Response to Proposed Conclusion of Law No. 62:

The Proposed Conclusion is incorrect, incomplete, misleading, and unsupported by the record.

First, as to the law, the Proposed Conclusion is overbroad to the extent it tars agreements with procompetitive benefits, which are permissible under the rule of reason. As even the authority cited by the Proposed Conclusion acknowledges, in some instances "a division of markets or other cartel-like activity is actually essential to the provision of a lawful service." *Blue Cross*, 65 F.3d at 1416. And as the Supreme Court recently highlighted in the Section 1 context, "courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect." *Alston*, 141 S. Ct. at 2161 (citing amicus brief with approval).

Second, as to the facts, the Proposed Conclusion is wrong in suggesting that Altria's actions harmed consumers. As Respondents have explained, Complaint Counsel cannot meet its burden to show substantial anticompetitive effects. (*See* Resps.' Opening Br., Discussion, Part II; *see also* RFF Parts XIII-XVIII). To the contrary, the record shows that Nu Mark's products were not competitive and thus the withdrawal of those products had no detrimental impact on the market. (RFF Part XII). Moreover, Altria did not constrain prices, the company was not a source of innovation for e-vapor products (as it acquired every one of its products externally), and its discontinuing its e-vapor products freed up shelf space that allowed more successful manufacturers

to expand. (RFF Part XVII). Indeed, competition has flourished—and intensified—since Altria's investment in JLI. (RFF Part XIII).

63. "[I]t is a basic antitrust principle that the impact of an agreement on competition is assessed as of 'the time it was adopted.'" *Impax*, 994 F.3d at 496 (quoting *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.)).

Response to Proposed Conclusion of Law No. 63:

The Proposed Conclusion is inaccurate, incomplete, misleading, and unsupported by the cited legal authority to the extent it is intended to suggest that the Court may not consider the actual effects of the alleged agreement in assessing whether it had substantial anticompetitive effects.

Polk Brothers instructed that a challenged restraint must be judged "at the time it was adopted" to determine whether it should be subject to *per se* or rule of reason treatment, not to determine whether the restraint resulted in anticompetitive effects. 776 F.2d at 190. As Judge Easterbrook explained, "[t]he difference [between 'naked' restraints and ancillary restraints] comes at the time people enter beneficial arrangements." *Id.* at 189. He offered the example of a noncompete: "Knowing that he is not cutting his own throat by doing so, the employer will train the employee, giving him skills, knowledge, and trade secrets that make the firm more productive. Once that employment ends, there is nothing left but restraint—but the aftermath is the wrong focus" because it ignores the procompetitive benefits that came before. *Id.* Thus, to determine whether a challenged restraint should be subject to *per se* treatment or a rule of reason analysis, "[a] court must ask whether an agreement *promoted enterprise and productivity at the time it was adopted*." *Id.* (emphasis added); *see also id.* ("If the restraint, viewed at the time it was adopted, may promote the success of this more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason."). This inquiry is not at issue here, given that Complaint Counsel is proceeding only under a rule of reason theory. (*See* Compl. ¶ 79; Tr. 64). In any event,

the parties' actual noncompete both "promoted enterprise and productivity at the time it was adopted" and continues to do so. *Polk Bros.*, 776 F.2d at 189.

By contrast, as part of its rule of reason analysis under Section 1 of the Sherman Act, the Court may of course consider what actually transpired as a result of the alleged agreement. After all, Section 1 rule of reason analysis requires courts "to assess a challenged restraint's *actual effect on competition*." *Alston*, 141 S. Ct. at 2151 (internal quotation marks omitted; emphasis added).

64. Complaint Counsel has shown direct evidence, through its expert and other documentary proof, that Respondents' agreement harmed competition. This direct evidence of anticompetitive effects meets the initial burden for Complaint Counsel to state a *prima facie* case. (CCFF §§ X.A-D). Under the rule of reason, plaintiffs may meet their initial burden by showing either: (1) direct evidence anticompetitive effects, or (2) Respondents' market power along with the likely effect of the conduct. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Where the plaintiff can show actual anticompetitive effects, a "full blown market analysis is not necessary." *Intel Corp. v. Fortress Investment Group LLC*, 511 F. Supp. 3d 1006, 1014 (N.D. Cal. 2021) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

Response to Proposed Conclusion of Law No. 64:

The Proposed Conclusion is incorrect and unsupported by the record.

First, unlike this case, the cases where the Supreme Court endorsed an abbreviated analysis of market definition involved *per se* treatment or a so-called "quick look" at anticompetitive effects. *See, e.g.*, *Ind. Fed'n of Dentists*, 476 U.S. at 459 ("[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of [the challenged] agreement.") (citation omitted); *Catalano*, 446 U.S. at 648 ("An agreement to terminate the practice of giving credit . . . falls squarely within the traditional *per se* rule against price fixing."); *see also Am. Express Co.*, 138 S. Ct. at 2285 n.7 (collecting prior cases). By contrast, Complaint Counsel here has expressly forsaken a *per se* or "quick look" theory and is instead explicitly proceeding under the full rule of reason framework. (*See* Compl. ¶ 79; Tr. 64; CC Opening Br. 58 n.17).

Second, even setting aside the mode of antitrust analysis, Complaint Counsel has not offered direct evidence of anticompetitive effects. "Direct evidence of anticompetitive effects would be proof of *actual* detrimental effects, such as reduced output, increased prices, or decreased quality in the relevant market." *Am. Express*, 138 S. Ct. at 2284 (emphasis added) (quotation omitted). It is not enough merely to show an exit from the market; were that the rule, every merger would be illegal. And as Respondents have explained, Complaint Counsel can show no actual detrimental effects on the market. (*See* Resps.' Opening Br., Discussion, Part II.A; Resps.' Reply Br., Parts III.B.1.c-d). To the contrary, prices have gone down, output has gone up, and market concentration is lower since Altria's investment in JLI. (RFF Part XII). Thus, Complaint Counsel has not met its initial burden.

B. Respondents Cannot Show Procompetitive Justifications for Their Agreement

65. Under the rule of reason, after Complaint Counsel has shown evidence of anticompetitive harm, the burden switches to Respondents to establish the "pro-competitive redeeming virtues" of the agreement. *See Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 59 (2nd Cir. 1997). Procompetitive benefits can include "the creation of efficiencies in the operation of a market or the provision of goods and services." *Indiana Fed'n of Dentists*, 476 U.S. at 459.

Response to Proposed Conclusion of Law No. 65:

Respondents have no specific response except to note that Complaint Counsel's burden at the first step is to show evidence of a "*substantial* anticompetitive effect." *Alston*, 141 S. Ct. at 2161 (emphasis added).

66. Respondents cannot demonstrate how the only service from Altria to JLI that survived the Amended Services Agreement (regulatory support service) benefitted consumers or competition. (CCFF §§ XI, XIV). Thus, Respondents cannot offer any "pro-competitive redeeming virtues" sufficient to save the anticompetitive agreement. *See Clorox*, 117 F.3d at 59.

Response to Proposed Conclusion of Law No. 66:

The Proposed Conclusion is improper and should be disregarded to the extent it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. To stay on the market, JLI must obtain regulatory approval from the FDA. (RFF ¶¶ 60-65). And Altria's provision of regulatory services enabled JLI to file a timely PMTA and substantially increased the quality of the PMTA, thus benefiting competition. (*See* Resps.' Opening Br., Discussion, Part III.B; *see also* RFF Part XI).

67. As an anticompetitive agreement without offsetting benefits, Respondents' agreement constitutes an unfair method of competition in violation of FTC Act Section 5, 15 U.S.C. §45(a), and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Response to Proposed Conclusion of Law No. 67:

The Proposed Conclusion is incorrect and unsupported by the record. Regardless of how the market is precisely defined, there can be no dispute that it would be less competitive without JUUL, a popular pod-based e-vapor product with nicotine salts that has had significant success in converting adult cigarette smokers. (RFF ¶¶ 224-36). To stay on the market, JLI must obtain regulatory approval from the FDA. (RFF ¶¶ 60-65). And Altria's provision of regulatory services enabled JLI to file a timely PMTA and substantially increased the quality of the PMTA, thus benefiting competition. (*See* Resps.' Opening Br., Discussion, Part III.B; *see also* RFF Part XI).

C. Even if Respondents Could Show Procompetitive Justifications for Their Agreement, the Agreement Is Not Necessary to Achieve Them

68. A restraint is unreasonable when "any procompetitive benefits it produces 'could have been achieved through less anticompetitive means.'" *Impax*, 994 F.3d at 497 (quoting *Am. Express*, 138 S. Ct. at 2284). "Less restrictive alternatives are 'those that would be less prejudicial to competition as a whole.'" *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n Inc.*, 883 F.3d 32, 45 (2d Cir. 2018) (quoting *Capital Imaging Associates v. Mohawk Valley Med. Associates Inc.*, 996 F.2d 537, 543 (2d Cir. 1993). "The idea is that it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition. Focusing on the existence of less restrictive alternatives may allow court to avoid

difficult balancing and to 'smoke out' anticompetitive effects or pretextual justifications for the restraint." *Impax*, 994 F.3d at 497-98 (quoting C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM L. REV. 927, 947-63 (2016)).

Response to Proposed Conclusion of Law No. 68:

The Proposed Conclusion is incomplete and thus misleading. Complaint Counsel fails to account for the Supreme Court's recent admonition in *Alston*—the very case it cites in the next Proposed Conclusion—that "antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency." 141 S. Ct. at 2161 (internal quotation marks, alterations, and citation omitted). "That would be a recipe for disaster, for a 'skilled lawyer' will 'have little difficulty imagining possible less restrictive alternatives to most joint arrangements.' " *Id.* (quoting Areeda & Hovenkamp ¶ 1913b (2018)). As the Supreme Court emphasized in *Alston*, "[f]irms deserve substantial latitude to fashion agreements that serve legitimate business interests," including agreements along the lines of those at issue here that are "aimed at introducing a new product into the marketplace." *Id.* at 2163.

In addition, to meet its burden at the third step, Complaint Counsel must show that its proffered alternative is "viable," "substantially less restrictive," and "virtually as effective in serving the legitimate objective without significantly increased cost." *Cnty. of Tuolumne* v. *Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001) (internal quotations marks and emphasis omitted). As the case cited by Complaint Counsel itself makes clear, Complaint Counsel "cannot just point to" a hypothetical alternative without demonstrating "equivalent viability." *N. Am. Soccer League*, 883 F.3d at 45.

69. As the Supreme Court in *Alston* observed, "however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven

procompetitive benefits." *Alston*, 141 S. Ct. at 2162 (citing Areeda & Hovenkamp ¶1505 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative")).

Response to Proposed Conclusion of Law No. 69:

The Proposed Conclusion is incomplete and misleading. Complaint Counsel disregards that *Alston* also cautioned that "antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency." *Alston*, 141 S. Ct. at 2161 (internal quotation marks, alterations, and citation omitted). "That would be a recipe for disaster, for a 'skilled lawyer' will 'have little difficulty imagining possible less restrictive alternatives to most joint arrangements.' " *Id.* (quoting Areeda & Hovenkamp ¶ 1913b (2018)). As the Supreme Court emphasized in *Alston*, "[f]irms deserve substantial latitude to fashion agreements that serve legitimate business interests," including agreements along the lines of those at issue here that are "aimed at introducing a new product into the marketplace." *Id.* at 2163.

70. Even if Respondents could show a procompetitive justification for their agreement, the evidence shows that the anticompetitive agreement was not necessary to achieve these objectives. (CCFF ¶¶ 1920-55).

Response to Proposed Conclusion of Law No. 70:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. Complaint Counsel has not proffered an equally viable, less restrictive alternative to the actual noncompete to ensure that Altria did not get access to proprietary information of JLI from which it could then benefit in product development. (*See* Resps.' Opening Br., Discussion, Part III.C; Resps.' Reply Br., Part III.C.3; RFF Part XI.E).

D. Standing Alone, the Written Non-Compete Also Violates Section 1 of the Sherman Act

71. Covenants not to compete are valid where "(1) ancillary to the main business purpose of a lawful contract, and (2) necessary to protect the covenantee's legitimate property interest which require that the covenants be as limited as is reasonable to protect the covenantee's interest." *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899)). Respondents satisfy neither element here.

Response to Proposed Conclusion of Law No. 71:

Setting aside the first sentence of the Proposed Conclusion, with which Respondents agree, the Proposed Conclusion that "Respondents satisfy neither element" of the test set forth in *Lektro-Vend Corp.* is incomplete, incorrect, and unsupported by the record.

As an initial matter, the Proposed Conclusion fails to account for the *Lektro-Vend Corp.* court's observation that "[t]he recognized benefits of reasonably enforced noncompetition covenants are by now beyond question." 660 F.2d at 265.

In addition, Respondents satisfy both elements of the test articulated in the Proposed Conclusion because (1) the actual noncompete between Altria and JLI was reasonable, tailored, and facilitated Altria's provision of unique and critical regulatory services to JLI in support of JLI's PMTA and (2) Complaint Counsel has not proffered an equally viable, less restrictive alternative to the actual noncompete between Altria and JLI. (*See* Resps.' Opening Br., Discussion, Parts III.B-C; Resps.' Reply Br., Parts III.C.1-2; *see also* RFF Part XI).

72. Respondents' written non-compete agreement included in the Transaction ("Non-Compete") precludes Altria from participating in all aspects of the e-cigarette business, including R&D and any collaboration with third-parties (including PMI), for an initial term of six years, which is indefinitely extendable by three-year increments if not terminated by either party. (CCFF ¶¶ 38-40, § VIII.N). Even if the Court believes Altria exited the e-cigarette market for reasons unrelated to the deal with JLI, the Non-Compete still violates Section 1 given Altria's status as a potential competitor in the e-cigarette market. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 146 (2013); *Palmer v. BRG of Ga. Inc.*, 498 U.S. 46, 50 (1990).

Response to Proposed Conclusion of Law No. 72:

The Proposed Conclusion is incorrect and unsupported by the record. The actual noncompete does not violate Section 1 because Complaint Counsel cannot meet its burden to show substantial anticompetitive effects flowing from the absence of Altria as a potential competitor. As Respondents have explained, whether Altria (1) would have developed or acquired a new product, and (2) obtained FDA approval for the product is inherently speculative. (*See* Resps.' Opening Br., Discussion, Part II.D.3; Resps.' Reply Br., Part III.B.1.e; *see also* RFF Part XVI.C). And even if Altria could have developed or acquired a new product that would obtained FDA approval, it would have been years before that product could have reached market. (RFF Part XVI.C.2). Finally, Complaint Counsel has adduced no evidence that any such hypothetical future product would have had an impact in the market such that its elimination was likely to cause anticompetitive harm. (RFF Part XVI.C.5).

In addition, the Proposed Conclusion is unsupported by the cited authority. Unlike *Actavis*, there is no allegation in this case that JLI paid Altria for the noncompete. Rather, it was Altria that paid JLI and also agreed to the noncompete—as an ancillary element of the parties' larger transaction involving an investment by Altria in JLI and the provision of services by Altria to JLI. (*See* Resps.' Opening Br., Discussion, Part III.A; Resps.' Reply Br., Part III.C.1). That is, to use Complaint Counsel's test from the Proposed Conclusion, the actual noncompete does not "suppress[] competition without creating efficiency," *Rothery Storage*, 792 F.2d at 224, and it is "necessary to achieve otherwise unattainable procompetitive benefits," *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 872 (N.D. Ill. 2010). The citation to *Palmer* is similarly inapposite. That case concerned a "naked" market allocation agreement between two companies who "[e]ach

agreed not to compete in the other's territories." 498 U.S. at 49. Here, again, the actual noncompete is ancillary to the larger transaction between JLI and Altria.

73. Respondents cannot demonstrate that the Non-Compete is ancillary to an otherwise lawful transaction because the underlying Transaction is invalid. In order to be ancillary, "an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). Importantly, for the ancillary restraints doctrine to apply, the underlying Transaction must itself be legitimate, and "even restraints ancillary in form are illegal if they are part of a general plan" to violate the antitrust laws. *Id.* (citing *Addyston Pipe*, 85 F. at 280). Accordingly, any restraint in furtherance of a Section 1 or Section 7 violation cannot properly be considered an "ancillary" restraint. *Id.*

Response to Proposed Conclusion of Law No. 73:

The Proposed Conclusion is incorrect and unsupported by the record. As an initial manner, the conclusion is circular: It simply assumes the conclusion that Complaint Counsel has proven a Section 1 or Section 7 violation independent of the actual noncompete—in which case analyzing whether the actual noncompete is ancillary would be academic. Complaint Counsel has not made such a showing. (*See* Resps.' Opening Br., Discussion, Part I). In any event, the actual noncompete was "subordinate and collateral to a separate, legitimate transaction." *Rothery Storage*, 792 F.2d at 224. (*See* Resps.' Opening Br., Discussion, Part III.A). Thus, it is an "ancillary" restraint.

74. Where a restraint is "so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary." *Rothery Storage*, 792 F.2d at 224. Moreover, "under established precedent, a restraint is only ancillary if it [is] necessary to achieve otherwise unobtainable procompetitive benefits." *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 872 (N.D. Ill. 2010). The Non-Compete fails on these criteria as well: the written agreement is broad enough to harm competition, it creates little to no efficiencies, and any procompetitive benefits could be achieved by less restrictive alternatives.

Response to Proposed Conclusion of Law No. 74:

The Proposed Conclusion is incorrect, incomplete, misleading, and unsupported by the record.

First, the Supreme Court recently made clear in *Alston* that "courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency." 141 S. Ct. at 2161 (internal quotation marks, alterations, and citation omitted). "That would be a recipe for disaster, for a 'skilled lawyer' will 'have little difficulty imagining possible less restrictive alternatives to most joint arrangements.' " *Id.* (quoting Areeda & Hovenkamp ¶ 1913b (2018)); *see also Rothery Storage*, 792 F.2d at 227 ("We do not believe . . . that . . . the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity."). As the Supreme Court emphasized in *Alston*, "[f]irms deserve substantial latitude to fashion agreements that serve legitimate business interests," including agreements along the lines of those at issue here that are "aimed at introducing a new product into the marketplace." *Id.* at 2163.

Second, as Respondents have explained, the actual noncompete between Altria and JLI facilitated efficiencies through Altria's provision of unique and critical regulatory services to JLI in support of JLI's PMTA; Complaint Counsel has not proffered a viable, less restrictive alternative to the actual noncompete between Altria and JLI; and Complaint Counsel has failed to show any anticompetitive effects resulting from the actual noncompete. (*See* Resps.' Opening Br., Discussion, Parts II and III.B-C; Resps.' Reply Br. Parts III.B.1, III.C; *see also* RFF Parts XI-XVII).

75. Even where ancillary to a legitimate transaction, written non-competes are subject to the rule of reason. *Lektro-Vend*, 660 F.2d at 265; *Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3rd Cir. 2001). Here, the Non-Compete fails under the rule of reason because the anticompetitive effects of the written agreement substantially outweigh any procompetitive benefits. (CCFF §§ X.B.3, X.C-D).

Response to Proposed Conclusion of Law No. 75:

Although Respondents agree that the rule of reason applies to the actual noncompete, the Proposed Conclusion is incorrect and unsupported by the record to the extent it concludes that the

actual noncompete fails under that framework. As Respondents have explained, the actual noncompete between Altria and JLI facilitated efficiencies through Altria's provision of unique and critical regulatory services to JLI in support of JLI's PMTA; Complaint Counsel has failed to show any anticompetitive effects resulting from the actual noncompete; and Complaint Counsel has not proffered a viable, less restrictive alternative to the actual noncompete between Altria and JLI. (*See* Resps.' Opening Br., Discussion, Parts II and III.B-C; Resps.' Reply Br., Parts III.B.1 and III.C; *see also* RFF Parts XI-XVII).

V. THE TRANSACTION VIOLATES SECTION 7 OF THE CLAYTON ACT

76. Section 7 of the Clayton Act prohibits the acquisition of "the whole or any part of the stock or other share capital" where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

Response to Proposed Conclusion of Law No. 76:

Although Respondents agree that the Proposed Conclusion accurately quotes the language of Section 7, the Proposed Conclusion is incomplete for two reasons.

First, the quoted language omits relevant language from Section 7 limiting liability to acquirers. *See* 15 U.S.C. § 18 ("No person . . . shall acquire . . . ."). Courts have consistently held that this section provides no basis to find a violation by *the seller* in a transaction. *See, e.g.*, *Coca Cola Bottling Co.*, 575 F.2d at 227 ("By its express terms § 7 proscribes only the act of acquiring, not selling, when the forbidden effects may occur."); *Dailey*, 380 F.2d at 488 (affirming dismissal of Section 7 claim as to seller and explaining that "§ 7 by its terms proscribes only the acquiring corporation"); *Gerlinger*, 311 F. Supp. 2d at 852 ("'[B]y its express terms, [S]ection 7 of the Clayton Act is directed only against the acquiring corporation.'") (quoting *Aspen Labs*, 492 F. Supp. at 300).

Second, courts have interpreted this statutory language as imposing on antitrust plaintiffs "the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" *Kraft General Foods*, 926 F. Supp. at 358 (quoting *Atlantic Richfield Co.*, 297 F. Supp. at 1066). As the Supreme Court has made plain, Section 7 "deals in 'probabilities,' not 'ephemeral possibilities.'" *Marine Bancorp.*, 418 U.S. at 622-23. Thus, Complaint Counsel must show that "the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings Inc.*, 605 F. Supp. 2d at 35 (quoting *Marine Bancorp.*, 418 U.S. at 623 n.22).

77. As the Supreme Court held in *United States v. E. I. du Pont de Nemours & Co.*, "any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce." 353 U.S. 586, 592 (1957); *see also Yamaha Motor Co. v. FTC*, 657 F.2d 971, 947 (8th Cir. 1981) (involving an acquisition of a 38 percent interest).

Response to Proposed Conclusion of Law No. 77:

Respondents have no specific response.

78. Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. *See, e.g.*, *FTC v. Univ. Health*, *Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). "Congress used the phrase '*may be* to substantially competition' to indicate that its concern was with probabilities, not certainties[.]" *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (quoting *Brown Shoe,* 370 U.S. at 323).

Response to Proposed Conclusion of Law No. 78:

The Proposed Conclusion is incomplete. Courts have interpreted this statutory language as imposing on antitrust plaintiffs "the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" *Kraft General Foods*, 926 F. Supp. at 358 (quoting *Atlantic Richfield Co.*, 297 F. Supp. at 1066). As the Supreme Court has made plain, Section 7 "deals in 'probabilities,' not 'ephemeral possibilities.'" *Marine Bancorp.*, 418 U.S. at 622-23. Thus, Complaint Counsel must show that "the loss of competition is a

'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings Inc.*, 605 F. Supp. 2d at 35 (quoting *Marine Bancorp.*, 418 U.S. at 623 n.22).

79. An acquisition violates Section 7 if it "create[s] an appreciable danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.) (citation omitted).

Response to Proposed Conclusion of Law No. 79:

The Proposed Conclusion is incomplete. Courts require antitrust plaintiffs to show "that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" *Kraft General Foods*, 926 F. Supp. at 358 (quoting *Atlantic Richfield Co.*, 297 F. Supp. at 1066). As the Supreme Court has made plain, Section 7 "deals in 'probabilities,' not 'ephemeral possibilities.'" *Marine Bancorp.*, 418 U.S. at 622-23. Thus, Complaint Counsel must show that "the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings Inc.*, 605 F. Supp. 2d at 35 (quoting *Marine Bancorp.*, 418 U.S. at 623 n.22).

Moreover, where post-acquisition evidence is available at the time of trial, it "can be an important indicator of the probability of anticompetitive effects where the evidence is such that it could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition." *Lektro Vend Corp.*, 660 F.2d at 276 (citing *Gen. Dynamics*, 415 U.S. at 506); *see also United States* v. *Int'l Harvester Co.*, 564 F.2d 769, 780 (7th Cir. 1977) (consideration of post-acquisition evidence was proper where "much of it was beyond the power of the parties to manipulate"). Indeed, post-acquisition evidence may be "dispositive" where it shows, as it does here, "actual entry that has prevented the merged entity from maintaining its market share." *United States* v. *Bazaarvoice*,

Inc., 2014 WL 203966, at *74 (N.D. Cal. Jan. 8, 2014). Complaint Counsel does not dispute that the post-acquisition evidence in this case of increasingly competitive market conditions is properly before the Court.

80. Although the Transaction involves a partial (35 percent) equity acquisition of JLI, it effectively caused the effect of a full acquisition as it completely eliminated one of the competitors (here, Altria) from the market. (CCFF §§ VIII.M-N). This is exactly like the type of a merger case described in the *Horizontal Merger Guidelines*—a horizontal merger that "completely and permanently eliminat[es] competition between them. This elimination of competition is a basic element of merger analysis." *Horizontal Merger Guidelines* § 13 ("Partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition.").

Response to Proposed Conclusion of Law No. 80:

The Proposed Conclusion is incomplete and misleading.

First, the Proposed Conclusion is misleading to the extent that it suggests that the transaction "completely eliminated" Altria "from the market." As Respondents have explained, Altria discontinued Nu Mark's e-vapor products for independent business reasons and regardless of the prospect of any transaction with JLI. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A). At the time the transaction was entered into on December 20, 2018, Altria had no e-vapor products on the market and was pursuing (at best) a five-to-seven-year plan with the Growth Teams. (RFF ¶¶ 842, 902, 905). Thus, Altria's action to remove Nu Mark's e-vapor products from the market cannot be considered an "effect" of the JLI transaction for purposes of Section 7 of the Clayton Act, *see Aetna*, 240 F. Supp. 3d at 79-80, and the only effect of the transaction was to limit the speculative potential of the Growth Teams through the actual noncompete.

Second, the Proposed Conclusion omits the fact that the actual noncompete is not "permanent[]" but instead has an initial term of six years tied to Altria's provision of services to JLI. (RFF ¶ 1129).

A. The Transaction Is Presumptively Unlawful in the Relevant Market

81. Courts traditionally analyze Section 7 under a burden-shifting framework consisting of three steps. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990); *In re Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 9549988, at *9 (F.T.C. Nov. 5, 2010).

Response to Proposed Conclusion of Law No. 81:

Respondents have no specific response.

82. Under the burdening-shifting framework, Complaint Counsel can establish a presumption of anticompetitive harm by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in the market. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). The typical measure for determining market concentration is the Herfindahl-Hirschman Index ("HHI") which is calculated by summing the squares of the individual market shares of all the firms in the market. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715–16 (D.C. Cir. 2001); *Tronox*, 332 F. Supp. 3d at 207. The government can bolster its presumption based on market share with additional evidence showing that competitive effects are likely. *Heinz*, 246 F.3d at 717.

Response to Proposed Conclusion of Law No. 82:

The Proposed Conclusion is incomplete for three reasons.

First, before the Court can assess market concentration, Complaint Counsel must first satisfy its burden to establish the "necessary predicate" of a well-defined relevant product market. *du Pont*, 353 U.S. at 593; *see also Arch Coal*, 329 F. Supp. 2d at 119 ("The FTC bears the burden of proof and persuasion in defining the relevant market."). "Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." *Se. Mo. Hosp.*, 642 F.3d at 613.

Second, assuming a market is properly defined, the Proposed Conclusion fails to note that it is Complaint Counsel's burden to support its HHI calculations with "reliable, reasonable, close approximation of relevant market share data." *H & R Block*, 833 F. Supp. 2d at 72; *see also FTC* v. *PPG Indus.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986) (requiring "the closest available approximation" of concentration in the relevant market); *Comprehensive Sec., Inc.* v. *Metro. Gov't*

of Nashville & Davidson Cty., 2021 WL 2355067, at *5 (M.D. Tenn. June 9, 2021) (rejecting plaintiffs' HHI calculation as "unreliable" because their "method for calculating the HHI value likely overstated the results").

Third, even if Complaint Counsel can both define a relevant product market and supply reliable HHI calculations that support a presumption of anticompetitive effects, that presumption is rebuttable. "Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." *Baker Hughes*, 908 F.2d at 984. "[O]nly a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of [a transaction]." *United States* v. *Gen. Dynamics Corp.*, 415 U.S. 486, 498 (quoting *Brown Shoe*, 370 U.S. at 322 n.38); *see also Deutsche Telekom*, 439 F. Supp. 3d at 217 (noting that "statistical market share evidence [can be] misleading" and explaining that presumption can be rebutted).

83. Respondents can then rebut the presumption of harm by producing "evidence that casts doubt on the significance or accuracy of" the government's evidence. *Polypore*, 2010 WL 9549988, at *9 (citing *Baker Hughes*, 908 F.2d at 985); *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008). The stronger the government's *prima facie* case, however, "the greater Respondents' burden of production on rebuttal." *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 76, *46 (Apr. 4, 2012); *see also Heinz*, 246 F.3d at 725. If Respondents successfully rebut the *prima facie* case, the burden of production shifts back to the government and "merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes*, 908 F.2d at 983 (citation omitted).

Response to Proposed Conclusion of Law No. 83:

Respondents have no specific response.

84. The Commission may rely on "the closest available approximation" of market shares when calculating concentration levels. *FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986). Indeed, the "FTC need not present market shares and HHI estimates with the precision of a NASA scientist." *Sysco*, 113 F. Supp. 3d at 54 (market share estimates were reliable because they were the "closest available approximation"); *see also PPG Indus.*, 798 F.2d at 1505 (affirming finding of highly concentrated market based on comparison of market shares in a related market); *United States v. Bazaarvoice, Inc.*, No.

13-cv-133, 2014 U.S. Dist. LEXIS 3284, at *237 (N.D. Cal. Jan. 8, 2014) (shares are imperfect but reveal the basic market structure).

Response to Proposed Conclusion of Law No. 84:

The Proposed Conclusion is incomplete. Courts insist on "reliable, reasonable, close approximation of relevant market share data." *H & R Block*, 833 F. Supp. 2d at 72. Thus, when the government proceeds with imprecise or inaccurate data, it does so at its peril, for a defendant may "discredit[] the data underlying the initial presumption in the government's favor." *Baker Hughes*, 908 F.2d at 991. While Complaint Counsel need not present HHI estimates "with the precision of a NASA scientist," *Sysco*, 113 F. Supp. 3d at 54, it does need to exceed the performance of a random dart-thrower. *See Comprehensive Sec.*, 2021 WL 2355067, at *5 (M.D. Tenn. June 9, 2021) (rejecting plaintiffs' HHI calculation as "unreliable" because their "method for calculating the HHI value likely overstated the results").

85. "Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anticompetitive." *Heinz*, 246 F.3d at 716; *see also Tronox*, 332 F. Supp. 3d at 207; *FTC v. Staples, Inc. ("Staples II")*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016); *Aetna*, 240 F. Supp. 3d at 42-43. An acquisition is "presumptively anticompetitive" if it increases the HHI by more than 200 points and results in a "highly concentrated market" with a post-acquisition HHI exceeding 2,500. *Tronox*, 332 F. Supp. 3d at 207; *Staples II*, 190 F. Supp. 3d at 128; *Horizontal Merger Guidelines* § 5.3.

Response to Proposed Conclusion of Law No. 85:

The Proposed Conclusion is incomplete. As the Commission's own Horizontal Merger Guidelines explain, HHI thresholds are not a "rigid screen." HMG § 5.3; *see also Baker Hughes*, 908 F.2d at 992 ("To allow the government virtually to rest its case [after establishing market concentration above its preferred HHI thresholds], leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl–Hirschman Index cannot guarantee litigation victories."). Instead, market concentration analysis must account for "recent or ongoing changes in market conditions [that]

indicate that the current market share of a particular firm . . . overstates the firm's future competitive significance." HMG § 5.2.

This principle is illustrated by the Commission's own analysis of Reynolds' merger with Brown & Williamson. The Commission's calculations provided that the merger would increase the HHI in the cigarette market by 378 points (above the threshold of 200 points) to a post-acquisition level of 3,113 (above the threshold of 2,500). Stmt. of the Fed. Trade Comm'n, *Proposed Merger Between RJ Reynolds Tobacco Holdings, Inc. and British American Tobacco p.l.c.*, File No. 041 0017, 2004 WL 3185289, at *1 (June 22, 2004). But the Commission recognized that Brown & Williamson's market share of approximately 10 percent "substantially overstate[d] its premerger significance" because most of its sales had been "in a sharp decline in recent years" as a result of "increased competition," and that decline was "expected to continue absent the merger." *Id.* at *4. Thus, notwithstanding that "the United States market for cigarettes is highly concentrated," the Commission concluded that a careful factual analysis "d[id] not support the conclusion that Brown & Williamson [was] competitively significant." *Id.* at *7.

86. Evidence presented at the hearing shows that the Transaction results in an HHI over 3,900 and an increase in HHI by over 650, well above the threshold for presumed harm. (CCFF ¶ 1754). The market shares and HHI levels here are comparable to the levels found to be unlawful by courts. In *FTC v. University Health*, *Inc.*, the court found that the FTC had "clearly established a *prima facie* case of anticompetitive effect" when it proved that a merger of two nonprofit hospitals would have resulted an increase in HHI of over 630, and a post-merger HHI of 3200. *Univ. Health Inc.*, 938 F.2d 1206,1211 n.12, 1219 (11th Cir. 1991); *see also Tronox*, 332 F. Supp. 3d at 207 (an increase in HHI over 720 and a post-merger HHI over 3,000).

Response to Proposed Conclusion of Law No. 86:

The Proposed Conclusion is inaccurate and unsupported by the record. As a result, Complaint Counsel has not met its burden of establishing a *prima facie* case of anticompetitive effects.

First, Complaint Counsel's HHI calculations assume that the removals of Altria's e-vapor products from the market in October 2018 and December 2018 were an "effect" of the transaction within the meaning of Section 7. That premise is wrong: Altria discontinued Nu Mark's e-vapor products for independent business reasons and regardless of the prospect of any transaction with JLI. (*See* Resps.' Opening Br., Discussion, Part I; Resps.' Reply Br., Part III.A). But even if the Court were to find that Altria would not have removed its products but for the prospect of a transaction with JLI, Complaint Counsel must still take the market as it existed at the time of the investment—*i.e.*, December 20, 2018, when Altria had no products on the market and was pursuing (at best) a five-to-seven-year plan with the Growth Teams. (*See* Resps.' Opening Br., Discussion, Part II.C.1; *see also Aetna*, 240 F. Supp. 3d at 79-80). Complaint Counsel must then prove that Altria's stock acquisition would substantially lessen competition from that point forward relative to what would have happened in the so-called "but-for world" absent the acquisition. Complaint Counsel has not done so.

Second, Complaint Counsel's HHI calculations are based on inaccurate data and indefensible assumptions, and should thus be disregarded. As Respondents have explained, Complaint Counsel's expert has taken a series of steps to inappropriately inflate the pre-transaction market shares and the post-transaction market shares. (*See* Resps.' Opening Br., Discussion, Part II.C.2; Resps.' Reply Br., Part IV.B; *see also* RFF Part XV.A). Further, the expert has failed to account for other real-world facts that call into question the reliability of his HHI calculations, including failing to account for the decline of cig-a-likes, the importance of nicotine salts, and the FDA's flavor ban. (RFF Part XV.B).

B. Evidence of Competitive Harm Bolsters the Presumption

87. Through contemporaneous business documents and testimony, Complaint Counsel presented evidence of competitive harm caused by the Transaction. Most importantly, the

> evidence clearly shows that Altria would not have exited the e-cigarette market absent the Transaction. This additional evidence of competitive harm further strengthens the structural presumption under the Section 7 framework, which increases the burden Respondents must shoulder on rebuttal. *Sysco*, 113 F. Supp. 3d at 23 ("The more compelling the [FTC's] prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully.") (quoting *Baker Hughes*, 908 F.2d at 991).

Response to Proposed Conclusion of Law No. 87:

The Proposed Conclusion is inaccurate and unsupported by the record.

First, Complaint Counsel has not shown that Altria would have maintained its e-vapor products on the market but for the prospect of the JLI transaction. As Respondents have explained, the record shows that Altria removed its e-vapor products from the market for independent business reasons and did so regardless of any prospective transaction with JLI. (*See* Resps.' Opening Br., Discussion, Part I, and Resps.' Reply Br., Part III.A; *see also* RFF Part IX).

Second, Complaint Counsel has not met its burden to show evidence of competitive harm. As Respondents have explained, Complaint Counsel cannot meet its burden to show substantial anticompetitive effects, whether through direct evidence or through a structural presumption based on market concentration. (*See* Resps.' Opening Br., Discussion, Part II; *see also* RFF Parts XIII-XVIII). In particular, Altria had determined that Nu Mark's existing products could not meet the PMTA standard because they were failing to convert smokers and suffered from technical problems. (RFF Part VII). The products lacked nicotine salts (or, in the case of MarkTen Bold, the right ratio of salts), and Altria had determined they were not commercially viable. (RFF ¶¶ 478, 627-51, 839-74). And Altria's e-vapor sales (made up mostly of cig-a-likes) were plummeting in 2018 as the pod category continued to soar in popularity. (RFF ¶¶ 562-67). Retailers were not sad to see Nu Mark's products leave the market because the products were failing, and their discontinuation freed up inventory dollars and shelf space for other, more

successful products. (RFF Parts IX.D.4, IX.F.4). Indeed, the record shows that competition has flourished and intensified since Altria's investment in JLI. (RFF Parts XII, XIII).

88. The Commission and courts have acknowledged that a showing of actual post-transaction harm is not required. Indeed, the Supreme Court in *United States v. General Dynamics Corp.* explained that the absence of "concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected." 415 U.S. 486, 505 (1974).

Response to Proposed Conclusion of Law No. 88:

The Proposed Conclusion is incomplete and thus misleading to the extent it implies that the Court is free to ignore evidence of post-transaction effects where it exists. Quite the contrary, "post-acquisition evidence favorable to a defendant can be an important indicator of the probability of anticompetitive effects where the evidence is such that it could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition." *Lektro Vend Corp.*, 660 F.2d at 276 (citing *Gen. Dynamics*, 415 U.S. at 506); *see also Int'l Harvester Co.*, 564 F.2d at 780 (consideration of post-acquisition evidence was proper where "much of it was beyond the power of the parties to manipulate"). Indeed, post-acquisition evidence may be "dispositive" where it shows, as it does here, "actual entry that has prevented the merged entity from maintaining its market share." *Bazaarvoice*, 2014 WL 203966, at *74. Complaint Counsel does not dispute that the post-acquisition evidence in this case of increasingly competitive market conditions is properly before the Court.

89. "Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial." *Polypore*, 2010 WL 9549988, at *8 (citing *General Dynamics*, 415 U.S. at 505-06).

Response to Proposed Conclusion of Law No. 89:

The Proposed Conclusion is incomplete and misleading. As the Commission further explained in *Polypore*, "the essential question remains whether the probability of such *future* impact exists at the time of trial." *Polypore*, 2010 WL 9549988, at *8 n.16 (emphasis in original) (citing *Gen. Dynamics*, 415 U.S. at 505). Thus, where a trial occurs *after* the transaction—and evidence of future impact exists in the form of post-transaction evidence—that evidence is properly before the Court. *See Lektro-Vend Corp.*, 660 F.2d at 276 (in trial after the merger, post-acquisition evidence that "competitive position had declined significantly after the merger . . . [was] admissible since the probability of anticompetitive effects is judged at the time of trial"). And "post-acquisition evidence favorable to a defendant can be an important indicator of the probability of anticompetitive effects where the evidence is such that it could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition." *Id.* at 276 (citing *Gen. Dynamics*, 415 U.S. at 506).

90. "And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before [section 7] can be called into play. If the enforcement of [section 7] turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

Response to Proposed Conclusion of Law No. 90:

The Proposed Conclusion is incomplete and misleading. As the Commission further explained in *Polypore*, "the essential question [under Section 7] remains whether the probability of such *future* impact exists at the time of trial." *Polypore*, 2010 WL 9549988, at *8 n.16 (emphasis in original) (citing *Gen. Dynamics*, 415 U.S. at 505). Thus, where a trial occurs *after* the transaction—and evidence of future impact exists in the form of post-transaction evidence—

that evidence is properly before the Court. *See Lektro-Vend Corp.*, 660 F.2d at 276 (in trial after the merger, post-acquisition evidence that "competitive position had declined significantly after the merger . . . [was] admissible since the probability of anticompetitive effects is judged at the time of trial"). And "post-acquisition evidence favorable to a defendant can be an important indicator of the probability of anticompetitive effects where the evidence is such that it could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition." *Id.* at 276 (citing *Gen. Dynamics*, 415 U.S. at 506).

91. Evidence that Altria and JLI competed vigorously against each other before the Transaction supports a finding of anticompetitive effects. "[M]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C. 2017); *Aetna*, 240 F. Supp. 3d at 43; *Staples II*, 190 F. Supp. 3d at 131.

Response to Proposed Conclusion of Law No. 91:

The Proposed Conclusion is incomplete, inaccurate, misleading, and unsupported by the record. While Complaint Counsel may wish to focus on generalizations about what may "often" be true, "antitrust theory and speculation cannot trump facts, and . . . cases must be resolved on the basis of the record evidence relating to the market and its probable future." *RAG-Stiftung*, 436 F. Supp. 3d at 291 (quoting *Arch Coal*, 329 F. Supp. 2d at 116-17). Thus, the Supreme Court has admonished that courts must judge "the probable anticompetitive effects of the merger" based on "a further examination of the particular market." *Gen. Dynamics*, 415 U.S. at 498 (quoting *Brown Shoe*, 370 U.S. at 321-22 & n.38).

Such an examination shows that Altria and JLI were not in fact "close competitors" at the time of the transaction. Rather, it shows the opposite: Altria's products were failing—and both parties knew it. (RFF Part V).

Elite, the pod-based product that Altria had hoped would be a "JUUL fighter," lacked critical nicotine salts and never commanded more than a 0.9 percent share of cartridge sales in the closed-system market despite Altria's distribution network and intense marketing efforts. (RFF ¶¶ 442, 571, 748, 1467). JLI executives recognized that "the product was a failure" and sales were "absolutely terrible." (RFF ¶¶ 443, 751). As a result, JLI was not "ever too focused on how MarkTen Elite was performing." (RFF ¶ 753). JLI neither lowered its price as a response to Elite's entry nor increased its price in response to Elite's withdrawal, demonstrating that the product was not a competitive constraint on JLI's pricing. (RFF ¶ 1640).

Moreover, Nu Mark's cig-a-likes were in a category that was "plummeting." (RFF ¶ 844). For its part, JLI "didn't think that MarkTen [cig-a-like] was a significant competitive threat." (RFF ¶ 759). Rather, JLI well understood the cig-a-like category was "dead" because the market was shifting toward pod-based products with nicotine salts, which Altria lacked. (RFF ¶¶ 755, 1412, Part XV.B.1.b). JLI never "change[d] its pricing" or "promotions" of JUUL—a pod-based product—"as a result of cig-a-like competition." (RFF ¶ 1405).

92. The Transaction between Respondents eliminated significant head-to-head competition between Altria and JLI in the U.S. closed-system e-cigarette market. (CCFF § X.A). Evidence from a variety of sources, including Respondents' own ordinary course documents, demonstrates that before the Transaction, Altria and JLI had engaged in intense price and non-price competition and that competition was set to intensify. (CCFF ¶¶ 1418-92, 1532-52). This pre-Transaction competition included frequent promotions and innovation competition to improve products for consumers. (CCFF §§ X.A.1-2). The loss of this competition provides direct evidence of the likely anticompetitive effects of the Transaction and bolsters the presumption of competitive harm. *See, e.g.*, *Polypore*, 2010 WL 9549988, at *24 (pre-acquisition competition between merging parties supported likely anticompetitive unilateral effects); *FTC v. Staples*, 970 F. Supp. 1066, 1083 (D.D.C. 1997); *Horizontal Merger Guidelines* § 6.1.

Response to Proposed Conclusion of Law No. 92:

The Proposed Conclusion is incomplete, inaccurate, misleading, and unsupported by the record.

First, the record does not show "significant head-to-head competition" between Altria and JLI or that "competition was set to intensify," as the Proposed Conclusion posits. Rather, it shows the opposite: Altria's products were failing—and both parties knew it. (RFF Part V).

Elite, the pod-based product that Altria had hoped would be a "JUUL fighter," lacked critical nicotine salts and never commanded more than a 0.9 percent share of cartridge sales in the closed-system market despite Altria's distribution network and intense marketing efforts. (RFF ¶¶ 442, 571, 748, 1467). JLI executives recognized that "the product was a failure" and sales were "absolutely terrible." (RFF ¶¶ 443, 751). As a result, JLI was not "ever too focused on how MarkTen Elite was performing." (RFF ¶ 753). JLI neither lowered its price as a response to Elite's entry nor increased its price in response to Elite's withdrawal, demonstrating that the product was not a competitive constraint on JLI's pricing. (RFF ¶ 1640).

Moreover, Nu Mark's cig-a-likes were in a category that was "plummeting." (RFF ¶ 844). For its part, JLI "didn't think that MarkTen [cig-a-like] was a significant competitive threat." (RFF ¶ 759). Rather, JLI well understood the cig-a-like category was "dead" because the market was shifting toward pod-based products with nicotine salts, which Altria lacked. (RFF ¶¶ 755, 1412, Part XV.B.1.b). JLI never "change[d] its pricing" or "promotions" of JUUL—a pod-based product—"as a result of cig-a-like competition." (RFF ¶ 1405).

Finally, there is no evidence that Altria was a source of innovative pressure within the industry. (RFF Part XVII.B). To the extent that Complaint Counsel has claimed otherwise, Respondents have explained why Complaint Counsel is mistaken. (RRFF ¶¶ 1441, 1482-92).

Second, even if there were some degree of competition between Altria and JLI, as Respondents have explained, Complaint Counsel cannot meet its burden to show competitive harm from the transaction, whether through direct evidence or through a structural presumption based

on market concentration. (*See* Resps.' Opening Br., Discussion, Part II; *see also* RFF Parts XIII-XVIII). To the contrary, the record shows that competition has flourished—and, indeed, intensified—since Altria's investment in JLI as Altria's discontinuation of Nu Mark's existing e-vapor products made room for better and more competitive products. (RFF Parts XII, XIII). This post-acquisition evidence is "an important indicator of the probability of anticompetitive effects" flowing from the transaction. *Lektro-Vend Corp.*, 660 F.2d at 276 (citing *Gen. Dynamics*, 415 U.S. at 506); *see also Int'l Harvester Co.*, 564 F.2d at 780 (consideration of post-acquisition evidence was proper where "much of it was beyond the power of the parties to manipulate").

93. The Transaction also harmed competition by eliminating the future competition between Altria and JLI in the "but for" world. *See FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020) ("The Court's objective is to determine the JV's likely effect on competition compared to the but-for world in which the JV is not allowed."). Because of the Transaction, including the written Non-Compete between Respondents, Altria stopped (and had to eliminate) its entire e-cigarette-related R&D efforts. (CCFF ¶¶ 1538-87, § X.C). Thus, the innovation competition in the closed-system e-cigarette market was significantly diminished because of Altria's exit, which further strengthens the presumption of competitive harm.

Response to Proposed Conclusion of Law No. 93:

The Proposed Conclusion is inaccurate and unsupported by the record. As Respondents have explained, Altria would not have been a significant competitor in the but-for world, regardless which market definition the Court ultimately adopts. (*See* Resps.' Opening Br., Discussion, Part II.D; Resps.' Reply Br., Parts III.B.1.b, III.B.1.e; *see also* RFF Part XVI). Altria had invested billions in attempting to develop potential reduced-risk products before it founded Nu Mark; each attempt was a commercial bust. (RFF ¶ 1555; Part II.A.1.b). None of the hundreds of millions of dollars invested in Nu Mark resulted in a commercially successful e-vapor product. (RFF ¶ 1555; Part II.A.1.d). Indeed, every product Nu Mark launched was acquired from another company. (RFF ¶ 1559).

But even if Altria had ultimately been able to develop or acquire a new e-vapor product, which is inherently speculative, it could not have commercialized that product without first obtaining FDA approval. (RFF ¶ 1545). "The presence of [a] regulatory scheme and need for approval" may "convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise," especially where "[t]here are no facts . . . which even permit [a court] to speculate as to the likelihood of [regulatory approval]." *City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d Cir. 1998). And even if Altria had been able (1) to develop or acquire a new product, and (2) obtain regulatory approval for that product, the complex regulatory review process would mean that it would take, in a best-case scenario, at least five years to bring the product to market, and potentially longer. (RFF ¶ 1545). As the Commission has observed, "[t]he actual potential competition doctrine rests upon firmest ground when *it is virtually certain* that, but for the merger or acquisition, the prospective entrant would have entered the market involved on an independent basis *in the near future.*" *B.A.T. Indus.*, 1984 WL 565384, at *4 (emphases added); *see also Aetna Inc.*, 240 F. Supp. 3d at 78-79 (adopting "near future" standard and defining it as four years in the context of the particular industry); *In the Matter of Heublein, Inc.*, 96 F.T.C. 385, 583 (1980) (applying the potential competition doctrine to assess whether a company selling imported wines would have, but for a merger, enhanced competition by selling domestic wines). In no reasonable sense would such late entry—at least five years from now and potentially longer—qualify as "the near future." *B.A.T. Indus.*, 1984 WL 565384, at *9.

C. Respondents Cannot Rebut the Strong Presumption of Harm

94. Respondents have the burden to rebut the presumption of illegality by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (alterations in original) (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)).

Response to Proposed Conclusion of Law No. 94:

Respondents agree that they would have the burden to rebut a presumption of illegality if Complaint Counsel succeeded in establishing the presumption. For the reasons given in RRCoL ¶ 86, however, Complaint Counsel has failed to meet its *prima facie* burden. Moreover, the Proposed Conclusion is incomplete. Where, as here, an antitrust plaintiff relies so heavily on market concentration statistics to meet its burden, it would be "particularly anomalous" to conceive of a defendant's rebuttal burden as significant. *See Baker Hughes*, 908 F.2d at 992. "If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the [plaintiff's] ultimate burden of persuasion—always an elusive distinction in practice—disintegrates completely." *Id.* at 991.

In any event, even if the Court were to credit Complaint Counsel's flawed HHI calculations, the presumption of illegality is amply rebutted on this record in light of the regulatory scheme, (RFF Part I.D), the inability of Altria's existing products to compete, (RFF Parts III, V, VII), the unlikelihood that Altria would be able to successfully bring new products to market in the near future, (RFF Part XVI), and the absence of any harm to price competition, innovation competition, or shelf space competition, (RFF Parts XII, XIII, XVII; *see also* Resps.' Opening Br., Discussion, Part II.D).

95. Respondents' burden is heavy, given the strength of Complaint Counsel's *prima facie* case. The stronger the *prima facie* case, the more evidence defendants must present to rebut the established presumption. *See Sysco*, 113 F. Supp. 3d at 23.

Response to Proposed Conclusion of Law No. 95:

The Proposed Conclusion is incorrect. Because Complaint Counsel has failed to establish a *prima facie* case of competitive harm, for the reasons given in RRCoL ¶¶ 86, 91-93, Respondents have no burden to rebut Complaint Counsel's Section 7 case.

96. Respondent has "the burden of showing that the entry [] of competitors will be 'timely, likely and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *Staples II*, 190 F. Supp. 3d at 133 (citation omitted); *see also Sysco*, 113 F. Supp. 3d at 80; *Horizontal Merger Guidelines* § 9. The higher the barriers to entry, the less likely it is that the "timely, likely, and sufficient" test can be met. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001).

Response to Proposed Conclusion of Law No. 96:

The Proposed Conclusion is incorrect. As explained in RRCoL ¶ 95, because Complaint Counsel has failed to establish a *prima facie* case of competitive harm, Respondents have no burden to rebut Complaint Counsel's Section 7 case.

97. Respondents bear the burden of proving cognizable efficiencies of a character and magnitude sufficient to ensure that the merger is not likely to be anticompetitive in any relevant market. *See H&R Block*, 833 F. Supp. 2d at 89; *Horizontal Merger Guidelines* § 10. Cognizable efficiencies must be merger-specific, verified, and not the result of anticompetitive reductions in output or service. *Horizontal Merger Guidelines* § 10. Given the high market concentration levels in this case, Respondents need to present "proof of extraordinary efficiencies" to rebut the presumption of likely anticompetitive effects. *United States v. Aetna*, 240 F. Supp. 3d. 1, 98 (D.D.C. 2017), *citing Heinz*, 246 F.3d at 72.

Response to Proposed Conclusion of Law No. 97:

The Proposed Conclusion is incorrect and incomplete. As explained in RRCoL ¶ 95, because Complaint Counsel has failed to establish a *prima facie* case of competitive harm, Respondents have no burden to rebut Complaint Counsel's Section 7 case. In any event, with respect to verifiability, efficiencies need not be "capable of precise quantification." *Arch Coal*, 329 F. Supp. 2d at 153. Rather, they must be based on "credible evidence" of "a prediction backed by sound business judgment." *Staples, Inc.*, 970 F. Supp. at 1089-90. And with respect to merger-specificity, "[t]he real question is whether the alternatives to merger are practical and more than merely theoretical." *United States* v. *Anthem, Inc.*, 855 F.3d 345, 357 (D.C. Cir. 2017).

98. Claimed efficiencies are not cognizable unless they are (1) "merger-specific," and (2) "reasonably verifiable by an independent party." *Staples II*, 190 F. Supp. 3d at 137 n. 15. Respondents must prove "merger-specificity and verifiability" of all claimed efficiencies. *Anthem*, 855 F.3d at 364; *see also Heinz*, 246 F.3d at 722.

Response to Proposed Conclusion of Law No. 98:

The Proposed Conclusion is incomplete. With respect to verifiability, efficiencies need not be "capable of precise quantification." *Arch Coal*, 329 F. Supp. 2d at 153. Rather, they must be based on "credible evidence" of "a prediction backed by sound business judgment." *Staples, Inc.*, 970 F. Supp. at 1089-90. And with respect to merger-specificity, "[t]he real question is whether the alternatives to merger are practical and more than merely theoretical." *Anthem*, 855 F.3d at 357.

99. Respondent has not produced evidence sufficient to rebut the presumption of harm likely to result from the Transaction. (CCFF §§ XIII-XIV).

Response to Proposed Conclusion of Law No. 99:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record. As an initial matter, Respondents bear no burden, because Complaint Counsel has failed to establish a *prima facie* case of competitive harm, as explained in RRCoL ¶ 95. But even if the Court applied a structural presumption, that conclusion is amply rebutted in light of the regulatory scheme, (RFF Part I.D), the inability of Altria's existing products to compete, (RFF Parts III, V, VII), the unlikelihood that Altria would be able to successfully bring new products to market in the near future, (RFF Part XVI), and the absence of any harm to price competition, innovation competition, or shelf space competition, (RFF Parts XII, XIII, XVII; *see also* Resps.' Opening Br., Discussion, Part II.D).

D. The Transaction Also Eliminated Altria As a Potential Competitor to JLI

100. Like the public exchanges case in *United States v. Aetna Inc.*, it is proper here to treat Respondents as actual competitors under Section 7 for analyzing the competitive effects of the Transaction because "the [relevant] case law does not support defendants' approach of viewing competition as an on-off switch where a merging party can simply switch it off entirely by withdrawing from a market . . . ." *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 76 (D.D.C. 2017). As the evidence indisputably shows, this is not a case

where "there is no pre-existing competition to begin with" between Respondents. *Id.* (citing *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 298 (1930)).

Response to Proposed Conclusion of Law No. 100:

The Proposed Conclusion is incorrect and unsupported by the cited authority. Adhering to the approach endorsed in *Aetna* does not mean that the Court should adopt the fiction of treating Altria and JLI as if they were actual competitors at the time of the transaction or even now. To the contrary, as the *Aetna* court explained in speaking about Aetna's presence on the relevant public exchanges in 2017, it "w[ould] not adopt the government's proposed approach of simply ignoring the reality that Aetna is not offering plans for 2017 in the relevant markets, and pretend that the facts are frozen as they were in 2016." 240 F. Supp. 3d at 79. Rather, the *Aetna* court recognized that because Aetna had left the market as of the time of trial in 2017, "there can be no lessening of competition for 2017." *Id.* Thus, like the *Aetna* court, this Court should reject Complaint Counsel's attempt to freeze the facts as they were before Altria's discontinuation of its e-vapor products, and instead recognize the obvious fact that Altria and JLI were *not* competitors at the time of the December 20, 2018 transaction and they are not competitors now.

101. Moreover, just like the case in *Aetna*, Complaint Counsel in this case alleges—and the evidence clearly shows—that Altria shut down its e-cigarette business *because of* the Transaction; therefore, it would be "especially inappropriate to apply a legal framework that would limit judicial inquiry." *Aetna*, 240 F. Supp. 3d at 78. "Courts appropriately guard their ability to ascertain the actual facts at issue, rather than allow a party to thwart judicial review through its own machinations." *Id.* (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Response to Proposed Conclusion of Law No. 101:

The Proposed Conclusion is incorrect, incomplete, misleading, and unsupported by the record.

At the threshold, the analogy to *Aetna* is flawed to the extent the Proposed Conclusion states that "Altria shut down its e-cigarette business *because* of the Transaction." To the contrary,

as Respondents have explained, the record shows that Altria removed its e-vapor products from the market for independent business reasons before any investigation in this case. (*See* Resps.' Opening Br., Discussion, Part I, and Resps.' Reply Br., Part III.A; *see also* RFF Part IX). *Aetna* was different because the company exited the relevant business lines "shortly *after* the [government's] complaint was filed." 240 F. Supp. 3d at 74 (emphasis added). And based on "significant evidence" about the company's decision, the *Aetna* court found that the company withdrew from those businesses after filing of the government's complaint "at least in part for the purpose of improving its litigation position." *Id.* at 80.

But even if the Court were persuaded that Altria would have kept its products on the market but for the transaction, that would not affect the outcome here for three reasons.

First, despite its conclusion that Aetna had exited "for the purpose of improving its litigation position" and its associated decision to treat Aetna as an actual competitor, the *Aetna* court nonetheless refused to indulge a counterfactual view of the market at the time of the trial. *See* 240 F. Supp. 3d at 79-80. Instead, the Court treated Aetna's motivations in exiting the relevant businesses as "one piece of evidence about whether Aetna w[ould] offer plans [in the future]." *Id.* at 80. It made clear that Complaint Counsel could not "pretend" the product discontinuations did not occur for purposes of its effects analysis. *Id.* at 79-80. Rather, the Court accepted that Aetna and its merger partners were *not* competitors at the time of trial and consequently "there [could] be no lessening of competition" at that time. *Id.* at 79. The same result obtains here, because at the time of the JLI transaction, Altria's presence in the e-vapor space was limited to the speculative potential of its Growth Teams. Consequently, there could be no "loss of competition [that was] a 'sufficiently probable and imminent' result of the [investment]." *CCC Holdings*, 605 F. Supp. 2d at 35 (quoting *Marine Bancorp.*, 418 U.S. at 623 n.22).

Second, the *Aetna* court explained that "the proper timeframe for evaluating the effects of the merger on future competition must be 'functionally viewed, in the context of its particular industry' " and centered its inquiry around whether Aetna was likely to re-enter the markets from which it had withdrawn "in the near future." *Id.* at 78-79, 93. Complaint Counsel cannot make that showing here in light of the regulatory scheme that prevents Altria from bringing any improved or newly developed products to the market in the absence of PMTA approval, a process which takes at least five years, and potentially longer, (RFF ¶ 1545), and which Complaint Counsel elsewhere concedes is highly uncertain and speculative, (CC Opening Br. 91).

Third, the *Aetna* court treated Aetna as an actual competitor for reasons that do not apply here. In particular, Aetna was "continu[ing] to offer very similar products in adjacent markets" and there were "indications that [it would] once again attempt to compete in the challenged markets" as soon as the following year. 240 F. Supp. 3d at 78; *see also id.* at 88. For the reasons discussed, no analogous conclusion is tenable on this record because Altria had no "very similar products in adjacent markets" and the company's plans for future re-entry into the market were limited to its investment in the Growth Teams.

For all these reasons, the Court should take the market as it actually was on December 20, 2018 and as it remains now—with Altria absent.

102. Even if the Court decided to treat Respondent Altria as a potential competitor instead of an actual one, as shown above, Complaint Counsel has provided ample evidence proving each of the elements of an actual potential competition case. (CCFF §§ VI, X.B-D).

Response to Proposed Conclusion of Law No. 102:

The Proposed Conclusion is improper and should be disregarded because it is a proposed finding of fact couched as a proposed conclusion of law. In any event, the Proposed Conclusion is incorrect and unsupported by the record.

As an initial matter, Respondents do not agree that the actual potential competition doctrine is a viable test. That doctrine, which "rests on speculation about . . . future conduct" and "does not promote existing competition," *United States* v. *Siemens Corp.*, 621 F.2d 499, 504 (2d Cir. 1980), hinges on precisely the types of "ephemeral possibilities" the Supreme Court rejected in *Brown Shoe*, 370 U.S. at 323. But Respondents recognize that this argument is foreclosed by FTC precedent and raise the argument only to preserve it for appellate review. Respondents agree with Complaint Counsel that Complaint Counsel's claim must be analyzed under the doctrine if the Court agrees with Respondents that Altria decided to discontinue its e-vapor products independent of the transaction. (*See* CC Opening Br. 95).

Applying the actual potential competition doctrine, Complaint Counsel has not shown—whether on a "clear proof" or "reasonable probability" standard—that Altria would have been a significant competitor in the relevant market in the near future. (*See* Resps.' Opening Br., Discussion, Part II.D.3; *see also* RFF Part XVI.C). Altria had invested billions in attempting to develop potential reduced-risk products before it founded Nu Mark; each attempt was a commercial bust. (RFF ¶ 1555; Part II.A.1.b). None of the hundreds of millions of dollars invested in Nu Mark resulted in a commercially successful e-vapor product. (RFF ¶ 1555; Part II.A.1.d). Indeed, every product Nu Mark launched was acquired from another company. (RFF ¶ 1559).

But even if Altria had ultimately been able to develop or acquire a new e-vapor product, which is inherently speculative, it could not have commercialized that product without first obtaining FDA approval. (RFF ¶ 1545). "The presence of [a] regulatory scheme and need for approval" may "convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise," especially where "[t]here are no facts . . . which even permit [a court] to speculate as to the likelihood of [regulatory approval]." *Pittsburgh*, 147 F.3d at 267-68. And even

if Altria had been able (1) to develop or acquire a new product, and (2) obtain regulatory approval for that product, the complex regulatory review process would mean that it would take, in a best-case scenario, at least five years to bring the product to market, and potentially longer. (RFF ¶ 1545). In no reasonable sense would such late entry qualify as "the near future." *B.A.T. Indus.*, 1984 WL 565384, at *9.

103. "Actual potential competition rests on the theory that the merger eliminated a firm that was on the verge of entering the market de novo or through a toehold acquisition." *Polypore*, 2010 WL 9549988, at *23 n.41 (citing *Marine Bancorp.*, 418 U.S.at 633; *Yamaha*, 657 F.2d at 977-78; *Mercantile Tex. Corp.*, 638 F.2d at 1265-70)), *aff'd on other grounds*, 686 F.3d 1208 (11th Cir. 2012); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) ("The theory of the (actual potential competition) doctrine is that competition in the market would be enhanced by the addition of the new competitor and therefore the elimination of such a potential competitor would substantially lessen competition within the meaning of [Section] 7." (internal quotations and citation omitted)).

Response to Proposed Conclusion of Law No. 103:

Respondents have no specific response except to note that Complaint Counsel acknowledged in its opening statement and its opening post-trial brief that if Altria removed its products for independent business reasons, Complaint Counsel is left with only a "potential competition claim." (Tr. 73; CC Opening Br. 95).

104. "Although the Supreme Court has yet to rule specifically on the validity of the actual-potential-entrant doctrine, it has delineated two preconditions that must be present, prior to any resolution of the issue. First, it must be shown that the alleged potential entrant had 'available feasible means' for entering the relevant market, and second, 'that those means offer(ed) a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects.'" *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981) (footnote omitted) (quoting *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974)).

Response to Proposed Conclusion of Law No. 104:

Respondents agree that "the Supreme Court has yet to rule specifically on the validity of the actual-potential-entrant doctrine." As Respondents observed above in RRCoL ¶ 102, that doctrine, which "rests on speculation about . . . future conduct" and "does not promote existing

competition," *Siemens Corp.*, 621 F.2d at 504, hinges on precisely the types of "ephemeral possibilities" the Supreme Court rejected in *Brown Shoe*, 370 U.S. at 323.

The balance of the Proposed Conclusion is incomplete to the extent it ignores additional requirements set forth in the Commission's own articulation of the potential competition standard. In *B.A.T. Industries*, for example, the Commission determined that a potential competition claim requires showing "future . . . competitive conditions" of the market into which products might enter, including (1) that the market will be "concentrated"; (2) that there is "a substantial likelihood" that independent entry would "produc[e] deconcentration"; and (3) that Altria is "one of only a few equally likely actual potential entrants." 1984 WL 565384, at *7-8 (F.T.C. Dec. 17, 1984). In addition, the Commission agreed that Complaint Counsel must present (4) "clear proof" that independent entry "would have occurred within the near future" but for the acquisition. *Id.* at *9.

105. When determining whether a firm is an actual potential entrant, the appropriate question is whether the firm "probably" would have entered the relevant markets. *Yamaha*, 657 F.2d at 977. A probability standard is consistent with Section 7 of the Clayton Act. Indeed, in *Yamaha*, the Eighth Circuit "stress[ed] the word 'probably' . . . because the question under Section 7 is not whether competition was actually lessened, but whether it 'may be' lessened substantially." *Id.*

Response to Proposed Conclusion of Law No. 105:

The Proposed Conclusion is incorrect, incomplete, and inconsistent with the Commission's own precedent. As the Commission has observed, "[t]he actual potential competition doctrine rests upon firmest ground when *it is virtually certain* that, but for the merger or acquisition, the prospective entrant would have entered the market involved on an independent basis *in the near future.*" *B.A.T. Indus., Ltd.*, 1984 WL 565384, at *4 (emphases added). The timing issue will be "the most difficult to resolve in actual potential competition cases" given the inherently predictive nature of the inquiry. *Id.* at *9. Thus, the Commission's "review of the legal and economic bases

for the actual potential competition doctrine has persuaded [it] that *clear proof* that independent entry would have occurred but for the merger or acquisition should be required to establish that a firm is an actual potential competitor." *Id.* at *10 (emphasis added). In adopting the "clear proof" standard, the Commission explicitly *rejected* the Eighth Circuit's *Yamaha* "reasonable probability" standard that the Proposed Conclusion cites. *See id.* at *9.

106. In the Commission's recent applications of the actual potential competition doctrine, the Commission has applied a "reasonable probability" standard. *See In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261, at *32 (F.T.C. January 30, 2014). In *McWane*, the Commission stated that the "ultimate issue" in determining whether a firm is an actual potential competitor hinges on whether the firm's "entry was reasonably probable." *Id.* (citations omitted). Notably, the Commission cited the Eighth Circuit's decision in *Yamaha* as support for the "reasonably probable" standard. *Id*.

Response to Proposed Conclusion of Law No. 106:

The Proposed Conclusion is incorrect and inconsistent with the Commission's own precedent, and it invites the Court to engage in arbitrary and capricious decisionmaking. "[A]gencies have [an obligation to] engage[] in reasoned decisionmaking." *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011). And "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.*; *see also Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[T]he agency must at least display awareness that it is changing position and show that there are good reasons for the new policy.") (internal quotation marks and citation omitted).

Yet, if Complaint Counsel is correct in its Proposed Conclusion, the Commission's decision in *McWane* represents precisely the unreasoned, *sub silentio* policy shift that the Supreme Court has forbidden as arbitrary and capricious. *Yamaha* aside, *McWane* fails to grapple with any of the several appellate decisions addressing the "actual potential competitor" doctrine. And

McWane fails even to cite the Commission's well-reasoned opinion in *B.A.T. Industries*, where the Commission could not have been clearer that "[it] . . . adopt[s] the 'clear proof' standard" over the "reasonable probability" standard. 1984 WL 565384, at *10.

This Court should not lightly infer that the Commission intended to reject its earlier precedent. That is especially so because the distinction between the two standards was immaterial on the facts of *McWane*, in light of the Commission's conclusion that Complaint Counsel had failed to meet its burden even on the lower "reasonable probability" standard. *See* 2014 WL 556261, at *35. Instead, the Court should continue to apply the *B.A.T. Industries* "clear proof" standard.

In any event, even applying Complaint Counsel's favored standard, Complaint Counsel has not shown a "reasonable probability" that Altria would been a significant competitor in the relevant market in the near future. (*See* Resps.' Opening Br., Discussion, Part II.D.3; *see also* RFF Part XVI.C). Altria had invested billions in attempting to develop potential reduced-risk products before it founded Nu Mark; each attempt was a commercial bust. (RFF ¶ 1555; Part II.A.1.b). None of the hundreds of millions of dollars invested in Nu Mark resulted in a commercially successful e-vapor product. (RFF ¶ 1555; Part II.A.1.d). Indeed, every product Nu Mark launched was acquired from another company. (RFF ¶ 1559).

But even if Altria had ultimately been able to develop or acquire a new e-vapor product, which is inherently speculative, it could not have commercialized that product without first obtaining FDA approval. (RFF ¶ 1545). "The presence of [a] regulatory scheme and need for approval" may "convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise," especially where "[t]here are no facts . . . which even permit [a court] to speculate as to the likelihood of [regulatory approval]." *Pittsburgh*, 147 F.3d at 267-68. And even

if Altria had been able (1) to develop or acquire a new product, and (2) obtain regulatory approval for that product, the complex regulatory review process would mean that it would take, in a best-case scenario, at least five years to bring the product to market. (RFF ¶ 1545). In no reasonable sense would such late entry qualify as "within a reasonable period of time." *FTC* v. *Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015).

107. Respondents' reliance on *In re B.A.T. Industries, Ltd.*, in which the Commission chose to apply what it termed a "clear proof" standard, is misplaced. 104 F.T.C. 852, 926 (1986). Not only does *B.A.T. Industries* predate the Commission's more recent applications of a "reasonable probability standard," but it was a unique "test case to see if purely objective evidence would establish liability under the actual potential entrant theory." *Id.* at 947 (Bailey, concurring). But even assuming *arguendo* that the "clear proof" standard is the correct standard of proof, the evidence proffered by Complaint Counsel clearly meets even this more stringent standard. (CCFF §§ VI, X.B-D).

Response to Proposed Conclusion of Law No. 107:

The Proposed Conclusion is incorrect and inconsistent with the Commission's own precedent, and it invites the Court to engage in arbitrary and capricious decisionmaking. "[A]gencies have [an obligation to] engage[] in reasoned decisionmaking." *Judulang*, 565 U.S. at 53. And "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *Fox Tel.*, 556 U.S. at 515. "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.*; *see also Encino Motorcars*, 136 S. Ct. at 2126 ("[T]he agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." (internal quotation marks and citation omitted)).

The Proposed Conclusion's reference to "more recent applications" in *McWane* represents precisely the unreasoned, *sub silentio* policy shift that the Supreme Court has forbidden as arbitrary and capricious. *Yamaha* aside, the Commission's decision in *McWane* fails to grapple with any of the several appellate decisions addressing the "actual potential competitor" doctrine. And

McWane fails even to cite the Commission's well-reasoned opinion in *B.A.T. Industries*, where the Commission could not have been clearer that "[it] . . . adopt[s] the 'clear proof' standard" over the "reasonable probability" standard. 1984 WL 565384, at *10.

This Court should not lightly infer that the Commission intended to reject its earlier precedent. That is especially so because the distinction between the two standards was immaterial on the facts of *McWane*, in light of the Commission's conclusion that Complaint Counsel had failed to meet its burden even on the lower "reasonable probability" standard. *See* 2014 WL 556261, at *35. Instead, the Court should continue to apply the *B.A.T. Industries* "clear proof" standard.

As to the application of the "clear proof" standard on the facts, Complaint Counsel has not provided "clear proof" that Altria would been a significant competitor in the relevant market in the near future. (*See* Resps.' Opening Br., Discussion, Part II.D.3; *see also* RFF Part XVI.C). Altria had invested billions in attempting to develop potential reduced-risk products before it founded Nu Mark; each attempt was a commercial bust. (RFF ¶ 1555; Part II.A.1.b). None of the hundreds of millions of dollars invested in Nu Mark resulted in a commercially successful e-vapor product. (RFF ¶ 1555; Part II.A.1.d). Indeed, every product Nu Mark launched was acquired from another company. (RFF ¶ 1559).

But even if Altria had ultimately been able to develop or acquire a new e-vapor product, which is inherently speculative, it could not have commercialized that product without first obtaining FDA approval. (RFF ¶ 1545). "The presence of [a] regulatory scheme and need for approval" may "convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise," especially where "[t]here are no facts . . . which even permit [a court] to speculate as to the likelihood of [regulatory approval]." *Pittsburgh*, 147 F.3d at 267-68. And even

if Altria had been able (1) to develop or acquire a new product, and (2) obtain regulatory approval for that product, the complex regulatory review process would mean that it would take, in a best-case scenario, at least five years to bring the product to market. (RFF ¶ 1545). In no reasonable sense would such late entry qualify as "the near future." *B.A.T. Indus.*, 1984 WL 565384, at *9.

VI. THE PROPOSED ORDER IS WARRANTED

108. Respondents Altria and JLI's agreement constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. To address competitive harms caused by their agreements, the Proposed Order is warranted.

Response to Proposed Conclusion of Law No. 108:

The Proposed Conclusion is incorrect and unsupported by the record. For the reasons set forth in Respondents' Opening and Reply Briefs, Complaint Counsel has not proven a violation of the antitrust laws, so it is not entitled to a remedy. But even were the Court to find a violation, Complaint Counsel's request that the Court terminate the noncompete and compel Altria to divest its shares should be denied. (*See* Resps.' Opening Br., Discussion, Part VI; Resps.' Reply Br., Part VI).

In particular, the lynchpin of an antitrust remedy must be the "restor[ation] [of] competition," not the "punish[ment] [of] antitrust violators." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). Yet here that is impossible in light of the regulatory regime to which Respondents are subject. Because the PMTA deadline has passed, Altria has no e-vapor product that it could market in the absence of FDA prior approval. (RFF ¶¶ 60-66, 119). And, even if Altria did, Complaint Counsel's substantially overbroad Proposed Order lacks any "reasonable relation" to any anticompetitive conduct and would thus still fail to restore competition. *See Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946).

These flaws underscore the proposition that "[a]bsent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief." *Deutsche Telekom*, 439 F. Supp. 3d at 230 n.23 (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001)); *see also* Sherman Act Section 2 Joint Hr'g: Remedies Hr'g Tr. 60 (Mar. 29, 2007) (Remarks of William H. Page) ("Sherman Act Hr'g") ("[R]emedies should be proportional to the strength of the proof that [defendant's] illegal actions actually reduced competition . . . . [W]here you have that relatively weak evidence of likely anticompetitive effect, then you need more evidence to support more [d]raconian remedies."). Here, competition flourished in the wake of the transaction, and Complaint Counsel has made no showing that nullifying the parties' deal would enhance it.

In addition, termination of the noncompete and divestiture of Altria's stake—at this delicate moment in JLI's existence—would harm "the interest of the general public." *United States* v. *Am. Tobacco Co.*, 221 U.S. 106, 185 (1911). It is the investment, paired with the noncompete to protect JLI's sensitive information, that enables Altria to provide ongoing critical regulatory support to JLI as it pursues its PMTA and prepares other applications, including a Modified Risk Tobacco Product application. (RFF ¶¶ 1265-67).

Finally, under the unique circumstances of this case, divestiture would be fundamentally inequitable to Altria in a manner that is tantamount to punishment prohibited by the Supreme Court. Although requiring Altria to divest would do nothing to promote competition in the short- and medium-term (or potentially ever), it would ensure that Altria and its stockholders would not be able to see any return on its investment, which it has already written down by over $11 billion (almost 90 percent). (RFF ¶¶ 1141-50).

109. Respondents' Transaction also violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The Proposed Order is warranted to address competitive harms caused by the Transaction.

Once Complaint Counsel has established a violation of Section 7, "all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

Response to Proposed Conclusion of Law No. 109:

The Proposed Conclusion is incorrect and unsupported by the record. For the reasons set forth in Respondents' Opening and Reply Briefs, Complaint Counsel has not proven a violation of Section 7 of the Clayton Act, so it is not entitled to a remedy. But even were the Court to find a violation, Complaint Counsel's request that the Court terminate the noncompete and compel Altria to divest its shares should be denied, together with any other remedy suggested by the Proposed Order. (*See* Resps.' Opening Br., Discussion, Part VI; Resps.' Reply Br., Part VI; *see also* RRCoL ¶ 108).

110. Complaint Counsel met its burden of proof in support of Count I and Count II of the Complaint.

Response to Proposed Conclusion of Law No. 110:

The Proposed Conclusion is incorrect and unsupported by the record, for the reasons set forth in Respondents' Opening and Reply Briefs.

111. Entry of the Proposed Order is necessary and appropriate to remedy and prevent the violations of law found to exist. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-30 (1957).

Response to Proposed Conclusion of Law No. 111:

The Proposed Conclusion is incorrect, as Respondents have explained. (*See* Resps.' Opening Br., Discussion, Part VI; Resps.' Reply Br., Part VI; *see also* RRCoL ¶ 108).

In particular, the Proposed Order is inappropriate because as drafted it would undermine competition and potentially hurt consumers. For example, the cease-and-desist provision imposes an absolute prohibition on noncompete agreements between either Respondent and "any Person" in the "development, manufacturing, distribution or sale of E-Cigarettes." (CC Proposed Order, Part II.A). This would affect contractual relationships up and down the manufacturing,

distribution, and retail channels, as well as hinder the very research and development efforts that Complaint Counsel claims Respondents *should have* entered into instead of investing in JLI. (*See, e.g.*, CC Opening Br. 81-82). Beyond the cease-and-desist provision, the prior approval provision covers "*any* agreement or business transaction" with "*any* Person that develops, manufactures, sells, or distributes E-Cigarettes." (CC Proposed Order, Parts I.G, II.B (emphasis added)). This provision thus requires prior approval for almost any agreement necessary to operate as an e-vapor manufacturer. It would clearly chill or even preclude Altria from working with another company to develop or promote a new e-cigarette product, which would implicate the very same types of agreements that Complaint Counsel now argues Altria should have continued to pursue. (*See, e.g.*, CC Opening Br. 81-82). In short, the Proposed Order includes provisions that are the exact opposite of "measures effective to restore competition." *du Pont*, 366 U.S. at 326.

The Proposed Order is also inappropriate because it exceeds the contemplated relief as disclosed by Complaint Counsel in the Complaint. For example, the cease-and-desist provision in the Notice encompassed only "future non-compete agreements *between Respondents*," while the Proposed Order reaches *any* noncompete related to the "development, manufacturing, distribution or sale of E-cigarettes." (*Compare* Notice of Contemplated Relief ¶ (b) (emphasis added), *with* CC Proposed Order Part II.A). Similarly, the Notice included a prior-approval requirement for transactions "*between Altria and JLI* that combine[] their businesses in the relevant market," while the Proposed Order requires prior approval for *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." (*Compare* Notice of Contemplated Relief ¶ (c), with CC Proposed Order Part II.B). Such requests are "outside the scope of the violations alleged in the Complaint and outside the scope of the notice of contemplated relief attached to the Complaint." *In re N.C. Bd.*

of Dental Examiners, 152 F.T.C. 75, 97 (2011) (*NCBDE*) (initial decision). What is more, Complaint Counsel's thirteenth-hour attempt to modify the relief it seeks has unfairly deprived Respondents of an opportunity to be heard at trial on the scope of these remedial provisions. Without proper notice and opportunity to be heard, Respondents would be deprived of due process if these remedies were imposed on them. *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing . . . .") (internal quotation marks omitted). Thus, the Court should also decline to enter the Proposed Order to the extent it expands terms beyond what was sought in the Complaint.

Finally, the Proposed Order is inappropriate because it is improperly punitive. "Equitable relief in an antitrust case should not embody harsh measures when less severe ones will do." *New York* v. *Microsoft Corp.*, 224 F. Supp. 2d 76, 100 (D.D.C. 2002) (*Microsoft II*) (internal quotations omitted). Moreover, a court may properly consider "economic hardship" when choosing "among two or more effective remedies." *du Pont*, 366 U.S. at 327. Yet the Proposed Order ignores this clear law. For example, the rescission provision would unduly punish Altria by requiring that, "without regard" to the divestiture, "Respondents rescind the Transaction Agreements and the Cooperation Agreements." (CC Proposed Order Part III.) Rescission of governance rights negotiated by Altria that are embedded in the transaction agreements—*prior to divestiture*—would prevent Altria from obtaining *any* value for those rights whatsoever, even though those rights were clearly part of the consideration Altria paid for in its multibillion-dollar investment. Likewise, recission of the Purchase Agreement would be fatal to JLI as it does not have the funds that would be necessary to effect rescission of the Purchase Agreement. And rescission of the Services Agreement, potentially while appellate review is still pending given the Proposed Order's phased

approach, would abruptly deprive JLI of its key partner in its continuing pursuit of PMTA authorization, crucial to keeping JLI's innovative products on the market and to introducing new products. No evidence has been developed by Complaint Counsel in these proceedings regarding the need for rescission or the effects it would have; Complaint Counsel's pretrial briefing discussed only divestiture and the termination of the noncompete. But it is plain that the proposed provision would punish Respondents and harm competition.

112. The Court has "wide discretion" in its choice of remedy where there is "a reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946).

Response to Proposed Conclusion of Law No. 112:

The Proposed Conclusion is incomplete. The Court's discretion is far from unlimited.

First, courts have recognized that "[e]quitable relief in an antitrust case should not embody harsh measures when less severe ones will do." *Microsoft II*, 224 F. Supp. 2d at 100 (internal quotations omitted). "Mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." *Microsoft Corp.*, 253 F.3d at 106 (quoting Areeda & Hovenkamp, Antitrust Law ¶ 650a). In particular, as relevant here, "divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain." *Id.* at 80. Moreover, a court may properly consider "economic hardship" when choosing "among two or more effective remedies." *du Pont*, 366 U.S. at 327.

Second, courts will not order relief "outside the scope of the violations alleged in the Complaint and outside the scope of the notice of contemplated relief attached to the Complaint." *NCBDE*, 152 F.T.C. at 97.

Third, due process imposes constraints on the relief that the Court can order, as Respondents must be given "notice and opportunity for hearing" as to the remedy. *See Loudermill*, 470 U.S. at 542.

Fourth, "[a]bsent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief." *Deutsche Telekom*, 439 F. Supp. 3d at 230 n.23 (quoting *Microsoft Corp.*, 253 F.3d at 80); *see also* Sherman Act Hr'g, *supra* ("[R]emedies should be proportional to the strength of the proof that [defendant's] illegal actions actually reduced competition . . . . [W]here you have that relatively weak evidence of likely anticompetitive effect, then you need more evidence to support more [d]raconian remedies.").

113. The Court is not limited to prohibiting the illegal practices in the precise form in which it finds they existed in the past. The Court "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *In re Polygram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at *29 (F.T.C. July 24, 2003).

Response to Proposed Conclusion of Law No. 113:

The Proposed Conclusion is incomplete and thus misleading. As the Commission said in its very next sentence of *Polygram*: "The remedy selected, however, must be reasonably related to the violation found to exist." 2003 WL 25797195, at *29 (citing *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946)). Particularly as it relates to divestment, "[a]bsent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief." *Deutsche Telekom*, 439 F. Supp. 3d at 230 n.23 (quoting *Microsoft Corp.*, 253 F.3d at 80). In addition, as noted above, "equitable relief in an antitrust case should not embody harsh measures when less severe ones will do," *Microsoft II*, 224 F. Supp. 2d at 100 (internal quotations omitted), and a court may properly consider "economic hardship" when choosing "among two or more effective remedies," *du Pont*, 366 U.S. at 327. Finally, due process also imposes constraints on the relief that the Court can order, as Respondents must be given "notice and opportunity for hearing" as to the remedy. *See Loudermill*, 470 U.S. at 542.

Dated: October 20, 2021

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CERTIFICATE OF SERVICE

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: October 20, 2021

s/ Beth Wilkinson

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