

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

In the Matter of

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

and

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

DOCKET NO. 9393

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

I. BACKGROUND 4

 1. The Rise of Electronic Cigarettes 4

 a. E-Cigarettes Are Critically Important to the Tobacco Companies 4

 b. Closed-System E-Cigarettes Differ from Open-Tank E-Cigarettes 5

 c. Closed-System E-Cigarettes Include Cigalikes and Pod-Based Products 5

 d. FDA Regulation and Other Barriers Limit Market Participation 6

 2. The Market for Closed-System E-Cigarettes in the United States Is Dominated by a Very Small Group of Competitors 7

 a. Altria 7

 b. JLI 8

 c. Reynolds 9

 d. ITG 9

 e. JTI 10

 f. NJOY 10

 3. The Transaction Includes a Non-Compete Prohibiting Altria from Competing in E-Cigarettes 10

 4. Altria Was a Meaningful and Well-Positioned Competitor Who Was Committed to the E-Cigarette Category over the Long-Term 12

 a. Altria was a Major Competitor in Closed-System E-Cigarettes 12

 b. Altria was Committed to Competing in E-Cigarettes Long-Term, and was Well-Positioned to Do So 14

 5. JLI’s Growth Threatened Altria 18

 6. As Part of Its Agreement to Acquire an Interest in JLI, Altria Agreed to—and Did—Exit the E-Cigarette Business 18

 7. The Non-Compete Foreclosed Other Avenues for Altria to Compete in the Closed-System E-Cigarette Market 27

II. ARGUMENT 30

 1. The Relevant Market Is Sales of Closed-System E-Cigarettes in the United States 30

 a. The Relevant Product Market Is Closed-System E-Cigarettes 30

 i. Closed-System E-Cigarettes Are a Relevant Product Market Based on the *Brown Shoe* Factors 32

 ii. The Closed-System E-Cigarette Market Excludes Open-Tank E-Cigarettes Because They Are Not Close Substitutes 35

- iii. The Hypothetical Monopolist Test Confirms Closed-System E-Cigarettes Are a Relevant Product Market..... 37
 - b. The Relevant Geographic Market Is the United States..... 38
- 2. Respondents’ Agreement Violates Section 1 of the Sherman Act..... 38
 - a. Altria and JLI agreed that Altria would exit the U.S. e-cigarette market in exchange for its stake in JLI..... 39
 - i. Respondents’ communications establish that both firms understood that Altria could not continue to compete in the e-cigarette market 40
 - ii. Altria’s outside agreement with PMI presented obstacles to Altria divesting or contributing its e-vapor assets..... 41
 - iii. In the absence of the transaction, the discontinuation of Nu Mark was against Altria’s economic self-interest..... 42
 - iv. The Timeline of Altria’s Actions is Highly Suspect..... 44
 - v. Respondents’ words and actions further support finding an anticompetitive agreement..... 45
 - vi. Altria’s proffered explanations for its decision to exit the e-cigarette market are pretextual and inconsistent..... 46
 - b. Respondents’ Agreement is Unlawful Under the Rule of Reason..... 51
 - i. The agreement has harmed and will continue to harm consumers 52
 - ii. Respondents cannot show procompetitive justifications for their Agreement 55
 - iii. Even if the Respondents could show procompetitive justifications, the Agreement was not necessary to achieve them..... 56
 - iv. The competitive harm outweighs any benefits 57
 - c. Standing alone, the written Non-Compete also violates Section 1 of the Sherman Act..... 57
 - i. Respondents cannot show the Non-Compete agreement is ancillary to an otherwise lawful transaction 58
 - ii. Even if the Non-Compete was ancillary to an otherwise lawful transaction, it fails under the rule of reason 60
- 3. The Transaction Violates Section 7 of the Clayton Act..... 60
 - a. Applicable Legal Standard Under Section 7..... 60
 - b. The Transaction Is Presumptively Unlawful in the Market for Sales of Closed-System E-Cigarettes in the United States 62
 - c. Evidence of Competitive Harm Bolsters the Presumption 64
 - d. Respondents Cannot Rebut the Strong Presumption of Illegality 66
 - i. Entry or expansion will not be timely, likely, or sufficient to counteract the anticompetitive effects of the Transaction 67
 - ii. The claimed efficiencies are insufficient to rebut the presumption of harm 69

a. Respondents’ Claimed Efficiencies Cannot be Verified.....	70
b.	71
e. The Transaction Also Eliminated Altria as a Potential Competitor to JLI.....	72
4. The Appropriate Remedies are the Complete Divestiture of Altria’s Equity Stake and the Immediate Termination of the Non-Compete Agreement.....	74
CONCLUSION	76

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 30, 31, 61

California Dental Ass’n v. FTC, 526 U.S. 756 (1999) 52

Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 51

Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410 (5th Cir. 2008) 62

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998) 39, 43

Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50 (2nd Cir. 1997) 52, 55

Cont’l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 40

Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010) 51

DTE Energy Co., No. C-4691 (F.T.C. Dec. 13, 2019) 58

FTC v. Arch Coal, 329 F. Supp. 2d 109 (D.D.C. 2004) 30

FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998) 71

FTC v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009) 67, 69

FTC v. Freeman Hosp., 69 F.3d 260 (8th Cir. 1995) 38

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001) *passim*

FTC v. Indiana Fed’n of Dentists, 476 U.S. 447 (1986) 30, 51, 55

FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865 (E.D. Mo. 2020) 30, 31, 61

FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016) 61, 69

FTC v. Ruberoid Co., 343 U.S. 470 (1952) 75

FTC v. Staples, Inc. (“Staples I”), 970 F. Supp. 1066 (D.D.C. 1997) 69

FTC v. Staples, Inc. (“Staples II”), 190 F. Supp. 3d 100 (D.D.C. 2016) 63, 65, 66, 67

FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015) 74

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

FTC v. Tronox Ltd., 332 F. Supp. 3d 187 (D.D.C. 2018)..... 30, 62, 63, 66

FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991)..... 61

FTC v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27 (D.D.C. 2018)..... 31, 69

Geneva Pharm. Tech. Corp. v. Barr Labs, Inc., 386 F.3d 485 (2d Cir. 2004) 51

Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986)..... 61

Impax Lab’ys, Inc. v. FTC, 994 F.3d 484 (5th Cir. 2021) 49, 52, 55

In re 1-800 Contacts, Inc., 2018 WL 6078349 (F.T.C. Nov. 7, 2018) *passim*

In re Benco Dental Supply Co., 2019 WL 5419393 (F.T.C. Oct. 15, 2019) 30, 39, 40

In re Flat Glass Antitrust Litig., 385 F.3d 350 (3d Cir. 2004)..... 39

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) 39, 45

In re McWane, Inc., 2012 WL 4101793 (F.T.C. Sept. 14, 2012) 42, 45, 46

In re OSF Healthcare Sys., 2012 FTC LEXIS 76, *46 (Apr. 4, 2012)..... 62

In re Otto Bock HealthCare N. America, Inc., 2019 WL 5957363 (F.T.C. Nov. 1, 2019) 31, 32

In re PolyGram Holding, Inc., 136 F.T.C. 310 (July 24, 2003) 75

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

In re Polyurethane Foam Antitrust Litig., 152 F. Supp. 3d 968 (N.D. Ohio 2015)..... 43

In re Publ’n Paper Antitrust Litig., 690 F.3d 51 (2d Cir. 2012)..... 40

In re Urethane Antitrust Litig., 913 F. Supp. 2d 1145 (D. Kan. 2012)..... 44

In re Wholesale Grocery Prod. Antitrust Litig., 752 F.3d 728 (8th Cir. 2014) 39

Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998)..... 56

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)..... 52

Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981)..... 58

Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys., 922 F.3d 713 (6th Cir. 2019) 59

NCAA v. Board of Regents, 468 U.S. 85 (1984)..... 56

Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) 30, 51

Oltrin Solutions, LLC, No. C-4388 (F.T.C. Mar. 7, 2013) 58

Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) 52, 57

Polygram Holding, Inc. v. F.T.C., 416 F.3d 29 (D.C. Cir. 2005)..... 59

Polypore Int’l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012)..... 30

Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011) 38

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)..... 50

Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998)..... 46

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986)..... 58, 59

Texaco Inc. v. Dagher, 547 U.S. 1 (2006) 58

U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986 (11th Cir. 1993) 31

United States v. Aetna Inc., 240 F. Supp. 3d 1 (D.D.C. 2017) 63, 65, 74

United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C. 2017) 65

United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015)..... 39

United States v. Apple, Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013)..... 39

United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990)..... 62, 65, 66

United States v. Citizens & S. Nat’l Bank, 422 U.S. 86 (1975) 66

United States v. Dairy Farmers of Am., Inc., 426 F.3d 850 (6th Cir. 2005)..... 75

United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957) 61, 74, 75

United States v. El Paso Nat. Gas Co., 376 U.S. 651 (1964)..... 74

United States v. H&R Block, 833 F. Supp. 2d 36 (D.D.C. 2011) 69, 70, 71

United States v. Marine Bancorporation, 418 U.S. 602 (1974) 73

United States v. Philadelphia Nat’l Bank, 374 U.S. 321 (1963) 62

W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010)..... 39

White v. R.M. Packer Co., 635 F.3d 571 (1st Cir. 2011) 46

Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981) 72, 73, 74

Statutes

15 U.S.C. § 1 38, 59

15 U.S.C. § 18..... 60

15 U.S.C. § 45..... 38

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Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1203 (4th Ed. 2013-2018)..... 61

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INTRODUCTION

In 2018, the leading U.S. tobacco company, Altria Group, Inc., agreed to exit the closed-system e-cigarette market in exchange for a 35 percent equity stake in the dominant e-cigarette supplier, Juul Labs, Inc. (“JLI”), in violation of the FTC, Sherman, and Clayton Acts. The results of this deal are repugnant to the purpose of the antitrust laws: Altria took a cut of JLI’s lucrative e-cigarette profits instead of competing against the market leader now or in the future,¹ while JLI enjoyed a multibillion-dollar payday and the comfort of having eliminated a dangerous rival from the marketplace.²

Prior to entering into its illegal arrangement with JLI, Altria recognized the strategic importance of e-cigarettes in the face of the steady decline of its traditional cigarette business.³ Seeking to establish a competitive position in this critical segment, Altria competed aggressively against JLI along a number of dimensions, including price, innovation, and shelf space. Altria’s exit deprived consumers of the benefits arising from this competition while eliminating one of the most significant threats to JLI’s continued dominance. After Altria’s exit, just four suppliers controlled over 90 percent of the closed-system e-cigarette market.⁴

The evidence of an illegal agreement that resulted in Altria orchestrating its own exit from the closed-system e-cigarette market is overwhelming. Direct communications between the Altria and JLI leadership teams throughout the negotiations make it clear that JLI demanded (and Altria understood) that competition between the two firms had to end if there was to be a deal:

¹ PX1274 (Altria) at 5 (Remarks by Howard Willard, Altria Chairman and CEO, and other members of Altria’s senior management team, 2019 Consumer Analyst Group of New York (CAGNY) Conference) (“Throughout our analysis, it became clear that investing with JUUL to accelerate its global growth was more value accretive than investing internally to leap frog its product.”).

² PX2170 (JLI) at 10 (“\$12 billion dollars that could have been spent competing with JUUL and our mission will now be used to help JUUL and our mission.”).

³ PX1172 (Altria) at 7 (“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.”).

⁴ See *infra* § I.2.

- On July 27, 2018, as negotiations were beginning to heat up between Respondents, JLI’s investment banker informed a senior member of the JLI leadership team that he was “**under the impression that [Altria] would just shut down Mark 10.**”⁵
- Just three days later, JLI presented Altria with a term sheet that offered several pathways for Altria to meet JLI’s non-compete demands, conveniently including the option of [REDACTED]
[REDACTED]⁶
- Altria’s August 5, 2018 draft talking points for negotiations with JLI emphasized Altria’s good faith gesture of “demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.”⁷
- An October 5, 2018 letter from Altria’s CEO to JLI’s CEO confirmed that “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.”⁸

Having signaled to JLI that its demands would ultimately be met, Altria began taking steps to fulfill that obligation. Altria’s exit occurred through the removal of its MarkTen Elite pod-based e-cigarette product in October 2018 and the shutdown of its entire e-cigarette business in early December 2018.⁹ Altria’s exit eliminated current competition from Altria’s e-cigarette products, including MarkTen Elite, which was “getting traction with consumers” after its introduction just eight months earlier,¹⁰ and MarkTen cigalikes, which were growing in sales.¹¹

Altria cited a variety of pretextual justifications, such as concerns over youth vaping, to disguise the true motive for its actions.¹² Given Altria’s longstanding commitment to growing its e-cigarette business and its prior communications with JLI, Altria’s claim that these actions were

⁵ PX2330 (JLI) at 1 (emphasis added).

⁶ PX1300 (Altria) at 5.

⁷ PX1390 (Altria) at 3-4.

⁸ PX2152 (JLI) at 3.

⁹ See *infra* § I.6.

¹⁰ PX9047 (Altria 2Q2018 Earnings Call) at 10.

¹¹ PX7003 (Quigley (Altria) IHT at 152).

¹² See *infra* § II.2.a.vi.

wholly independent of the transaction already strained credulity. When one also considers that Altria completed the shutdown of its e-cigarette business less than two weeks before the announcement of the transaction, that claim requires a willing suspension of disbelief.

The plain language of the non-compete removes any doubt as to the transaction’s impact on future competition: upon signing, Altria was unable to even begin taking steps to compete against JLI for a minimum of six years and had to end all of its e-cigarette R&D partnerships.¹³ The harm from this action was significant: in the five years preceding the non-compete, Altria had invested hundreds of millions of dollars in ongoing efforts to improve its existing e-cigarettes and develop next-generation e-cigarette products.¹⁴ Altria had also developed an impressive network of partners who were actively working on short, medium, and long-term strategies for improving its competitive position.¹⁵ All of the potential benefits to consumers that could have resulted from these innovation efforts were eliminated with the stroke of a pen.

Against the serious harm to competition caused by the transaction, Respondents offer no procompetitive benefits. First, Altria and JLI gutted nearly all of the potential efficiencies in January 2020 when they amended the transaction and eliminated many of the services Altria was to provide to JLI.¹⁶ The sole remaining efficiency claimed by Respondents—regulatory support services—centers on the vague notion that undefined Altria “expertise” will somehow assist JLI with obtaining FDA approval for its products. Respondents have not even come close to meeting their burden of verifying this efficiency claim or showing that it is merger specific. Nor can such a vague claim outweigh the harm resulting from the agreement under a rule of reason analysis.

¹³ See *infra* § I.3

¹⁴ See *infra* § I.4.b.

¹⁵ See *infra* § I.2.e.

¹⁶ Even if those services had not been discontinued, they would still fail to qualify as cognizable efficiencies under the Horizontal Merger Guidelines. U.S. Dep’t of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010) [hereinafter *Horizontal Merger Guidelines*]; see *infra* § 3(d)(2).

I. BACKGROUND

1. The Rise of Electronic Cigarettes

a. E-Cigarettes Are Critically Important to the Tobacco Companies

Electronic cigarettes (“e-cigarettes”)¹⁷ are critically important to the future of tobacco companies because they represent a fast-growing category, whereas traditional combustible cigarette volumes have declined steadily for decades. [REDACTED]

[REDACTED]¹⁸ To offset this volume decline, cigarette manufacturers have relied on regular price increases.¹⁹ In late 2017, however, the e-cigarette category began to experience rapid growth, driven almost entirely by JLI’s e-cigarette product, JUUL.²⁰ [REDACTED]
[REDACTED]²¹ thereby threatening the ability of traditional tobacco companies to maintain their profit levels.²²

Given the long-term decline in combustible cigarettes—and the acceleration of that decline with the rise of JUUL—[REDACTED]
[REDACTED]
[REDACTED]²³ Altria has publicly acknowledged the critical importance of its participation in the e-cigarette category, with its then-CEO remarking in the *Wall Street Journal* that, “[a]t a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core

¹⁷ The industry terms “e-cigarette” and “e-vapor” are used interchangeably throughout this brief.

¹⁸ See [REDACTED].

¹⁹ PX7004 (Willard (Altria) IHT at 42).

²⁰ PX1424 (Altria) at 3-4, 10; [REDACTED]; see also PX1288 (Altria) at 2 (attaching Citi analyst reporting “[N]ow the U.S. tobacco market is beginning to be disrupted by JUUL — U.S. cigarette volumes fell 6% in 1Q18 according to Nielsen, about 1-2% worse than historic models would suggest. This is due to the rapid growth of JUUL.”).

²¹ See [REDACTED].

²² See, e.g., PX2168 (JLI) at 4 (attaching Morgan Stanley report opining that “[g]iven [Altria]’s share price performance YTD, investors are clearly concerned about the impact of competitive products such as JUUL on [Altria]’s ability to sustain its topline and EPS growth algorithm”).

²³ [REDACTED]; see also [REDACTED].

business, if you don't invest in the new areas you potentially put your ability to deliver that financial result at risk.”²⁴

b. Closed-System E-Cigarettes Differ from Open-Tank E-Cigarettes

There are two main types of e-cigarettes: closed-system e-cigarettes and open-tank e-cigarettes. A closed-system e-cigarette only works with the sealed, pre-filled pods or cartridges specifically designed for the device and consumers cannot fill or refill those pods and cartridges with nicotine-containing e-liquid themselves.²⁵ In contrast, open-tank e-cigarettes have refillable tanks that users manually fill with e-liquid, which allows them to select from and mix a wide assortment of (often flavored) e-liquids.²⁶ Open-tank e-cigarettes tend to be larger than closed-system e-cigarettes and also allow users to customize many aspects of the device, such as batteries, coils, and power levels.²⁷

c. Closed-System E-Cigarettes Include Cigalikes and Pod-Based Products

Closed-system e-cigarettes consist of cigalikes and pod-based products, which offer similar user experiences, but with different aesthetics (i.e., shape and size). Cigalikes' size and shape are similar to traditional cigarettes, whereas pod-based products often resemble USB drives. Cigalikes and pod-based products both use sealed e-liquid pods or cartridges.²⁸ Both cigalikes and pod-based products may, or may not, contain nicotine salts.²⁹ Both forms can be disposable, or can be rechargeable devices into which new pre-filled pods or cartridges can be inserted.³⁰

²⁴ PX1172 (Altria) at 5; *see also* [REDACTED].

²⁵ PX7002 (Schwartz (Altria) IHT at 25-26); *see also* PX8004 (Farrell (NJOY) Decl. ¶ 11). Some closed-system products are intended to be discarded after one use, but most are multi-use devices that allow the consumer to insert a new sealed cartridge or pod once the initial one runs out of e-liquid.

²⁶ [REDACTED]; *see also* PX7004 (Willard (Altria) IHT at 58).

²⁷ PX7004 (Willard (Altria) IHT at 58).

²⁸ PX2579 (JLI) at 181; [REDACTED].

²⁹ PX5001 ¶ 30 (Rothman Rebuttal Report); PX1129 (Altria) at 12; [REDACTED].

³⁰ For example, NJOY Daily is a disposable cigalike product, and Puff Bar is a disposable pod-based product.

d. FDA Regulation and Other Barriers Limit Market Participation

FDA regulation and other barriers limit participation in the U.S. e-cigarette industry. In 2016, the FDA issued regulations requiring that manufacturers of new e-cigarette products submit a Premarket Tobacco Application (“PMTA”) and obtain a marketing authorization before they can sell their products.³¹ Existing e-cigarettes that were on the market prior to the effective date of the “Deeming Regulations” (August 8, 2016) could remain on the market, but the manufacturers of those products were required to file a PMTA by a certain deadline, which after several changes, was ultimately set at September 9, 2020.³² Manufacturers can submit PMTAs for new e-cigarette products after the deadline, but they cannot sell those products until receiving PMTA approval.³³ Preparing a PMTA requires a significant amount of resources—time, personnel, and money—which can range from { [REDACTED]

{ [REDACTED] }.³⁴

Firms seeking to compete in the U.S. e-cigarette space must also secure sufficient shelf space at convenience stores to generate awareness for their products.³⁵ { [REDACTED]

See PX8004 (Farrell (NJOY) Decl. ¶ 4); Matt Wallace, “Puff Bar Disposable Vapes | Save Money,” Mig Vapor, May 12, 2021, <https://www.migvapor.com/ecig-news/puff-bar-disposable-vapes-save-money>.

³¹ *See* PX9026 at 5-7 (FDA “Deeming Regulations” Final Rule, 81 Fed. Reg. 28974 (May 10, 2016)); PX8005 (Graham (NJOY) Decl. ¶¶ 16-19).

³² When the “Deeming Regulations” Final Rule went into effect in August 2016, the PMTA submission deadline was initially set as August 8, 2018. PX9026 at 39. In August 2017, the FDA pushed the deadline for e-cigarettes to August 8, 2022. [REDACTED]. This extension was challenged in federal court and, in July 2019, the district court held that PMTAs must be filed by May 12, 2020. *See Am. Acad. of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 487 (D. Md. 2019). In April 2020, due to the COVID-19 pandemic, the deadline was extended to September 9, 2020. PX9097 (FDA) at 1. Separately, in February 2020, a new FDA enforcement policy went into effect that required all non-tobacco, non-menthol flavored cartridge based e-cigarettes (such as fruit and mint-flavored pods) be removed from the market until they receive PMTA approval. PX9016 (FDA News Release) at 1; PX9069 (Washington Post Article) at 1-5.

³³ PX9097 (FDA) at 1.

³⁴ *See, e.g.*, [REDACTED] }; [REDACTED] }; [REDACTED] }.

³⁵ [REDACTED] }; PX7009 (Burns (JLI) IHT at 20-21).

[REDACTED] }³⁶ As the market leader in the overall tobacco category, Altria “typically get[s] quite good display space” because of “the strength of [its] brands.”³⁷ [REDACTED]

[REDACTED] }³⁸

2. The Market for Closed-System E-Cigarettes in the United States Is Dominated by a Very Small Group of Competitors

Sales of closed-system e-cigarettes in the U.S. are concentrated among a small number of competitors. [REDACTED]

[REDACTED]

[REDACTED] }³⁹

a. Altria

Altria is the long-standing market leader for tobacco products in the U.S.⁴⁰ Altria established an e-cigarette-focused subsidiary called Nu Mark around 2011 and introduced its first MarkTen e-cigarette products (MarkTen cigalikes) in 2013.⁴¹ By the fall of 2018, Altria sold a broad portfolio of e-cigarette products including cigalike products MarkTen, MarkTen Bold, and MarkTen XL, and pod-based products MarkTen Elite and Apex.⁴² Altria acquired the rights to

³⁶ [REDACTED]

³⁷ PX7004 (Willard (Altria) IHT at 23, 27); *see also* PX7033 (O’Hara (JLI) Dep. at 131-32).

³⁸ [REDACTED] }.

³⁹ [REDACTED] }.

⁴⁰ PX9017 (Altria Group, Inc. Form 10-K) at 4. Altria’s market leading products include its Marlboro cigarettes as well as the Copenhagen and Skoal smokeless tobacco products. PX9017 at 4. Led by Marlboro, Altria cigarettes account for almost half of the combustible cigarettes sold in the U.S. annually. PX8011 (Eldridge (ITG) Decl. ¶ 6).

⁴¹ *See* PX9000 at 6-7 (Altria 2017 Investor Day Remarks by Marty Barrington, Nov. 7, 2017); [REDACTED] }.

⁴² [REDACTED] }; PX1229 (Altria) at 11, 14; PX7026 (Gardner (Altria) Dep. at 45-49). [REDACTED] }.

MarkTen Elite in late 2017 from a Chinese contract manufacturer, Smoore, and Altria introduced MarkTen Elite in the U.S. in February 2018.⁴³

Altria licensed Apex from the global tobacco giant Philip Morris International (“PMI”), pursuant to a strategic partnership focused on next-generation nicotine products.⁴⁴ That strategic partnership (internally called Project Vulcan) included a Joint Research, Development and Technology Sharing Agreement 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.”⁴⁵ [REDACTED]

[REDACTED].⁴⁶

[REDACTED]

[REDACTED].⁴⁷

b. JLI

JLI, then operating under the name Pax Labs, introduced its signature “JUUL” product, a closed-system pod-based e-cigarette, in 2015.⁴⁸ [REDACTED]

[REDACTED].⁴⁹ Sales of JUUL began growing rapidly towards the end of 2017 and JUUL soon overtook Altria’s MarkTen and Reynold’s Vuse to become the top selling closed-system e-cigarette.⁵⁰ [REDACTED]

[REDACTED].⁵¹

⁴³ [REDACTED]; PX1229 (Altria) at 11; PX7003 (Quigley (Altria) IHT at 14-15); PX7018 (Schwartz (Altria) Dep. at 54-55).

⁴⁴ [REDACTED]; PX1484 (Altria) at 3. [REDACTED]; PX7002 (Schwartz (Altria) IHT at 46-47).

⁴⁵ PX1484 (Altria) at 3; *see also* PX7031 (Willard (Altria) Dep. at 152-54); [REDACTED].

⁴⁶ [REDACTED].
⁴⁷ [REDACTED]

⁴⁸ PX2160 (JLI) at 62-63.

⁴⁹ [REDACTED].

⁵⁰ PX1424 (Altria) at 10; PX1280 (Altria) at 9-10.

⁵¹ [REDACTED]

c. Reynolds

[REDACTED]

[REDACTED] }⁵² [REDACTED]

[REDACTED]

[REDACTED] }⁵³ Vuse was the market-leading e-cigarette brand in the U.S. until JUUL began to grow rapidly in late 2017 and early 2018.⁵⁴ Like Altria, Reynolds and its parent British American Tobacco (“BAT”) invested significantly in e-cigarette products.⁵⁵ [REDACTED]

[REDACTED]

[REDACTED] }⁵⁶ [REDACTED]

[REDACTED] }⁵⁷

d. ITG

ITG Brands (“ITG”) is the third-largest tobacco company in the U.S.⁵⁸ ITG sells e-cigarettes under the brand name blu.⁵⁹ [REDACTED]

[REDACTED] }⁶⁰ [REDACTED]

[REDACTED] }⁶¹

⁵² [REDACTED] }

⁵³ [REDACTED] }

⁵⁴ PX1284 (Altria) at 15-16; PX4012 (Altria) at 12; PX1280 (Altria) at 9-10.

⁵⁵ See, e.g., PX9067 (*BAT boosts vaping investment again as competition heats up*, Reuters, April 25, 2018, <https://www.reuters.com/article/us-bat-outlook/bat-boosts-vaping-investment-again-as-competition-heats-up-idUSKBN1HW15V>).

⁵⁶ [REDACTED] }; see also PX4040 (Altria) at 12.

⁵⁷ [REDACTED] }

⁵⁸ PX8011 (Eldridge (ITG) Decl. ¶ 2). ITG is a subsidiary of British-based tobacco company Imperial Brands PLC. PX8011 ¶ 3.

⁵⁹ PX8011 (Eldridge (ITG) Decl. ¶ 19). Imperial Brands acquired its blu e-cigarette brand in 2015. PX8011 ¶ 3.

⁶⁰ [REDACTED] }

⁶¹ [REDACTED] }

e. JTI

JTI is an international tobacco company that sells the Logic e-cigarette brand in the U.S.

[REDACTED]

[REDACTED].⁶²

f. NJOY

Of the remaining major e-cigarette companies, NJOY is the only company not affiliated with a traditional tobacco firm. [REDACTED]

[REDACTED].⁶³ [REDACTED]

[REDACTED].⁶⁴

3. The Transaction Includes a Non-Compete Prohibiting Altria from Competing in E-Cigarettes

On December 20, 2018, Altria and JLI announced Altria’s \$12.8 billion investment in JLI, taking a 35 percent non-voting equity interest in JLI (“Transaction”).⁶⁵ As part of the Transaction, Altria and JLI entered into a number of agreements, including a Services Agreement, a Relationship Agreement, and an Intellectual Property License Agreement.⁶⁶

The Relationship Agreement includes a non-compete clause (the “Non-Compete”) barring Altria from participating in all aspects of the e-cigarette business, including R&D, for an initial term of six years, which is indefinitely extendable by three-year increments if not terminated by either party.⁶⁷ In effect, Altria “commit[ted] to conduct e-vapor operations

⁶² [REDACTED]

⁶³ See [REDACTED].

⁶⁴ [REDACTED]

⁶⁵ PX9081 (Altria) at 1; see PX2141 (Altria/JLI) (Purchase Agreement, Dec. 20, 2018).

⁶⁶ PX1275 (Altria); PX1276 (Altria); PX2139 (JLI).

⁶⁷ PX1275 (Altria) at 5, 14; PX1276 (Altria) at 25-27.

exclusively through [JLI].”⁶⁸ The Non-Compete is comprehensive in that it prohibits Altria from engaging in the following activities 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**”).⁶⁹

While Respondents are likely to claim⁷⁰ that the Non-Compete has a specific carve out allowing Altria to keep its existing e-cigarette products on the market, that argument is disingenuous. The Non-Compete contains a provision allowing Altria to “engage in the business relating to (I) its Green Smoke, MarkTen . . . and MarkTen Elite brands, in each case, *as such business is presently conducted*.”⁷¹ But this provision has no impact whatsoever on the scope of the Non-Compete because Altria announced “the discontinuation of production and distribution of all *MarkTen* and *Green Smoke* e-vapor products” on December 7, 2018, almost immediately prior to the signing of the Non-Compete, and halted its sales of MarkTen Elite products in October 2018.⁷² While the Non-Compete extinguished any possibility of future competition, Altria also decided to discontinue its existing e-cigarette business in response to JLI’s clear demand for a halt to *all* competition.

⁶⁸ PX1181 (Altria) at 67.

⁶⁹ PX1276 (Altria) at 25-26 (emphasis in original).

⁷⁰ Indeed, Respondents already raised this argument in their motions to dismiss the private class actions challenging their anticompetitive conduct. *See* Altria’s Motion to Dismiss at 13-14, *In re Juul Labs Inc., Antitrust Litig.*, Docket No. 3:20-cv-02345-WHO (N.D. Cal. Jan. 15, 2021), ECF No. 207. The district court has tentatively denied that motion. *See* Tentative Rulings on Motion to Compel and Motions to Dismiss, *In re Juul Labs, Inc., Antitrust Litig.*, Docket No. 3:20-cv-02345-WHO (N.D. Cal. Apr. 21, 2021), ECF No. 248.

⁷¹ PX1276 (Altria) at 26 (emphasis added).

⁷² PX9080 (Altria) at 1 (italics in original); PX9114 (Altria) at 2.

Under the original Services Agreement, Altria agreed to provide some shelf space and a variety of services to JLI.⁷³ However, on January 28, 2020, Respondents executed an Amended Services Agreement that eliminated all services except for regulatory support services.⁷⁴

4. Altria Was a Meaningful and Well-Positioned Competitor Who Was Committed to the E-Cigarette Category over the Long-Term

a. Altria was a Major Competitor in Closed-System E-Cigarettes

Through its Nu Mark subsidiary, Altria was a significant competitor in closed-system e-cigarettes. { [REDACTED]

[REDACTED]

[REDACTED] }⁷⁵ In 2018, Nu Mark’s MarkTen cigalike products and the pod-based MarkTen Elite were growing in sales volumes and revenues. { [REDACTED] }⁷⁶ In

late July 2018, only five months after its launch, Altria’s CEO told investors that MarkTen Elite was “getting traction with consumers.”⁷⁷ In that same earnings call, he also touted the growth of the new MarkTen Bold cigalike product, which had nicotine salt technology,⁷⁸ an innovative feature designed to improve the nicotine delivery of e-cigarettes.⁷⁹ Even after JLI’s meteoric rise,

⁷³ PX1275 (Altria) at 27-32.

⁷⁴ PX9028 (Altria Form 8-K) at 2 (“Under 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 [PMTA] applications and/or its modified risk tobacco products authorization (MRTP) and (ii) retail shelf space through March 31, 2020.”); PX0012 (Altria/JLI) at 2; *see also* PX9029 (Altria) at 3.

⁷⁵ [REDACTED]

⁷⁶ [REDACTED]; *see also* [REDACTED]. From May to July 2018, MarkTen Elite’s average sales per store grew in major retail chains such as Walgreens, 7-Eleven, Wawa, Speedway, and Sheetz. PX1013 (Altria) at 7, 9; PX7003 (Quigley (Altria) IHT at 135-36). As one former Altria executive testified, “the cig-a-like platform was growing. Not declining.” PX7003 (Quigley (Altria) IHT at 152). And “Elite was growing” too. PX7003 (Quigley (Altria) IHT at 56).

⁷⁷ PX9047 (Altria 2Q2018 Earnings Call) at 10; *see also* PX2289 (JLI) at 21 (JLI competitive analysis recognizing MarkTen Elite as a product with “[l]ong-[t]erm [v]iability”); PX1033 (Altria) at 1 (“[T]he best is yet to come. . . . MarkTen Elite can hunt.”).

⁷⁸ PX9047 (Altria 2Q2018 Earnings Call) at 9-10.

⁷⁹ *See* PX7016 (Jupe (Altria) Dep. at 106-07); PX7027 (Murillo (Altria/JLI) Dep. at 173-74).

[REDACTED]
[REDACTED].⁸⁰

Nu Mark was actively developing improvements to its MarkTen and MarkTen Elite products, including planning optimized future versions of those products. For example, in the fall of 2018, Nu Mark implemented a newly designed gasket for MarkTen Elite, which fixed leaking from the pods⁸¹—a common problem with pod-based e-cigarettes.⁸² Nu Mark also planned to introduce a new battery system with a sensor in both MarkTen and MarkTen Elite to prevent “dry puffing” and to reduce levels of formaldehyde.⁸³ Preliminary test results indicated that the new battery system was successful at reducing the levels of formaldehyde in the MarkTen cigalike, and Altria’s Richard Jupe expected the same technology could be applied to the MarkTen Elite.⁸⁴ Additionally, Nu Mark was in the process of developing an optimized version of MarkTen Elite—“Elite 2.0”—which would include e-liquids with nicotine salts to enhance consumer satisfaction, and had begun conceptual work on an “Elite 3.0” device.⁸⁵ As noted above, Nu Mark had launched a product containing nicotine salts, MarkTen Bold,⁸⁶ and was leveraging the consumer feedback it received on its current product lines to inform future R&D efforts.⁸⁷

Altria was not only focused on its current e-cigarette products, but was also spending a significant amount of time, money, and resources planning and developing future e-cigarette

⁸⁰ See [REDACTED].

⁸¹ PX1373 (Altria) at 23; PX1568 (Altria) at 2; PX1566 (Altria) at 1; *see also* PX1617 (Altria) at 51; [REDACTED] [REDACTED].

⁸² PX1395 (Altria) at 6, 11-12; PX8011 (Eldridge (ITG) Decl. ¶ 25).

⁸³ PX7016 (Jupe (Altria) Dep. at 79-81, 89-90); PX1373 (Altria) at 4; PX1407 (Altria) at 4; PX7003 (Quigley (Altria) IHT at 116-17); PX7041 (Quigley (Altria) Dep. at 62).

⁸⁴ PX7016 (Jupe (Altria) Dep. at 114-15); *see also* PX7017 (Magness (Altria) Dep. at 154-55); PX7027 (Murillo (Altria/JLI) Dep at 113-14); PX4123 (Altria) at 15-16; PX7036 (Garnick (Altria) Dep. 73-74); PX4113 (Altria) at 1.

⁸⁵ *See, e.g.*, PX4115 (Altria) at 10; PX4318 (Altria) at 8, 11-14; PX7013 (Brace (Altria) Dep. at 181-82); [REDACTED] [REDACTED].

⁸⁶ PX9047 (Altria 2Q2018 Earnings Call) at 9-10.

⁸⁷ *See, e.g.*, PX7014 (Baculis (Altria) Dep.) at 119–20; PX7026 (Gardner (Altria) Dep.) at 87.

products. Altria had a number of potential e-cigarette products in its development pipeline, and was conducting research intended to optimize future products. For example, { [REDACTED]

[REDACTED] }⁸⁸ And Altria was actively pursuing a number of R&D projects for the next generation of e-cigarettes, including smart-pod technology and new flavor innovations.⁸⁹ Altria’s long-term pipeline initiatives in 2018 included Project Panama and Project Hudson, two in-house development projects to create the next generation of Altria pod-based e-cigarette products.⁹⁰

Through its relationship with PMI, known as Project Vulcan, Altria had another promising avenue to market new e-cigarette products. Project Vulcan would have allowed Altria to market PMI’s proprietary “Mesh” e-cigarette technology⁹¹ in the U.S.⁹² The Apex e-cigarette that Altria introduced into e-commerce in September 2018 was an earlier version of the Mesh technology licensed from PMI pursuant to the Vulcan relationship.⁹³ PMI currently sells e-cigarettes using the Mesh technology in several countries outside the U.S. under the brand name VEEV.⁹⁴ { [REDACTED]

[REDACTED] }⁹⁵

b. Altria was Committed to Competing in E-Cigarettes Long-Term, and was Well-Positioned to Do So

Through its public statements and its actions, including investing hundreds of millions in the developing, marketing, and selling of e-cigarettes, Altria has consistently demonstrated its long-term commitment to competing in e-cigarettes. Through its position as a large, well-

⁸⁸ { [REDACTED] . }

⁸⁹ See, e.g., PX7016 (Jupe (Altria) Dep. at 255); PX1673 (Altria) at 7, 9, 13.

⁹⁰ PX7004 (Willard (Altria) IHT at 138); PX7002 (Schwartz (Altria) IHT at 63-64); PX1298 (Altria) at 48.

⁹¹ PX7020 (King (PMI) Dep. at 15-16, 19) (explaining that the Mesh technology applies electricity to a wire-type screen, or mesh, in order to vaporize a liquid containing nicotine).

⁹² PX1485 (Altria) at 2.

⁹³ { [REDACTED] }; PX7002 (Schwartz (Altria) IHT at 46-47).

⁹⁴ PX7020 (King (PMI) Dep. at 15-17).

⁹⁵ { [REDACTED] }; { [REDACTED] }; { [REDACTED] . }

capitalized company with market-leading tobacco products, and extensive distribution, sales, marketing, R&D, and regulatory infrastructure, Altria was well-positioned to be a significant long-term competitor in e-cigarettes.

Indeed, just as Altria's Marlboro brand dominates the combustible cigarette market, Altria's oft-stated goal was to "lead the U.S. e-vapor category with a portfolio of superior, reduced-risk products"96 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."97

Altria's senior executives repeatedly acknowledged that e-cigarettes were critical to the company's future:

- Marty Barrington, former Chairman and CEO, told investors in November 2017: "So we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products."98
- Jody Begley, then President of Nu Mark, told investors in November 2017: "We continue to believe e-vapor holds great long-term promise. Today the U.S. represents the largest e-vapor market in the world."99
- Howard Willard, former Chairman and CEO, told investors in February 2018: "NuMark's goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products that adult smokers and vapers choose over cigarettes and that generate cigarette-like margins at scale. [. . .] NuMark 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."100

⁹⁶ PX9045 (Altria 2018 CAGNY Remarks, Feb. 21, 2018) at 6; *see also* [REDACTED].

⁹⁷ PX9045 (Altria 2018 CAGNY Remarks, Feb. 21, 2018) at 7.

⁹⁸ PX9000 (Altria Investor Day Remarks) at 5

⁹⁹ PX9000 (Altria) at 16.

¹⁰⁰ PX9045 (Altria) at 6-7.

- Joe Murillo, former SVP for Regulatory Affairs, testified: “And so we knew that the e-vapor category was a super important reduced risk opportunity for the company, and we were, you know, doing everything we could to advance that.”¹⁰¹

These statements were not merely wishful thinking; Altria backed them up with serious capital investments. Altria’s annual spend on e-cigarette product development grew more than tenfold over a five-year period: from a mere \$7 million in 2012 to a projected \$90 million in 2017.¹⁰² The Company spent \$350 million dollars on its Center for Research and Technology, which housed “more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products,” including e-cigarettes.¹⁰³ In November 2017, Altria’s former Chairman and CEO aptly described how the Company’s enormous financial engine confers advantages for competing in innovative, reduced-risk products like e-cigarettes:

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 maintain our dividend payout ratio target of approximately 80% of adjusted diluted EPS and 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.¹⁰⁴

With massive resources and a demonstrated willingness to use them, Altria left no doubt as to its intent to compete in the e-cigarette market over the long term.

Altria’s long-term commitment to the e-cigarette market is also apparent from its willingness to engage in R&D efforts to create innovative e-cigarette products, even when some of those efforts might not succeed. Richard Jupe, Altria’s VP of Product Development, explained: “[with] innovation, you are more ripe to fail than you are to succeed. For every nine

¹⁰¹ PX7007 (Murillo (Altria/JLI) IHT at 65).

¹⁰² PX1633 (Altria) at 8.

¹⁰³ PX9000 (Altria Investor Day Remarks by Marty Barrington, November 2, 2017) at 5.

¹⁰⁴ PX9000 (Altria Investor Day Remarks by Marty Barrington, November 2, 2017) at 8.

things that fail, hopefully, you get one success. [. . .] So innovation is like that. You’ve got to have a lot of different bets.”¹⁰⁵ Moreover, even failed product development efforts still provided valuable learning for Altria’s ongoing R&D efforts.¹⁰⁶

Altria’s rapid rollout of MarkTen Elite in 2018 illustrates the advantages Altria has in the e-cigarette market. Relying on Altria’s extensive relationships with retailers,¹⁰⁷ established distribution network and sales force, and ability to fund promotions, Nu Mark was able to take Elite from zero retail stores to 25,000 retail stores between February and October of 2018.¹⁰⁸ In fact, Altria believed it would have Elite in 37,000 stores by the end of 2018.¹⁰⁹ Indeed, 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.¹¹⁰ [REDACTED]

[REDACTED].¹¹¹ As part this initiative, Altria invested over \$100 million in e-cigarette shelf space, or “fixtures,” to be installed at retail locations and enticed retailers to participate by offering payments.¹¹²

¹⁰⁵ PX7016 (Jupe (Altria) Dep. at 215).

¹⁰⁶ PX7016 (Jupe (Altria) Dep. at 63-64) (“Q. [W]ould Altria take those, you know, those learnings from potential failed projects and use that to inform future product development efforts? A. Yeah. We try. Absolutely, we try. I mean, in a lot of cases, you can. In some cases, those learnings are not relevant. I mean, if it’s -- if it’s not feasible because of energy, well, you don’t secure to that type of approach, right? So, again, you always try to build on your failures. Not always are you successful on building on your failures. I can probably think of a couple projects where we failed twice.”).

¹⁰⁷ For example, most retailers that sell cigarettes have contracts with Altria, and those contracts typically require the retailers to place Altria cigarettes in the prime (i.e., top) spot on the shelf. PX8011 (Eldridge (ITG) Decl. ¶ 14).

¹⁰⁸ PX7014 (Baculis (Altria) Dep. at 62-63); [REDACTED]; PX4012 (Altria) at 27. MarkTen Elite was quickly available in 23,000 stores by the end of June 2018. PX1229 (Altria) at 18; PX9047 (Altria Q2 2018 Earnings Call) at 3. Altria planned to expand to 37,000 stores by the end of 2018, and further expansions still for the first half of 2019. PX1320 (Altria) at 52; PX1617 (Altria) at 5-6; PX1616 (Altria) at 2-4.

¹⁰⁹ PX7003 (Quigley (Altria) IHT at 159).

¹¹⁰ See PX7004 (Willard (Altria) IHT at 26-27) (explaining that dominant tobacco brands drive foot traffic to c-stores); PX8011 (Eldridge (ITG) Decl. ¶ 31).

¹¹¹ [REDACTED]

¹¹² PX7003 (Quigley (Altria) IHT at 48-49); [REDACTED]

Market participants agree that, given its resources, Altria was a long-term threat in the e-cigarette market. For instance, a JLI board member described Altria as “definitely well-equipped to do well in the space,”¹¹³ and an ITG executive testified that he expected the MarkTen Elite brand to grow “[g]iven Altria’s resources as the largest tobacco company in the U.S.”¹¹⁴

5. JLI’s Growth Threatened Altria

The JUUL product took off dramatically in 2017, quickly eclipsing Altria’s MarkTen and Reynold’s Vuse to become the leader in e-cigarettes.¹¹⁵ Notably, JLI’s stated corporate mission is to “transition the world’s billion adult smokers away from combustible cigarettes.”¹¹⁶ Indeed, JLI posed a dangerous new threat to Altria on two fronts: it stood in the way of Altria’s goal of leading the e-cigarette category and threatened to disrupt Altria’s lucrative traditional cigarette business.¹¹⁷ [REDACTED]

[REDACTED] }¹¹⁸ Indeed, Altria executives quickly identified acquiring all or part of JLI as “Plan A,” and identified focusing on Altria’s own e-cigarette business as “Plan B.”¹¹⁹

6. As Part of Its Agreement to Acquire an Interest in JLI, Altria Agreed to—and Did—Exit the E-Cigarette Business

During negotiations with Altria, JLI made clear that it would only be willing to do a transaction if Altria agreed to stop competing in e-cigarettes, now and in the future. Altria

¹¹³ PX7011 (Valani (JLI) IHT at 137-38).

¹¹⁴ PX8011 (Eldridge (ITG) Decl. ¶ 28).

¹¹⁵ PX1424 (Altria) at 10-11; PX1280 (Altria) at 9-11.

¹¹⁶ PX9050 (JLI mission and values webpage) at 1; *see also* PX7009 (Burns (JLI) IHT at 15-16); PX7011 (Valani (JLI) IHT at 75).

¹¹⁷ Altria viewed JLI as a threat to its core business, attributing the accelerated decline in cigarette sales to the growth of e-vapor [REDACTED]; [REDACTED]; [REDACTED]; PX9039 (Altria Earnings Call Transcript, Jan. 30, 2020) at 7; PX9030 (Altria Earnings Call Slides, Jan. 30, 2020) at 19.

¹¹⁸ [REDACTED]; [REDACTED].

¹¹⁹ PX7003 (Quigley (Altria) IHT at 160-61) (“Q. When you say, I have my plan B approach ready, what is plan B? A. [...] When I got the job, Howard [Willard] sat K.C. [Crosthwaite] and I down and said, you know, K.C., in your job, you are responsible for project Tree. Brian, you are responsible -- and that’s plan A. Plan B is without Tree, what do we do with our vapor business? And Brian, I need you focused on that. So what I was referring to is, hey, I felt like we had a great plan for the Nu Mark business.”).

conveyed to JLI that it was willing to meet this demand, and ultimately did so by withdrawing its e-cigarette products from the market just prior to executing its Transaction with JLI.

For JLI, a “precept” of any deal was that Altria could no longer compete in e-cigarettes, other than through its interest in JLI.¹²⁰ As JLI board member Riaz Valani explained, if Altria owned a partial interest in JLI, but continued to compete with its own e-cigarettes, it would naturally have a greater incentive to push its own products over JLI’s products.¹²¹ As JLI’s former CFO explained: “[W]e had always contemplated that Altria would be subject to a noncompete in the e-vapor category as part of any transaction with us.”¹²²

JLI clearly communicated to Altria—and Altria understood—that a requirement of any transaction would be that Altria not compete in e-cigarettes now or in the future. JLI told Altria that “if you were to work with us, you’d need to be exclusive because we couldn’t have you selling some product you own a hundred percent of competing on the shelf with something that [. . .] you own less percentage of.”¹²³ Likewise, JLI board member Nick Pritzker personally discussed with Altria CEO Howard Willard and CFO Billy Gifford the point that Altria could not have any e-cigarette products on the market if Altria was going to invest in JLI and have access to JLI information.¹²⁴ JLI board member Valani testified that Altria realized “probably pretty early on” that JLI would not do a deal unless Altria agreed not to sell any of its own e-cigarette

¹²⁰ PX7011 (Valani (JLI) IHT at 63-65).

¹²¹ PX7011 (Valani (JLI) IHT at 63-65).

¹²² PX7005 (Danaher (JLI) IHT at 164); *see also* PX7009 (Burns (JLI) IHT at 138) (“I don’t think it’s practical in terms of Altria wanting to have a significant stake in the company, have transparency on all the major strategic and operational priorities [...] and in parallel at the same time be competing with us against that product roadmap and those products.”).

¹²³ PX7011 (Valani (JLI) IHT at 63); *see also* PX7035 (Masoudi (JLI) Dep. at 41-42) (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.”).

¹²⁴ PX7021 (Pritzker (JLI) Dep. at 88-90).

products, and admitted that this commitment by Altria appeared in term sheets exchanged between the Respondents.¹²⁵

JLI focused on the end result of Altria no longer competing in e-cigarettes, but did not care how this “end state” was achieved—be it through Altria divesting its e-cigarette business to a third party, contributing it to JLI, or by Altria simply ceasing to operate the business.¹²⁶ As JLI board member Pritzker explained, “[t]he goal was for [Altria] to be not competing against Juul if they had a significant interest in Juul, and I didn’t care how that would come about.”¹²⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹²⁸

During negotiations, Altria indicated to JLI that its relationship with PMI might complicate its ability to divest or contribute its e-cigarette assets.¹²⁹ Mr. Pritzker acknowledged that one of the ideas that might have come up in discussions was that Altria would “cease to operate” its e-cigarette business.¹³⁰ Indeed, in a July 27, 2018 email to Mr. Pritzker, JLI’s adviser at Goldman Sachs, Peter Gross, wrote that he was “**under the impression that [Altria] would just shut down Mark 10.**”¹³¹

On July 30, 2018, JLI sent a term sheet to Altria with 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

¹²⁵ PX7011 (Valani (JLI) IHT at 63-64).

¹²⁶ PX7011 (Valani (JLI) IHT at 81-82).

¹²⁷ PX7021 (Pritzker (JLI) Dep. at 97).

¹²⁸ [REDACTED] }

¹²⁹ [REDACTED] }; PX7031 (Willard (Altria) Dep. at 242-44).

¹³⁰ PX7021 (Pritzker (JLI) Dep. at 86).

¹³¹ PX2330 (JLI) at 1 (emphasis added).

delivery systems and products it acquired, developed or has under development.¹³²

Thus, JLI presented Altria with three options for meeting its demand for getting out of the e-cigarette business: (1) divest its e-cigarette assets; (2) contribute those assets to JLI; or (3) cease operating those assets entirely. JLI's former CFO Timothy Danaher confirmed that "what [JLI was] more concerned with is we want a noncompete. How it's going to be accomplished, right, needs to be determined, and, frankly, we were putting the onus on [Altria] to figure it out."¹³³ As described below, Altria ultimately chose the third option.

After receipt of the July 30, 2018 term sheet from JLI, the senior Altria executives leading the negotiations with JLI suddenly began to push for the elimination of Nu Mark's products. In order to convince Altria's board to spend billions of dollars to buy a stake in JLI rather than continue to invest in its own e-cigarette products, Altria executives gave a presentation to Altria's board that gave the impression that Nu Mark's products were doing worse than they actually were.¹³⁴ This abrupt reversal confused the Nu Mark team, which did not understand why Altria's leadership was suddenly keen to trash its own products. As demonstrated in the timeline of negotiations set forth below, when Altria appeared to backtrack on its commitment to exit the e-cigarette market, it met with fierce resistance from JLI. Once it became clear that JLI would accept nothing less than the complete elimination of Altria as an e-cigarette competitor, Altria's leadership began taking decisive steps to exit the market, as clearly contemplated in the communications outlined below:

¹³² PX1300 (Altria) at 5 (emphasis added).

¹³³ PX7005 (Danaher (JLI) IHT at 168).

¹³⁴ PX1008 (Altria) at 2; *see also* [REDACTED].

On August 1, 2018, Altria CEO Howard Willard and Altria CFO Billy Gifford met with JLI board members Nick Pritzker and Riaz Valani and JLI CEO Kevin Burns for dinner in the Park Hyatt Hotel in Washington, DC, to discuss the proposed transaction.¹³⁵

- Just two days later on August 3, 2018, Nu Mark President Brian Quigley met with Mr. Willard, Mr. Gifford, Altria General Counsel Murray Garnick, and Altria Chief Growth Officer KC Crosthwaite to provide a business update on Nu Mark.¹³⁶ Mr. Gifford suggested the possibility of pulling Elite, a key product for Nu Mark, which surprised Mr. Quigley since Elite had just recently been launched.¹³⁷
- Altria’s August 5, 2018 draft talking points for negotiations with JLI make clear that Altria was not going to exit e-cigarettes unless necessary to do a deal with JLI: **“Altria has come a long way to accommodate [JLI] in this process, including [...] demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.”**¹³⁸
- Another draft of the August 5, 2018 talking points stated: “if we establish this partnership, then we expect Altria will [...] potentially exit our own vapor business” and **that if a deal does not work out, Altria and JLI should “shake hands, and agree to be competitors.”**¹³⁹
- On August 9, 2018, Altria’s Gifford sent a markup of the term sheet to JLI’s Pritzker, Valani, and Burns that was “to serve as the basis of discussion at our upcoming meeting.”¹⁴⁰ That markup deleted the provision requiring Altria to divest, contribute, or cease to operate its e-vapor products.¹⁴¹
- On August 10, 2018, Altria top executives 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.¹⁴² They also decided to move forward with plans to submit PMTAs for MarkTen cigalikes.¹⁴³
- On August 11, 2018, Mr. Willard called Mr. Quigley and said he understood and agreed with Mr. Quigley’s position that Altria should have an e-vapor platform on the market that Altria can grow from.¹⁴⁴

¹³⁵ PX1300 (Altria) at 1, 4-5; PX7011 (Valani (JLI) IHT 84-85).

¹³⁶ PX7003 (Quigley (Altria) IHT at 123).

¹³⁷ PX7003 (Quigley (Altria) IHT at 132-34).

¹³⁸ PX1390 (Altria) at 3-4 (emphasis added).

¹³⁹ PX1304 (Altria) at 3 (emphasis added).

¹⁴⁰ PX1303 (Altria) at 1.

¹⁴¹ PX1303 (Altria) at 15.

¹⁴² PX0019 (Altria) at 5; PX1607 (Altria) at 1; PX7003 (Quigley (Altria) IHT at 145); *see* PX1560 (Altria) at 2 (new gasket reduced percentage of pods leaking to less than 1%).

¹⁴³ PX7003 (Quigley (Altria) IHT at 146).

¹⁴⁴ PX7003 (Quigley (Altria) IHT at 144-46).

- On August 14, 2018, Mr. Quigley emailed Altria Chief Growth Officer Crosthwaite to express concern that a draft presentation for Altria’s board presented “only the bad news” regarding Nu Mark, and concern that he had heard that “the decision has been made to stop NuMark,” which he did not understand to be the case:

Give me a call. I understand why you are telling the story you are telling to the BOD however, I have a few concerns about it. 1). It is clearly only the bad news version of the story 2) some of the points are flat out incorrect (e.g. mark ten cig a like platform is declining). It is growing volume is the second fastest growing brand in terms of volume behind JUUL.

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 NuMark’ and I know that decision has not been made. I had a discussion with Howard 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.¹⁴⁵

- On August 14, 2018, JLI’s Pritzker emailed Altria’s Willard and Gifford to tentatively schedule a meeting in San Francisco on Saturday, August 18, 2018.

- [REDACTED]

On August 15, 2018, JLI’s Valani emailed to Altria’s 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.”¹⁴⁷ JLI’s list addressed Altria’s deletion in the August 9, 2018 term sheet of its obligation to divest, contribute, or cease to operate its e-vapor business. JLI made it crystal clear that it was unacceptable for Altria to retain any ability to compete in e-cigarettes:

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

¹⁴⁵ PX1008 (Altria) at 2.

¹⁴⁶ [REDACTED]

¹⁴⁷ PX4171 (Altria) at 1-3; PX1308 (Altria) at 1-4.

future products. The commitment to divest Mark Ten has been stricken. This is not acceptable to us.¹⁴⁸ (emphasis added).

Also on August 15, 2018, Devitre and Valani met in Mr. Devitre's office in New York.¹⁴⁹ During that meeting, Mr. Devitre forwarded JLI's list of issues to Altria CEO Willard, who forwarded it to his colleagues Murray Garnick and KC Crosthwaite.¹⁵⁰ Apparently satisfied that the conditions set forth in its August 15, 2018 list would be met, JLI went forward with the August 18, 2018 meeting with Altria in San Francisco.¹⁵¹ Indeed, Altria's outline for the August 18, 2018 meeting indicates that at that meeting, Altria reassured JLI of its commitment to exit the e-cigarette market, and explained that its removal of the term requiring Altria to exit the e-cigarette market was "driven by antitrust and for the protection of both companies."¹⁵² On August 19, 2018, JLI circulated a revised term sheet in which it reinserted a broad non-compete requirement and a commitment by Altria to contribute its e-cigarette assets to JLI.¹⁵³

After receiving the August 19, 2018 revised term sheet from JLI, Altria continued to pursue a transaction with JLI:

- From August 21–23, 2018, Altria executives presented to its board at Altria's "Marlboro Ranch" in Montana on the Transaction and the future of Altria's e-vapor products.¹⁵⁴ This presentation was unusual because Nu Mark leadership did not get to present on Altria's e-cigarette business, as it had in the past. Instead, the Altria executives in charge of negotiating a deal with JLI presented the e-cigarette information to the board.¹⁵⁵

¹⁴⁸ PX4171 (Altria) at 2.

¹⁴⁹ PX7001 (Devitre (JLI) IHT at 93-95); PX1308 (Altria) at 2.

¹⁵⁰ PX1308 (Altria) at 1; PX1168 (Altria) at 1; PX1302 at 1.

¹⁵¹ PX7032 (Valani (JLI) Dep. at 63-64).

¹⁵² PX1493 (Altria) at 2.

¹⁵³ PX2185 (JLI) at 1, 4-5, 20-21; PX1307 (Altria) at 1-2, 6-7, 20-21.

¹⁵⁴ PX1424 (Altria) at 1; PX7003 (Quigley (Altria) IHT at 149-150) ("Q. Is that what this deck was -- it says August 2018 board of directors. Was it your understanding that it was intended to be presented to the board of directors? A. That's my understanding."); [REDACTED].}

¹⁵⁵ PX7003 (Quigley (Altria) IHT at 149-51); PX7031 (Willard (Altria) Dep. at 108-109).

- [REDACTED] }¹⁵⁶
- On August 27, 2018, Valani, Burns, Pritzker, and JLI’s outside counsel met with Willard, Gifford, and Altria’s outside counsel in New York City.¹⁵⁷ On August 29, 2018, at Altria’s request, Altria and JLI outside counsel met to discuss the proposed transaction.¹⁵⁸
- On September 11, 2018, Altria leadership told the board that negotiations with JLI were continuing and noted that an Altria “non compete” was a “[k]ey term” for further negotiations.¹⁵⁹
- On October 5, 2018, Altria’s Willard sent JLI’s Pritzker, Valani, and Burns a letter accepting various conditions proposed by JLI, including that **“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.”**¹⁶⁰ (emphasis added). Upon receiving this letter, JLI CEO Burns forwarded it to JLI’s Chief Legal Officer with a simple note: “Game on Again.”¹⁶¹
- On October 11, 2018, Altria’s adviser James Wappler (of Perella Weinberg Partners) stated to colleagues that “Pritzker called back this evening and said the [JLI] Board is supportive of moving forward on the terms outlined by Howard [Willard].”¹⁶² Those terms included a commitment by Altria to exit the e-vapor market.¹⁶³
- On October 12, 2018, in a text message from Willard to Devitre, Willard stated: “Spoke to Nick [Pritzker] last night | Tentative agreed to a call on Monday to agree on terms | Agreed on term in the letter.”¹⁶⁴
- On October 15, 2018, Altria sent JLI a term sheet that included a reference to “exiting the marketing and sale” of e-vapor products.¹⁶⁵

¹⁵⁶ [REDACTED].}

¹⁵⁷ PX7032 (Valani Dep. at 86-88).

¹⁵⁸ PX7032 (Valani Dep. at 91-92); PX2394 (JLI) at 1.

¹⁵⁹ PX4467 (Altria) at 1, 4-5; PX4466 (Altria) at 1.

¹⁶⁰ PX2152 (JLI) at 2-3.

¹⁶¹ PX2183 (JLI) at 1.

¹⁶² PX3198 (Altria) at 1.

¹⁶³ PX2183 (JLI) at 2 (Letter from Howard Willard to JLI) (“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”).

¹⁶⁴ PX4167 (Altria) at 7 (“[Willard] (10/12/2018 10:37:04 AM +0000) : ‘Spoke to Nick last night | Tentative agreed to a call on Monday to agree on terms | Agreed on term in the letter’ [Devitre] (10/12/2018 12:17:40 PM +0000) : ‘Sounds good. Well done Howard.’”).

¹⁶⁵ PX2147 (JLI) at 24 (“Services provided upon earlier of (i) contribution described above or (ii) [Altria] otherwise existing the marketing and sales of products in the Field.”).

- On October 20, 2018, JLI’s Valani indicated to Altria’s Devitre at a breakfast meeting that JLI was “ready to do a deal.”¹⁶⁶
- On October 21, 2018, Garnick observed in an internal email that “no evapor product fits with Tree [the JLI Transaction].”¹⁶⁷

Almost immediately after, on October 25, 2018, Altria informed the FDA (and announced publicly) that it was removing its pod-based e-cigarettes Elite and Apex from the market, ostensibly due to concerns about contributing to youth usage of pod-based products.¹⁶⁸ Within hours of announcing that it was withdrawing its pod-based products due to concerns about youth usage, Altria’s Willard and Gifford spoke to JLI’s Valani, Pritzker, and Burns to indicate that Altria was still interested acquiring an interest in JLI—the market leader for pod-based e-cigarettes.¹⁶⁹

On October 29, 2018, one day after attending a dinner in New York, Willard, Gifford, Garnick, Crosthwaite, and Altria’s outside counsel met with Valani, Pritzker, Burns, and JLI’s outside counsel and hammered out a final term sheet, which included Altria not competing in the e-cigarette market.¹⁷⁰ Shortly thereafter due diligence began, and by December 4, 2018, JLI and Altria were working on a draft press release announcing the Transaction.¹⁷¹

¹⁶⁶ PX1313 (Altria) at 1.

¹⁶⁷ PX1228 (Altria) at 1.

¹⁶⁸ PX2014 (JLI) at 2-4. On September 12, 2018, the FDA sent letters to Altria, JLI, Reynolds, ITG, and JTI regarding underage use of e-cigarettes. PX1163 at 4 (Statement from FDA Commissioner Scott Gottlieb, Sept. 12, 2018) (“Today, we sent letters to five e-cigarette manufacturers whose products [. . .] collectively, represent more than 97 percent of the current market for e-cigs – JUUL, Vuse, MarkTen, blu e-cigs, and Logic.”); PX1163 (Altria) at 8 (Letter from the U.S. Food & Drug Administration, Sept. 12, 2018).

¹⁶⁹ PX2022 (JLI) at 1.

¹⁷⁰ PX7032 (Valani (JLI) Dep. at 98-103); [REDACTED]; [REDACTED]; PX4167 (Altria) at 8 (“[Devitre] (10/29/2018 05:53:33 PM +0000): ‘How is it going?’ [Willard] (10/29/2018 07:35:31 PM +0000): ‘We have reached agreement on terms’”); see PX1271 (Altria) at 1 (“If Richard [Altria] has not otherwise transferred its interests in its e-vapor assets to a third party, then Richard [Altria] agrees that it will contribute, upon receipt of Antitrust Clearance, to Jack [JLI] at Jack’s [JLI’s] election, all Richard [Altria] 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 [JLI] shall pay Richard [Altria] an amount to be mutually agreed.”).

¹⁷¹ PX7011 (Valani (JLI) IHT at 133.

On December 7, 2018, after five years of significant investment and continuous participation in the e-cigarette market, Altria announced its decision to wind down its remaining e-cigarette business, including its MarkTen cigalike.¹⁷² On December 9, 2018, as Respondents moved rapidly towards announcing the deal, Altria General Counsel Garnick emailed JLI's General Counsel Masoudi in response to Masoudi's inquiry about the timing of the Non-Compete.¹⁷³ With Altria already having taken major steps towards meeting JLI's demands by removing Elite in October and shutting down the rest of Nu Mark just two days earlier, Mr. Garnick had little trouble reassuring Mr. Masoudi that "[t]his is of course a nonissue, since we are not in the market anymore."¹⁷⁴ Any hope of future competition between Respondents would soon be extinguished with the signing of the six-year Non-Compete agreement eleven days later.

On December 20, 2018, less than two weeks after Altria announced its exit from the e-cigarette market, Altria and JLI executed and closed Altria's \$12.8 billion investment in JLI,¹⁷⁵ and Altria ended all e-vapor sales and R&D.¹⁷⁶

7. The Non-Compete Foreclosed Other Avenues for Altria to Compete in the Closed-System E-Cigarette Market

By requiring that JLI be the only vehicle through which Altria could compete in e-cigarettes, the Transaction foreclosed Altria from other avenues through which it would have competed. As discussed above, as part of its Transaction with JLI, Altria removed—and per the Non-Compete could not reintroduce—the e-cigarette products it already had on the market.

¹⁷² PX2146 (JLI) at 1.

¹⁷³ PX1162 (Altria) at 1-2.

¹⁷⁴ PX1162 (Altria) at 1-2.

¹⁷⁵ PX2134 (JLI) at 1-3 (“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.”); PX9099 at 1 (BusinessWire release, Dec. 20, 2018) (announcing signature by Altria and JUUL of service agreements and Altria's \$12.8 billion investment in JUUL); *see also* PX1275 (Altria/JLI) (Services Agreement, Dec. 20, 2018); PX1276 (Altria/JLI) (Relationship Agreement, Dec. 20, 2018).

¹⁷⁶ PX1022 (Altria) at 1 (noting plan to “ensure a rapid and comprehensive closure to product development work associated with e-vapor”).

Moreover, the Non-Compete meant that Altria had to shut down the substantial R&D activity that it was conducting in e-cigarettes, including the development of new versions of Elite that would include nicotine salts.¹⁷⁷ The Transaction prevented Altria from pursuing any alternative acquisitions or development partnerships relating to e-cigarettes.

Altria argues that it was “many years” away from potentially bringing a new e-cigarette product to market,¹⁷⁸ but that is incorrect because under its Vulcan partnership with PMI, Altria would have the right to introduce PMI’s Mesh e-vapor product (VEEV) in the U.S. [REDACTED]

[REDACTED]

[REDACTED] }¹⁷⁹ [REDACTED]

[REDACTED] }¹⁸⁰ By entering into the Transaction and Non-Compete with JLI, Altria effectively ended its strategic collaboration with PMI in e-cigarettes. [REDACTED]

[REDACTED]

[REDACTED] }¹⁸¹ [REDACTED]

¹⁷⁷ See *supra* § I.a.

¹⁷⁸ PX0027 (Altria, Answers and Defenses) at 4-5.

¹⁷⁹ [REDACTED] }; see also [REDACTED] ;

[REDACTED] }

¹⁸⁰ [REDACTED] }

¹⁸¹ [REDACTED] };

[REDACTED] }

[REDACTED] }; see also PX1276 (Altria) at 20, 27-29 (Relationship Agreement, Dec. 20, 2018).

[REDACTED] }; PX9040 (Wall Street Journal, Sept. 25, 2019).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }¹⁸³

In addition to ending Altria’s collaboration with PMI on e-vapor, the Transaction also prevents Altria from entering into any other development or acquisition agreements relating to e-cigarettes. As late as October 2018, Altria was considering a development and IP deal with London-based e-cigarette startup Ayr Labs, “who has no access to the US market and [was] very open to working with [Altria].”¹⁸⁴ Similarly, Altria had discussions in 2018 with the French e-cigarette company J-Well, whose pod-based product called Bo met the FDA’s August 2016 deeming date and thus could remain on the U.S. market pre-PMTA approval.¹⁸⁵ Altria also monitored R&D developments from Chinese manufacturers to identify potential opportunities for acquisitions or collaborations.¹⁸⁶ In addition to looking at acquisition opportunities, Altria worked on e-cigarette development with various outside companies specializing in areas such as engineering, electronics, and materials.¹⁸⁷ The Non-Compete with JLI foreclosed all of these

¹⁸² [REDACTED]

[REDACTED]

[REDACTED]

¹⁸³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } See [REDACTED]

[REDACTED]

¹⁸⁴ PX1656 (Altria) at 1; PX7015 (Gogova (Altria) Dep. at 192).

¹⁸⁵ PX7003 (Quigley (Altria) IHT at 104-06); PX1317 (Altria) at 10-12.

¹⁸⁶ See PX7018 (Schwartz (Altria) Dep. at 53); PX7016 (Jupe (Altria) Dep. at 21). As noted above in § II.a, Elite was acquired in 2017 from Chinese contract manufacturer Smoore. PX7003 (Quigley (Altria) IHT at 15).

¹⁸⁷ PX7016 (Jupe (Altria) Dep. at 21, 44-45, 50-51).

potential avenues for Altria to acquire additional e-cigarette products or pursue additional e-cigarette development partnerships.

II. ARGUMENT

1. The Relevant Market Is Sales of Closed-System E-Cigarettes in the United States

a. The Relevant Product Market Is Closed-System E-Cigarettes

The relevant product market “identifies the product and services with which the defendants’ products compete.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015) (quoting *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004)).¹⁸⁸ “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 Co. v. United States*, 370 U.S. 294, 325 (1962)). “A relevant product market need not be defined around a *single* product.” *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 884 (E.D. Mo. 2020) (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.”). “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.*,

¹⁸⁸ The market definition discussion included in this section is primarily relevant to Count II, an illegal acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18. For Count I, an illegal agreement under 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) (explaining that “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”).

Inc., 7 F.3d 986, 995 (11th Cir. 1993)). 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.” *In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 5957363, at *13 (F.T.C. Nov. 1, 2019) (citing *Brown Shoe*, 370 U.S. at 325); *see also In re Polypore Int’l, Inc.*, Docket No. 9237, 2010 WL 9549988, at *11 (F.T.C. Nov. 5, 2010).

Courts and the Commission also rely on the approach prescribed by the *Horizontal Merger Guidelines* in defining relevant product markets.¹⁸⁹ *See, e.g., FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47, 57–58 (D.D.C. 2018); *Sysco*, 113 F. Supp. 3d at 33–34; *Otto Bock*, 2019 WL 5957363, at *13; *Polypore*, 2010 WL 9549988, at *11. The *Horizontal Merger Guidelines* define a relevant product market in economic terms, by asking whether a hypothetical monopolist of a particular group of substitute products could profitably impose a “small but significant non-transitory increase in price” (“SSNIP”) over those products, or whether customers switching to alternative products would make such a price increase unprofitable. *Horizontal Merger Guidelines* § 4.1.1; *see also Peabody Energy*, 492 F. Supp. 3d at 886; *Otto Bock*, 2019 WL 5957363, at *13.

As shown below, both the “practical indicia” identified by the Supreme Court in *Brown Shoe* and the hypothetical monopolist test outlined in the *Horizontal Merger Guidelines* support the conclusion that closed-system e-cigarettes is an appropriate relevant antitrust market.

¹⁸⁹ “Although they are not binding, the [*Horizontal Merger Guidelines*] ‘have [] been repeatedly relied on by the courts’ in evaluating merger challenges.” *Peabody Energy*, 492 F. Supp. 3d at 883 n.9 (quoting *Tronox*, 332 F. Supp. 3d at 206).

i. Closed-System E-Cigarettes Are a Relevant Product Market Based on the *Brown Shoe* Factors

The relevant product market in which Respondents competed vigorously before Altria's exit in 2018 is the sale of closed-system e-cigarettes. Closed-system e-cigarettes have distinct product features,¹⁹⁰ provide unique user experiences,¹⁹¹ and are sold through the multi-outlet and convenience ("MOC") channel, which largely consists of convenience stores.¹⁹² Consistent with these particular attributes of closed-system e-cigarettes, market participants—including producers and retailers—view the closed-system e-cigarette space as a distinct competitive marketplace and their ordinary course of business documents reflect such market realities.

First and foremost, Respondents considered their respective MarkTen and JUUL e-cigarette product lines to be competing in a market that consists of closed-system e-cigarettes. Altria tracked the performance of its MarkTen cigalikes and MarkTen Elite pod-based products, both of which were closed-system e-cigarettes, against the performance of other closed-system e-cigarettes, with a particular emphasis on JLI's JUUL product.¹⁹³ For example, in an August 2018 presentation, Altria tracked promotion and launch activities of other closed-system e-cigarette competitors including JUUL.¹⁹⁴ Altria also developed market reports for closed-system e-cigarettes that track the prices of other closed-system e-cigarettes.¹⁹⁵ In numerous internal documents, Altria listed VUSE, blu, Logic, and JUUL—all of which were closed-system e-cigarette brands—as competitors of its own closed-system e-cigarette products.¹⁹⁶ In fact, an

¹⁹⁰ See *supra* § I.b.

¹⁹¹ PX8008 (Huckabee (Reynolds) Decl. ¶ 12); PX8004 (Farrell (NJOY) Decl. ¶ 11); PX7022 (Begley (Altria) Dep. at 72-73) ("And there were also consumers that preferred the simplicity of closed system products.").

¹⁹² See, e.g., PX4029 (Altria) at 8; PX8008 (Huckabee (Reynolds) Decl. ¶ 14); PX8004 (Farrell (NJOY) Decl. ¶ 11);

¹⁹³ See, e.g., PX1280 (Altria) at 10 (showing market shares over time for closed-system e-cigarette competitors in the MOC channel); PX1424 (Altria) at 11, 16-23; PX1013 (Altria) at 9.

¹⁹⁴ PX1056 (Altria) at 23.

¹⁹⁵ PX1087 (Altria) at 5.

¹⁹⁶ See, e.g., PX1100 (Altria) at 40; PX1229 (Altria) at 5; PX4012 (Altria) at 12, 15; PX4028 (Altria) at 11; PX4029 (Altria) at 13; PX7014 (Baculis (Altria) Dep. at 71).

more rectangular, like a USB drive.²⁰³ Both cigalikes and pod-based products use replaceable cartridges or pods,²⁰⁴ and both use e-liquids that can have similar chemical characteristics and can contain nicotine salts in their formula.²⁰⁵ Moreover, both cigalikes and pod-based products offer similar ease of use and convenience, and are sold side-by-side in convenience stores.²⁰⁶ Further, the various datasets that Respondents use in the ordinary course of business do not distinguish between cigalikes and pod-based products sold in the retail channel.²⁰⁷

As a result, when closed-system e-cigarette producers—including Altria and JLI—assessed their competitive landscape, they focused on *all* competitive closed-system e-cigarette products which included both cigalikes and pod-based products. Even before Altria launched its first pod-based product (MarkTen Elite) on the market in early 2018, JLI—a company that offers only a pod-based product, JUUL—tracked Altria’s e-cigarette business closely, including market shares, prices, and the characteristics of Altria’s MarkTen cigalike products, and it considered MarkTen to be a significant competitor. For example, in 2017, JLI executives noted that JUUL’s main competitors included MarkTen, which included only cigalike products on the market at the time.²⁰⁸ Moreover, after Altria launched MarkTen Elite in February 2018, JLI continued to track MarkTen cigalike products and often did not distinguish between the two products. For example, in several 2018 documents shared with investors, JLI compared its JUUL product with both MarkTen (cigalike) and MarkTen Elite (pod-based) products.²⁰⁹

²⁰³ PX4029 (Altria) at 7; PX7004 (Willard (Altria) IHT at 104) (“A cig-a-like normally refers to an e-vapor product that visually looks more like a cigarette. So it’s a cylindrical tube.”); PX7026 (Gardner (Altria) Dep. at 48) (“[C]igalike is cigarette-like. It looks like a cigarette. It’s a closed system.”); PX7003 (Quigley (Altria) IHT at 14); PX7026 (Gardner (Altria) Dep. at 211) (“JUUL was a rectangular device and Elite was a sort of smashed diamond shape.”).

²⁰⁴ PX2579 (JLI) at 181.

²⁰⁵ See, e.g., PX1028 (Altria) at 6; PX1129 (Altria) at 12; { [REDACTED] }.

²⁰⁶ See, e.g., PX4012 (Altria) at 40.

²⁰⁷ See PX5001 at ¶ 38 (Rothman Rebuttal Report).

²⁰⁸ PX2580 (JLI) at 3; see also PX2588 (JLI) at 3; PX2488 (JLI) at 2.

²⁰⁹ PX2067 (JLI) at 14; PX2590 (JLI) at 29; PX2531 (JLI) at 033.

Furthermore, JLI has consistently viewed as their primary competitors all other major closed-system e-cigarettes—not only competitive pod-based products, but also cigalikes, including Altria’s MarkTen products.²¹⁰ For example, a 2018 JLI investor presentation included a slide tracking “competitive [product] launches,” which listed major closed-system e-cigarette products—both cigalikes (e.g., MarkTen XL Bold, Logic Power, and blu PLUS) and pod-based products (e.g., MarkTen Elite, VUSE Alto, and myblu).²¹¹ In a December 2018 email, a JLI executive attached a JLI quarterly update identifying major closed-system e-cigarette brands offering both cigalikes and pod-based products (e.g., Vuse, MarkTen, blu, and Logic) as competitors.²¹² In addition, one of JLI’s board members, Riaz Valani, testified that both cigalikes and pod-based products competed with JLI.²¹³ Further, ordinary-course business documents from other closed-system e-cigarette producers also show that they consider a market for closed-system e-cigarettes that encompasses both cigalikes and pod-based products. For example, a

[REDACTED]

[REDACTED]²¹⁴

ii. The Closed-System E-Cigarette Market Excludes Open-Tank E-Cigarettes Because They Are Not Close Substitutes

Closed-system e-cigarettes and open-tank products have: (1) distinct product attributes; (2) dissimilar user experiences; and (3) are sold in different retail channels. Due to these differences, market participants—manufacturers, distributors, and retailers—do not view closed-

²¹⁰ See, e.g., PX2350 (JLI) at 2; PX2579 (JLI) at 7; PX7005 (Danaher (JLI) IHT at 114–17).

²¹¹ PX2532 (JLI) at 16; see also PX2344 (JLI) at 4 (showing the flavor coverage and nicotine range of various closed system products, including both cigalikes and pod-based products); PX2451 (JLI) at 1 (considering both cigalikes and pod-based products when discussing the shares of different flavored products and calculating market shares); [REDACTED]

²¹² PX2526 (JLI) at 7; see also PX2531 (JLI) at 34.

²¹³ PX7032 (Valani (JLI) Dep. at 54–55) (“Q. When you say products that would compete with JLI, what types of products are you referring to? . . . A. E-cigarettes; you know, e-cigarettes generally. Q. When you say, “e-cigarettes generally,” does that include pod-based e-cigarettes? A. Yes. Q. Does it include Cigalikes? A. Broadly, yes.”).

²¹⁴ [REDACTED].

system e-cigarettes and open tank products as close substitutes. First, closed-system e-cigarettes and open-tank e-cigarettes have different product characteristics that appeal to different users. Open-tank e-cigarettes allow for a much more customizable experience whereby users can experiment with different e-liquids, creating customized flavors or nicotine strength.²¹⁵ This was true prior to the FDA flavor ban, but is even more true now, because the FDA flavor ban applies only to pods and cartridges for closed-system e-cigarettes, not to e-liquids for open-tank products.²¹⁶ In addition, unlike with closed-system e-cigarettes, consumers can customize each individual component of an open tank e-cigarette.²¹⁷ With their distinct product attributes, closed-system e-cigarettes and open-tank e-cigarettes provide vastly different user experiences. As Altria’s former CEO testified, open-tank users consider tinkering with their open-tank products and mixing different flavored e-liquids as a “hobby.”²¹⁸ On the other hand, closed-system e-cigarette users prefer convenience, simplicity, and portability of closed-system products as they tend to be smaller and easier to use than open-tank products.²¹⁹ In addition, closed-system e-cigarettes and open-tank products are sold in different retail channels. The vast majority of closed-system e-cigarettes are sold through the MOC channel, which consists primarily of convenience stores.²²⁰ [REDACTED]

[REDACTED] }²²¹

Consistent with the differences described above, market participants—including Respondents—do not consider closed-system e-cigarettes and open-tank e-cigarettes as close

²¹⁵ PX8003 (Wexler (Turning Point Brands) Decl. ¶ 18).

²¹⁶ PX9016 (FDA) at 1.

²¹⁷ PX7004 (Willard (Altria) IHT at 58).

²¹⁸ PX7004 (Willard (Altria) IHT at 58); *see also* PX7022 (Begley (Altria) Dep. at 74); PX7025 (Burns (JLI) Dep. at 54–56); PX8008 (Huckabee (Reynolds) Decl. ¶ 12); PX8003 (Wexler (Turning Point Brands) Decl. ¶ 9).

²¹⁹ PX8008 (Huckabee (Reynolds) Decl. ¶ 12); PX8004 (Farrell (NJOY) Decl. ¶ 11); PX7022 (Begley (Altria) Dep. at 73) (“And there were also consumers that preferred the simplicity of closed system products.”).

²²⁰ *See, e.g.*, PX4029 (Altria) at 8.

²²¹ *See* [REDACTED]. }

substitutes or as close competitors. For example, closed-system e-cigarette producers' ordinary course of business documents show that they track sales volumes and market shares for closed-system e-cigarette products.²²² Likewise, ordinary-course documents show that closed-system competitors analyze and compare the features, prices, brand awareness, and consumer satisfaction for the closed-system e-cigarettes on the market, without including any such analysis of open-tank e-cigarettes.²²³ Moreover, closed-system e-cigarette producers and retailers do not consider open-tank products when making pricing or promotion decisions for closed-system e-cigarettes.²²⁴

iii. The Hypothetical Monopolist Test Confirms Closed-System E-Cigarettes Are a Relevant Product Market

Consistent with the "practical indicia" described above, the empirical analysis conducted by Complaint Counsel's economic expert, Dr. Dov Rothman, supports a relevant product market consisting of closed-system e-cigarettes. [REDACTED]

[REDACTED] }²²⁵ Using what is called a "critical elasticity test,"²²⁶ Dr. Rothman's analysis shows that the elasticity of demand for closed-system e-cigarettes is "less (in absolute value) than" the critical elasticity. The empirical result means that not enough consumers of closed-system e-cigarettes would substitute to alternative products to make a SSNIP by a hypothetical

²²² See, e.g., PX2145 (JLI) at 23 (chart showing only closed-system brands); PX1280 (Altria) at 10 (chart showing only closed-system brands); PX1323 (Altria) at 7 (chart showing only closed-system brands); [REDACTED].

²²³ See, e.g., PX2082 (JLI) at 4-5 (charts showing only closed-system brands); [REDACTED].

²²⁴ [REDACTED]; [REDACTED]; [REDACTED]; PX7012 (Eldridge (ITG) Dep. at 171; [REDACTED]) (testifying that open tank users are a "completely different type of customer segment").

²²⁵ [REDACTED].

²²⁶ This kind of analysis is also referred to as a "critical loss" analysis. See PX5000 at ¶ 79 n.174 (Rothman Report).

monopolist unprofitable. Thus, the relevant product market is properly defined as closed-system e-cigarettes.²²⁷

b. The Relevant Geographic Market Is the United States

“A relevant geographic market defines the geographic area to which consumers ‘could practicably turn for alternative sources of the product.’” *Polypore*, 2010 WL 9549988, at *16 (quoting *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995)); see also *Horizontal Merger Guidelines* § 4.2. Here, the relevant geographic market is the United States. Given the FDA’s regulations, including the PMTA requirement,²²⁸ closed-system e-cigarette customers in the United States cannot simply import e-cigarettes without prior authorization, and thus they cannot defeat a SSNIP imposed by a hypothetical monopolist of closed-system e-cigarettes sold in the United States by substituting to e-cigarette products sold outside of the United States.²²⁹

2. Respondents’ Agreement Violates Section 1 of the Sherman Act

This case concerns an agreement not to compete between the behemoth of the tobacco industry and one of its most aggressive and disruptive competitors in the e-cigarette market. Altria agreed to exit the U.S. e-cigarette market and to stop competing now and in the future, in exchange for a stake in JLI. This agreement resulted in the complete elimination of all price, innovation, and shelf-space competition from Altria in the U.S. closed-system e-cigarette market.

Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits unfair methods of competition, including conduct that violates Section 1 of the Sherman Act, 15 U.S.C. § 1. A Section 1 violation requires proof of (1) a contract, combination, or conspiracy that (2) unreasonably restrains trade. See *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011); *In re Benco*

²²⁷ PX5000 at ¶¶ 67, 80–82 (Rothman Report).

²²⁸ See PX9071 (FDA Factsheet on Imported Tobacco, available at <https://www.fda.gov/industry/regulated-products/imported-tobacco> (last accessed April 20, 2021)).

²²⁹ PX5000 at ¶¶ 83–84 (Rothman Report).

Dental Supply Co., Docket No. 9379, 2019 WL 5419393, at *68 (F.T.C. Oct. 15, 2019). A plaintiff need only establish that a defendant violated Section 1 by a preponderance of the evidence. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56, 663 (7th Cir. 2002).

a. Altria and JLI agreed that Altria would exit the U.S. e-cigarette market in exchange for its stake in JLI

The evidence will establish that Altria and JLI entered into an agreement not to compete in the U.S. e-cigarette market. “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)). An anticompetitive agreement may be established through either direct or circumstantial evidence, or a combination of the two. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010); *Benco*, 2019 WL 5419393, at *9. Indeed, because it is rare for parties to an illegal agreement to commit the entirety of their anticompetitive agreement to writing, plaintiffs commonly prove the existence of an anticompetitive agreement through inferences drawn from circumstantial evidence. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998); *Benco*, 2019 WL 5419393, at *9; *see also In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014). 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). Circumstantial evidence is no less persuasive than direct evidence. *E.g., 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).

When evaluating the existence of an anticompetitive agreement, courts must consider the “totality of the evidence.” *Id.* (quoting *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012)); *see also Benco*, 2019 WL 5419393, at *9. 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).

Here, the totality of the evidence makes clear that Altria and JLI entered into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI.

i. Respondents’ communications establish that both firms understood that Altria could not continue to compete in the e-cigarette market

The communications between Respondents demonstrate a mutual understanding that Altria could not continue competing in the e-cigarette market and sign a deal of any kind with JLI. In advance of a key meeting between the principle deal negotiators at the Hyatt hotel in Washington, DC, JLI sent Altria a term sheet clearly spelling out its requirement that Altria “divest . . . contribute [or] *cease to operate*), [its e-vapor] assets”²³⁰ When Altria initially struck the provision, JLI delivered a blunt message: “This is not acceptable to us.”²³¹

Furthermore, internal communications among both Respondents’ leaders further reinforce the notion that Altria’s decision to shut down its e-cigarette business was explicitly linked to the JLI deal. For example, on the Altria side, Murray Garnick sent an email on November 15 to Willard, Gifford, and Crosthwaite in which he stated: “[I]f [the Transaction] goes forward, we need to consider canceling Mark Ten now [.]”²³² On December 1, Altria decided to “stop making all e-vapor products” in order to, according to Garnick, prepare for

²³⁰ PX1300 (Altria) at 5 (emphasis added).

²³¹ PX1308 (Altria) at 2.

²³² PX4353 (Altria) at 1.

“post [Transaction] Altria.”²³³ On the JLI side, JLI’s chief investment banker on the deal wrote to Nick Pritzker that he “was under the impression that [Altria] would just shut down Mark 10.”²³⁴

ii. Altria’s outside agreement with PMI presented obstacles to Altria divesting or contributing its e-vapor assets

The Parties argue that Altria could have satisfied JLI’s demands by divesting or contributing its e-cigarette business to JLI. However, because of Altria’s agreement with PMI, Altria could not exit the e-cigarette market except by ceasing operations before July 2020.²³⁵ This delay threatened Respondents’ ability to immediately initiate certain Transaction-related services that JLI was eager to obtain quickly such as placing JUUL advertising “inserts” in packs of Marlboro cigarettes.²³⁶ JLI was eager to begin using these services as soon as possible after the transaction was closed.²³⁷ But Altria recognized that it could not agree to JLI’s terms in writing prior to HSR approval without facing antitrust scrutiny.²³⁸

Facing these challenges, Altria settled on what it viewed as the best available option to satisfy its commitment to JLI: accepting JLI’s unlawful proposal to cease operating its e-vapor business. Once it was satisfied that Altria had indeed fulfilled its obligations to stop competing against it, JLI moved quickly to finalize a deal. Less than two weeks later, on December 19, 2018, mere hours after Altria actually stopped selling its e-vapor products, Respondents’ boards approved the Transaction.²³⁹ { [REDACTED]

²³³ PX4277 (Altria) at 1.

²³⁴ PX2330 (JLI) at 1.

²³⁵ See *supra* § I.6; PX7036 (Garnick (Altria) Dep. at 156-57); PX7035 (Masoudi (JLI) Dep. at 79-83) (testifying that JLI sought legal advice on implications of Altria’s contractual relationship with PMI for an Altria/JLI deal).

²³⁶ See *supra* § I.6.

²³⁷ PX7042 (Danaher (JLI) Dep. at 155).

²³⁸ PX1493 (Altria) at 2.

²³⁹ PX2459 (JLI) at 1; PX7033 (O’Hara (JLI) Dep. at 177-178; [REDACTED]; PX2604 (JLI) at 1-8.

[REDACTED] }²⁴⁰ Respondents were thus able to avoid any delay in Altria providing the “extended services.”²⁴¹

iii. In the absence of the transaction, the discontinuation of Nu Mark was against Altria’s economic self-interest

Altria’s discontinuation of its e-vapor business was against its economic interest and indeed the evidence is clear that Altria would have competed in the e-cigarette segment but for the Transaction. “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). 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.²⁴² Altria had already spent hundreds of millions of dollars developing and marketing e-cigarette products, and had hundreds of people working on e-cigarette product development and marketing.²⁴³ The company repeatedly touted the importance of the e-cigarette market to its investors given the steady decline of the combustible cigarette category.²⁴⁴ Altria could not afford to stand on the sidelines as e-vapor products displaced traditional cigarettes.²⁴⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }²⁴⁷

²⁴⁰ [REDACTED]

²⁴¹ PX1162 (Altria) at 1.

²⁴² See *supra* § I.4.

²⁴³ See *supra* § I.4.

²⁴⁴ PX1172 (Altria) at 7; see also [REDACTED]; [REDACTED].

²⁴⁵ See *supra* § I.4.

²⁴⁶ See [REDACTED].

²⁴⁷ [REDACTED].

Altria frequently made public statements to investors, which must be truthful and accurate under SEC regulations, on the importance of the e-cigarette market to Altria. In an interview with the *Wall Street Journal*, Howard 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.”²⁴⁸ Similarly, 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.”²⁴⁹

Moreover, as soon as Altria discontinued MarkTen, observers in the investment community quickly linked the discontinuation to rumors about a potential Altria/JLI combination.²⁵⁰ 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.”²⁵¹ 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.²⁵²

In view of Altria’s statements to investors as well as the general understanding in the investment community, it is highly implausible that Altria would exit the e-cigarette market in the absence of a strategic combination with JLI. 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*, 158 F.3d at 572).

²⁴⁸ PX1172 (Altria) at 5.

²⁴⁹ PX2006 (JLI) at 5.

²⁵⁰ PX1293 (Altria) at 4; PX1293 (Altria) at 80.

²⁵¹ PX1293 (Altria) at 4.

²⁵² PX1293 (Altria) at 80.

iv. The Timeline of Altria's Actions is Highly Suspect

When compared to Altria's prior commitment to being a long-term, strategic competitor in the e-cigarette market,²⁵³ 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 In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1154-55 (D. Kan. 2012) (timeline of events can support inference of conspiracy). { [REDACTED] }²⁵⁴ At a quarterly earnings call in mid-2018, Howard Willard reported to investors that MarkTen Elite was "getting traction with customers."²⁵⁵ The head of Nu Mark, Brian Quigley, testified that both MarkTen and MarkTen Elite products were growing.²⁵⁶

But separately, and secretly, Altria's top executives were meeting with executives from JLI as early as fall 2017,²⁵⁷ and exchanging draft terms sheets as early as July 2018.²⁵⁸ Given the timing of (1) Respondents' initial agreement on terms in October 2018, (2) Altria's discontinuation of its e-vapor products in October and December 2018, and (3) the announcement of the Transaction on December 20, 2018, it is implausible that the events were unrelated.²⁵⁹ When Altria announced that it was suspending MarkTen Elite, Altria gave JLI a copy of the announcement as soon as it was released.²⁶⁰ Howard Willard then called Valani, Pritzker, and Burns and privately reassured the JLI leadership that Altria's publicly stated concerns about pod products and youth usage in no way dampened its eagerness to secure a

²⁵³ *See supra* § I.4.

²⁵⁴ { [REDACTED] }.

²⁵⁵ PX9047 (Altria 2Q2018 Earnings Call) at 10.

²⁵⁶ PX7003 (Quigley (Altria) IHT at 56, 152).

²⁵⁷ PX7021 (Pritzker (JLI) Dep. at 30).

²⁵⁸ *See generally* PX1300 (Altria); PX1497 (Altria); PX2173 (JLI).

²⁵⁹ *See supra* § I.6.

²⁶⁰ PX2022 (JLI) at 1.

partnership with the e-cigarette market leader.²⁶¹ Likewise, Altria’s December 7, 2018 announcement was immediately noticed by JLI executives.²⁶² As discussed above, Altria agreed to JLI’s terms by “ceas[ing] to operate” its e-vapor business.²⁶³

v. Respondents’ words and actions further support finding an anticompetitive agreement

Respondents’ words and actions suggest they were acutely aware that a deal between Altria and JLI could raise antitrust concerns. Statements suggestive of a conspiracy have also been identified as an independent “plus factor” supporting the inference of an agreement. *See High Fructose Corn Syrup*, 295 F.3d at 662; *McWane*, 2012 WL 4101793, at *14. Altria made such a statement when it explained its rationale for removing JLI’s “cease to operate” language from the term sheet, suggesting that it did so because of the antitrust concerns raised by such problematic language, even while reaffirming its willingness to accede to JLI’s demand for a halt to all forms of competition between the two firms.²⁶⁴ Garnick later suggested to Crosthwaite that instead of sending edits to JLI’s term sheet, Altria should ask “our outside counsel to ‘clarify’ the term sheet with [JLI]’s lawyers and resolve the antitrust issues” because Altria did not want “to send [JLI] a term sheet and have them send back another angry memo.”²⁶⁵ Respondents’ outside counsel made a statement suggesting that Respondents were aware of the significance of Altria’s shutdown of its e-vapor business to HSR clearance.²⁶⁶ On December 9, 2018, in response to JLI’s General Counsel Jerry Masoudi’s inquiry into whether Altria would agree to have the

²⁶¹ PX7011 (Valani (JLI) IHT at 124-127).

²⁶² PX7005 (Danaher (JLI) IHT at 175); PX7035 (Masoudi (JLI) Dep. at 89); PX7039 (Robbins (JLI) Dep. at 146-148).

²⁶³ PX1300 (Altria) at 5.

²⁶⁴ PX1493 (Altria) at 1.

²⁶⁵ PX4288 (Altria) at 1.

²⁶⁶ PX2605 (JLI) at 10.

non-compete go into effect prior to antitrust clearance, Garnick assured him that “[t]his is of course a nonissue, since we are not in the market anymore.”²⁶⁷

Respondents were aware that explicitly linking the Transaction with the discontinuation of Altria’s e-vapor business raised antitrust concerns,²⁶⁸ so Altria began taking steps satisfy its commitment before the Transaction announcement, including suspending MarkTen Elite in October 2018 and announcing on December 7, 2018, that it would wind down the remainder of its e-cigarette business.²⁶⁹ These circumstances further support finding Respondents entered into an illegal agreement.²⁷⁰

vi. Altria’s proffered explanations for its decision to exit the e-cigarette market are pretextual and inconsistent

Altria offers a myriad of excuses, as to why it discontinued its e-cigarette products and exited a market that it had continuously proclaimed to be a strategic priority. While Altria initially cited the issue of youth use of pod-products in its letter to the FDA announcing the discontinuation of MarkTen Elite, Altria also argues that its Nu Mark products were inferior and could not possibly compete with JLI, and that Altria would be unable to secure PMTAs for its products. All of these arguments are pretextual and implausible. Evidence of the absence of legitimate justifications for anticompetitive conduct, and the proffer of pretextual justifications for that conduct, further strengthens the inference of an unlawful agreement. *See, e.g., White v. R.M. Packer Co.*, 635 F.3d 571, 585 (1st Cir. 2011); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 478 (3d Cir. 1998); *McWane*, 2012 WL 4101793, at *17.

²⁶⁷ PX1162 (Altria) at 1.

²⁶⁸ PX1493 (Altria) at 2; PX1499 (Altria) at 2.

²⁶⁹ PX2022 (JLI) at 1; PX2146 (JLI) at 1.

²⁷⁰ Relatedly, evidence of frequent communications between conspirators is sometimes treated as an independent “plus factor” which can further bolster the inference of an illegal 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). The record in this case is ripe with numerous in-person meetings and phone calls throughout the Transaction negotiations. *See supra* § I.6.

While Altria cited youth usage concerns as a justification for discontinuing MarkTen Elite and Apex,²⁷¹ Altria had no evidence that its e-vapor products were used by minors.²⁷² In fact, Altria executives repeatedly testified that Altria did not market to minors and that Altria did not have a known issue with minors using Altria's e-cigarette products.²⁷³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁷⁴ Valani reported that the decision had the intended effect, making him feel "scared" not to agree to the Transaction because Altria had "set things up quite nicely" to pressure the FDA to come after JLI.²⁷⁵ Moreover, it is highly implausible that Altria would shut down its own pod-based products out of a concern about youth vaping while secretly negotiating to take a stake in JLI, the firm largely believed to responsible for the youth vaping epidemic.²⁷⁶

[REDACTED].²⁷⁷

[REDACTED]

[REDACTED].²⁷⁸ As Richard Jupe explained, "it's a matter of being patient.... We're going to make more mistakes than victories, but it's a

²⁷¹ PX2022 (JLI) at 2.

²⁷² PX7023 (Fernandez (Altria) Dep. at 77-78).

²⁷³ PX7031 (Willard (Altria) Dep. at 267); PX7017 (Magness (Altria) at 194-95).

²⁷⁴ [REDACTED]

²⁷⁵ PX7011 (Valani (JLI) IHT at 128-129).

²⁷⁶ See PX9079 ("A Conversation with FDA Commissioner Scott Gottlieb on His Tenure and Policy Reforms," (The Brookings Institute, Washington DC, Mar. 19, 2019) at 8-11); PX7017 (Magness (Altria) at 169, 232-33, 268-69).

²⁷⁷ See e.g., [REDACTED].

²⁷⁸ [REDACTED] }.

journey, not a knob you turn and all of a sudden you're an innovative company."²⁷⁹ The other tobacco majors recognized the need to make long-term investments in the e-cigarette market.²⁸⁰

Altria's documents show that it viewed its products as successful [REDACTED]
[REDACTED].²⁸¹

Altria's third excuse for its decision to shut down its entire e-cigarette business is that its products faced an uncertain pathway to regulatory approval.²⁸² It is surprising that Respondents would even make this claim given that Altria's supposed expertise with the PMTA process lies at the heart of the one remaining efficiency or procompetitive benefit that Respondents claim from this Transaction.²⁸³ Logical inconsistency aside, this claim lacks evidentiary support. First, Altria knew about most of the issues with its products when it introduced them to the market.²⁸⁴ [REDACTED]

[REDACTED].²⁸⁵ Altria was actively working on solutions to many of its problems and had a proven record of fixing issues.²⁸⁶ Second, prior to the shutdown, Altria's regulatory affairs team already had prepared many of the PMTA materials for MarkTen's cigalike product and was planning its PMTA efforts for MarkTen Elite.²⁸⁷ Other e-cigarette manufacturers, including JLI, faced similar challenges, but did not exit the e-cigarette market, and subsequently submitted tens of thousands of PMTA

²⁷⁹ PX7016 (Jupe (Altria) Dep. at 211-212).

²⁸⁰ See *supra* § I.2.

²⁸¹ See *supra* § I.4.a; [REDACTED].

²⁸² PX7004 (Willard (Altria) IHT at 211-212); [REDACTED].

²⁸³ See *infra* §§ II.b.ii-iv, II.d.2.

²⁸⁴ PX7026 (Gardner (Altria) Dep. at 89-96); PX7003 (Quigley (Altria) IHT at 153); see also PX7014 (Baculis (Altria) Dep. at 162-163); PX1373 (Altria) at 22.

²⁸⁵ See [REDACTED].

²⁸⁶ PX1579 (Altria) at 1; see also [REDACTED].

²⁸⁷ [REDACTED]; PX7003 (Quigley) Altria IHT at 22-23, 30-32); PX1011 (Altria) at 20.

applications.²⁸⁸ Finally, Altria has lost all credibility on issues relating to these claimed PMTA challenges due to several of its senior executives providing materially misleading testimony regarding the rollout of a new gasket for MarkTen Elite designed to remedy the product’s leaking problem.²⁸⁹ Indeed, Altria was forced to admit that Nu Mark had distributed MarkTen Elite units with the new gasket for sale in the U.S. in the fall of 2018 despite having submitted a white paper assuring FTC staff that this event did not occur.²⁹⁰ This was a significant development, as those same executives had also testified that Elite’s leaking issue was a major challenge to its future success with consumers.²⁹¹ As courts have long recognized, a misrepresentation of this magnitude calls the overall truthfulness of these executives’ explanations for Altria’s actions into serious question. *See, e.g., Impax Lab ’ys, Inc. v. FTC*, 994 F.3d 484, 499-500 (5th Cir. 2021) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.

²⁸⁸ PX5000 at ¶ 113 (Rothman Report); *Tobacco Product Applications: Metrics & Reporting*, FDA (Feb. 16, 2021), <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-applications-metrics-reporting> (accessed May 13, 2021).

²⁸⁹ *See, e.g.*, PX7036 (Garnick (Altria) Dep. at 22) (“Q. Is there any testimony that you would change? A. There was testimony that I believe to be mistaken, yes. Q. And what is that testimony? A. Well, for example, after 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.”); PX7003 (Quigley (Altria) IHT at 81) (Q. What ultimately happened with the new gasket? Was the fix ever implemented? A. No.”); PX7031 (Willard (Altria) Dep at 60) (“ Q. Okay. Mr. Willard, you mentioned that there would be a potential risk that the FDA would deem the new gasket a changed product; is that correct? A. Yeah. I think the team felt that there was an argument that could be made that it was not a changed product, but that, obviously, a counterargument could also be made. And in the end, we decided not to take that risk.”)

²⁹⁰ Compare PX0019 (Altria) at 6 (Respondent Altria’s Responses and Objections to Complaint Counsel’s Requests for Admission to Respondent Altria) (“Subject to and without waiving any objections, Altria admits 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.’”) with PX0019 at 5-6 (“Subject to and without waiving any objections, Altria admits that in a White Paper, dated February 27, 2020, submitted to FTC Staff, Altria 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.’”)

²⁹¹ PX7003 (Quigley (Altria) IHT at 72); [REDACTED]; [REDACTED]; [REDACTED].}

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’”).

[REDACTED]

[REDACTED]

[REDACTED]²⁹² However, the former SVP of Altria’s Consumer and Market Insights Group admitted that Altria never conducted any studies to evaluate conversion potential for MarkTen Elite.²⁹³ Indeed, Altria’s claims about conversion potential boil down to the fact that JLI was gaining e-vapor market share more rapidly than its products.²⁹⁴ But manufacturers have submitted tens of thousands of PMTA applications for products that had lower market share than Altria’s products at the time that Altria discontinued them.²⁹⁵ Altria’s willingness to abandon its entire e-cigarette business simply because JLI had a higher market share appears to be a uniquely defeatist attitude among the major e-cigarette competitors.

The reality hiding behind these flimsy pretexts is that both Altria and JLI had strong incentives to enter into the anticompetitive arrangement. JLI feared Altria’s current and future competitive abilities and wanted the company out of the e-cigarette market.²⁹⁶ For its part, Altria saw an opportunity to take a highly profitable shortcut to the long-coveted leadership position in the strategically important e-cigarette market rather than battle JLI for control.²⁹⁷ Indeed, Howard Willard communicated as much to investors in 2019: “Throughout our analysis, it

²⁹² [REDACTED].

²⁹³ PX7023 (Fernandez (Altria) Dep. at 88-89); PX1323 (Altria) at 13.

²⁹⁴ PX7026 (Gardner (Altria) Dep. at 24-26); [REDACTED].

²⁹⁵ *Tobacco Product Applications: Metrics & Reporting*, FDA (Feb. 16, 2021), <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-product-applications-metrics-reporting>.

²⁹⁶ *See supra* § I.6.

²⁹⁷ *See supra* § I.5.

became clear that investing with JUUL to accelerate its global growth was more value accretive than investing internally to leap frog [Altria’s] products.”²⁹⁸

In view of these factors, the totality of the evidence supports an inference that Altria and JLI entered into an illicit agreement for Altria to exit the U.S. e-cigarette market in exchange for a portion of JLI.

a. Respondents’ Agreement is Unlawful Under the Rule of Reason

Respondents’ agreement that Altria exit the market in exchange for a share of JLI’s profits is clearly anticompetitive and therefore unlawful under the rule of reason. The rule of reason tests “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (quoting *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918)). When applying the rule of reason courts rely on a burden-shifting framework. Under this framework, Complaint Counsel has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers. *In re 1-800 Contacts, Inc.*, Docket No. 9372, 2018 WL 6078349, at *16 (F.T.C. Nov. 7, 2018). If the plaintiff meets its initial burden, the burden shifts to Respondents to show a procompetitive rationale for the restraint. *Id.* If Respondents make this showing, then the plaintiff must show that the procompetitive justification could be reasonably achieved through less anticompetitive means or that the anticompetitive harms outweigh the procompetitive benefits. *Id.* (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *Geneva Pharm. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485, 507 (2d Cir. 2004)).²⁹⁹ When applying this

²⁹⁸ PX1274 (Altria) at 5.

²⁹⁹ Respondents’ conduct may well amount to a *per se* violation of Section 1 or be unlawful under the “inherently suspect” standard. See *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829-31 (3d Cir. 2010) (describing three standards courts use to analyze alleged restraints); see also Complaint, *In re Juul Labs, Inc., Antitrust Litig.*,

framework, “the sequence for evaluating particular evidence may vary under a particular structured analysis, but the ultimate burdens remained unchanged.” *Id.*

The record is clear that the Transaction resulted in the elimination of current and future price, innovation, and shelf-space competition between Respondents. By “commit[ting] to conduct e-vapor operations exclusively through [JLI],”³⁰⁰ the Transaction wholly eliminated Altria as a competitive factor in the e-cigarette market. As courts have repeatedly observed, market allocation agreements are particularly dangerous forms of anticompetitive conduct as they eliminate all forms of competition in the affected markets. *See Impax*, 994 F.3d at 493. As a result of this anticompetitive agreement, an aggressive competitor with significant financial resources, unique innovation capabilities, and an unmatched distribution network exited the e-cigarette market entirely. Respondents cannot offer any “pro-competitive redeeming virtues” sufficient to save the anticompetitive agreement. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 59 (2nd Cir. 1997).

i. The agreement has harmed and will continue to harm consumers

Here, the harm from Respondents’ agreement is self-evident: the shutdown of Altria’s e-cigarette business eliminated ongoing price, innovation, and shelf-space competition between Respondents while also reducing consumer choice.³⁰¹ There can be no doubt that Altria would have been a significant competitor absent the Transaction. [REDACTED]

[REDACTED]³⁰² and it sold products that were

Docket No. 3:20-cv-02345-WHO (N.D. Cal. Apr. 7, 2020) (private litigation challenging the instant Transaction as *per se* unlawful). Indeed, market allocation agreements among actual or potential competitors are typically *per se* antitrust violations. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). However, as Respondents’ agreement to exit the market clearly violates the more “thorough” rule of reason standard, Complaint Counsel’s case will proceed under that standard. *California Dental Ass’n v. FTC*, 526 U.S. 756, 759 (1999).

³⁰⁰ PX1181 (Altria) at 67; *see also* PX1265 (Altria) at 2.

³⁰¹ *See* PX5000 at ¶¶ 91-92 (Rothman Report).

³⁰² [REDACTED].

appealing to consumers.³⁰³ Altria had a strong incentive to compete and abundant resources to do so.³⁰⁴ Altria had—and was executing on—plans to put substantial resources into developing closed-system e-cigarette products and becoming the leader in reduced risk products.³⁰⁵

Altria was particularly well placed to compete in the future because of its dominant position in the traditional cigarette market, its access to shelf space, and its regulatory expertise.³⁰⁶ As one of the few U.S. tobacco companies with a track record of successful PMTAs, Altria was better positioned to comply with FDA regulation than its competitors.³⁰⁷ Altria had a robust pipeline of e-vapor products and plans in place to develop additional products.³⁰⁸ Altria also had access to PMI's products through an e-vapor development agreement, including the latest iterations of Mesh.³⁰⁹ Altria also had the resources to invest in additional innovative products and was exploring acquisitions around the time that it shut down its e-vapor business.³¹⁰

Additionally, the evidence shows that, prior to its exit, Altria did in fact compete in the U.S. closed-system e-vapor market on both price and non-price factors.³¹¹ Internal documents from Altria and JLI compare and report on each other's prices and promotions.³¹² [REDACTED]
[REDACTED].³¹³ For example, after MarkTen Elite was launched with a price promotion in 2018, JLI implemented its own price promotion.³¹⁴

³⁰³ PX3122 (Sheetz) at 1; PX7014 (Baculis (Altria) Dep. at 161, 165).

³⁰⁴ See *supra* § I.4.b.

³⁰⁵ See *supra* § I.4.a.

³⁰⁶ See *supra* §§ I.1.d. and I.4.b.; PX7011 (Valani (JLI) IHT at 137-38).

³⁰⁷ See PX7004 (Willard (Altria) IHT at 113 (noting that the FDA authorized the PMI/Altria IQOS heat-not-burn product in 2019).

³⁰⁸ See *supra* § I.4.

³⁰⁹ See *supra* §§ I.2.a. and I.4.a.

³¹⁰ PX5000 at ¶ 106 (Rothman Report); see *supra* § I.7.

³¹¹ See *supra* § I.4; [REDACTED].

³¹² See, e.g., PX4012 (Altria) at 29; PX2477 (JLI) at 1.

³¹³ [REDACTED].

³¹⁴ PX7002 (Schwartz (Altria) IHT at 89-90); [REDACTED].

Respondents also monitored each other’s product development and R&D activity.³¹⁵ A draft JLI memorandum from February 2018 indicated that JLI viewed Altria as a close competitor, while Altria maintained a “JUUL Book of Knowledge” that contained a “total assessment of Juul,” including product performance, toxicology, and intellectual property.³¹⁶ Altria and JLI also reacted to each other’s innovations and the innovations of other competitors. After seeing JLI’s success with nicotine salts, Altria began using nicotine salts in its MarkTen Bold cigalike and CYNC pod-based product, and planned to put nicotine salts into future versions of Elite.³¹⁷ And JLI’s success with a pod-based product fueled Altria’s desire to commercialize MarkTen Elite quickly.³¹⁸ Altria also invested significant R&D efforts on nicotine satisfaction, various flavor systems, and enhanced features that consumers wanted.³¹⁹ JLI, in turn, attempted to copy Altria innovations, including a larger pod-size containing more e-liquid,³²⁰ and further strived to have the “most elegant experience on the market.”³²¹

Respondents also competed for shelf space at retail and convenience stores.³²² For example, after Altria secured three-year shelf-space contracts at certain retailers, JLI prepared an “Altria Competitive Threat Response”³²³ and { [REDACTED] }
{ [REDACTED] }³²⁴

Altria’s shut down of Nu Mark pursuant to the agreement immediately harmed consumers by eliminating the entirety of this ongoing price, innovation, and shelf-space

³¹⁵ PX5000 at ¶ 137 (Rothman Report).

³¹⁶ PX2138 (JLI) at 27-29; PX1986 (Altria) at 1.

³¹⁷ See PX7038 (Myers (Altria) Dep. at 88); PX7003 (Quigley (Altria) IHT at 97, 100).

³¹⁸ PX7002 (Schwartz (Altria) IHT at 103); PX7022 (Begley (Altria) Dep. at 202-04); see PX7011 (Valani (JLI) IHT at 136-37).

³¹⁹ PX7014 (Baculis (Altria) Dep. at 101-02).

³²⁰ See PX2012 (JLI) at 20; PX2253 (JLI) at 8.

³²¹ PX2012 (JLI) at 21, 24.

³²² See *supra* § I.4.b.

³²³ PX2001 (JLI) at 1; PX2005 (JLI) at 2.

³²⁴ { [REDACTED] }.

competition. This evidence of anticompetitive effects is more than enough for Complaint Counsel to state a *prima facie* case. See *1-800 Contacts*, 2018 WL 6078349, at *39. Moreover, the agreement eliminated all future competition from Altria on any of these dimensions. The agreement is therefore also anticompetitive because it replaced the “possibility of competition [from Altria] with the certainty of none.” *Impax*, 994 F.3d at 495.

ii. Respondents cannot show procompetitive justifications for their Agreement

In this case, Respondents cannot proffer a procompetitive justification for their agreement not to compete in the U.S. e-cigarette market. 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. *Clorox*, 117 F.3d at 59. 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. Respondents are only credited benefits that flow to consumers. See *1-800 Contacts*, 2018 WL 6078349, at *35. While Altria and JLI are likely to point to their Services Agreement to argue that the agreement presents procompetitive benefits, those claims are particularly weak here where *all but one* of the services contemplated under the Services Agreement were terminated with the signing of the Amended Services Agreement.³²⁵ While under the initial agreement, [REDACTED], none of those services lasted past March 2020.³²⁶ The one service to survive the Amended Services Agreement was Altria’s provision of regulatory support services to JLI.³²⁷ Altria and JLI cannot demonstrate how these regulatory services benefitted consumers or competition.

³²⁵ See *supra* § I.3.

³²⁶ [REDACTED]; PX0012 (Altria/JLI) at 2; PX9028 (Altria Form 8-K, Jan. 28, 2020) at 2).

³²⁷ PX0012 (Altria/JLI) at 2; PX9028 (Altria Form 8-K, Jan. 28, 2020) at 2.

iii. Even if the Respondents could show procompetitive justifications, the Agreement was not necessary to achieve them

Even if Respondents could show a procompetitive justification for their agreement, the evidence shows that an agreement was clearly not necessary to achieve these objectives. A restraint of trade that offers some benefits may still be condemned under Section 1 if there were less restrictive means of obtaining those benefits. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *1-800 Contacts*, 2018 WL 608349, at *25-29. Indeed a restraint may be no broader than necessary to achieve the purported benefits. *See NCAA v. Board of Regents*, 468 U.S. 85, 119 (1984).

Respondents did not need to shut down Nu Mark and stop competing in order to achieve the purported benefits of the Transaction. While Respondents are likely to argue that Altria possessed certain indispensable scientific and regulatory expertise that would benefit JLI, it is clear from the record that JLI could have achieved these benefits on its own. JLI could have hired scientific and regulatory experts directly, and indeed, JLI did *in fact* hire a number of individuals from Altria to fill these roles, such as Joe Murillo who headed regulatory affairs at Altria.³²⁸ Further, some of the regulatory work Altria performed for JLI was performed by third party contractors with whom JLI could have contracted directly.³²⁹

JLI executives also claim that they wanted the Non-Compete in order to prevent Altria from benefiting from access to JLI's confidential information.³³⁰ Respondents could have set up

³²⁸ PX7007 (Murillo (Altria/JLI) IHT at 7-8); { [REDACTED] }; PX7010 (Gifford (Altria) IHT at 122).

³²⁹ PX7010 (Gifford (Altria) IHT at 123); PX7008 (Cullen (JLI) IHT at 130, 135-136); *see* PX7027 (Murillo (Altria/JLI) Dep. at 49-50).

³³⁰ PX7021 (Pritzker (JLI) Dep. 65-66); PX7009 (Burns (JLI) IHT at 137-38).

an information firewall as an alternative to Altria discontinuing its e-cigarette products, but they apparently never explored this less restrictive alternative.³³¹

iv. The competitive harm outweighs any benefits

Even if the Court were to find that Respondents’ agreement was necessary to achieve the proffered benefits, the competitive harm would still substantially outweigh those benefits. As discussed above, the agreement resulted in the complete elimination of Altria, a behemoth innovator in the tobacco industry, as a competitor in the U.S. closed-system e-cigarette market. This agreement denied consumers the benefits of meaningful price, innovation, and shelf-space competition and also reduced consumer choice.³³² Respondents’ weak justifications in the form of discontinued services and uncertain regulatory benefits cannot possibly outweigh that complete loss of competition. *See 1-800 Contacts*, 2018 WL 6078349, at *54.

Dr. Rothman’s expert report further supports this finding: Dr. Rothman estimates that the loss of consumer surplus would be \$33.6 million per year if Altria would have maintained a 10 percent closed-system e-cigarette market share.³³³ But even this estimate is conservative because it does not take into account the benefits of innovation competition.³³⁴ The miniscule potential benefits to JLI’s business claimed by Respondents are easily outweighed by the substantial harm to competition that resulted when Altria exited the relevant market.

a. Standing alone, the written Non-Compete also violates Section 1 of the Sherman Act

Separate and apart from Altria’s agreement to cease the operations of its Nu Mark subsidiary, the written Non-Compete between the Respondents violates of Section 1 of the Sherman Act because it is not ancillary to a legitimate purpose. *Palmer*, 498 U.S. at 49-50.

³³¹ PX7042 (Danaher (JLI) Dep. at 154).

³³² *See supra* § II.2.b.i.

³³³ PX5000 at ¶ 144 (Rothman Report).

³³⁴ PX5000 at ¶ 145 (Rothman Report).

Further, even if the written Non-Compete was ancillary to the Transaction, it fails under the rule of reason because its anticompetitive effects of the written agreement substantially outweigh any procompetitive benefits.³³⁵ Covenants not to compete are permissible under the Sherman Act where they are (1) ancillary to the main business purpose of lawful contract, and (2) necessary to protect the covenantee’s legitimate property interests, which require that the covenant 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).

Here, Altria and JLI entered into a written agreement barring Altria from participating in all aspects of the e-cigarette business, including any R&D efforts, for a period of *at least six years*.³³⁶ Respondents cannot demonstrate the Non-Compete is ancillary to a legitimate business interest because the underlying Transaction is unlawful. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). Moreover, even if Respondents could demonstrate the agreement was ancillary to an otherwise legitimate transaction, the Commission has challenged non-compete agreements of equal or shorter length. *See, e.g., DTE Energy Co.*, No. C-4691, at 3-4, 14 (F.T.C. Dec. 13, 2019); *Oltrin Solutions, LLC*, No. C-4388 (F.T.C. Mar. 7, 2013). Accordingly, the written Non-Compete, standing alone, is independently unlawful under Section 1 of the Sherman Act.

i. Respondents cannot show the Non-Compete agreement is ancillary to an otherwise lawful transaction

Respondents cannot show that the written Non-Compete is ancillary to an otherwise lawful agreement. Written non-compete agreements may be permissible under the Sherman Act where they are “ancillary to the legitimate and competitive purpose of the business association.” *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). A non-compete provision is considered “ancillary”

³³⁵ *See supra* § II.2.b.

³³⁶ *See supra* § I.3.

to a lawful agreement where it “bears a *reasonable* relationship to the [business] venture’s success.” *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 725 (6th Cir. 2019) (emphasis in original). Non-compete agreements that are not ancillary to a legitimate and competitive business purpose look suspiciously like market allocation agreements and are thus treated as per se unlawful. *See Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 37 (D.C. Cir. 2005).³³⁷ As the D.C. Circuit explained, “[t]o be ancillary, and hence exempt from the per se rule, 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) (emphasis added).

Respondents will be unable to show their written Non-Compete satisfies the ancillary restraints doctrine. For one, Respondents will be unable to show the Non-Compete is ancillary to a legitimate and competitive business interest because, as discussed *supra*, the Transaction itself is an unlawful agreement under Section 1 of the Sherman Act,³³⁸ and as discussed *infra*, an illegal acquisition under Section 7 of the Clayton Act.³³⁹ With Altria’s shutdown of Nu Mark having ended the existing competition between Respondents, the Non-Compete was the perfect vehicle to eliminate all future competition between Altria and JLI. But even if Respondents could demonstrate that the Transaction was otherwise legitimate, Respondents will still face the burden of demonstrating the “*reasonable* relationship” between the Non-Compete and the overall Transaction. *Med. Ctr. at Elizabeth Place*, 922 F.3d at 725. Respondents will be unable to demonstrate that reasonable relationship here.

³³⁷ A written contract unquestionably provides direct evidence of an agreement for purposes of Section 1. *See Palmer*, 498 U.S. at 46 n.2, 49.

³³⁸ *See supra* §§ II.2.a-b.

³³⁹ *See infra* §§ II. 3.

ii. Even if the Non-Compete was ancillary to an otherwise lawful transaction, it fails under the rule of reason

Even if Respondents could show that the written Non-Compete satisfied the ancillary restraints doctrine, the agreement would still fail under the rule of reason: the anticompetitive effects substantially outweigh any procompetitive benefits, and the Non-Compete is more restrictive than necessary to achieve any legitimate business ends. *1-800 Contacts*, 2018 WL 6078349, at *16-17.

As discussed above, the anticompetitive effects stemming from Altria’s exit of the market are substantial.³⁴⁰ The Non-Compete resulted in the complete elimination of all price, innovation, and shelf-space competition from Altria for a period of at least six years.³⁴¹ This loss of competition has harmed and will continue to harm consumers.³⁴² Respondents cannot demonstrate any procompetitive benefits stemming from the Non-Compete,³⁴³ and, even if they could, the Non-Compete is more restrictive than necessary to achieve any legitimate business ends,³⁴⁴ and any benefit to competition is substantially outweighed by the likelihood of consumer harm.³⁴⁵

3. The Transaction Violates Section 7 of the Clayton Act

a. Applicable Legal Standard Under Section 7

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. The unambiguous text of Section

³⁴⁰ See *supra* § II.2.

³⁴¹ See *supra* § II.2.c.

³⁴² See *supra* § II.2.c.

³⁴³ See *supra* § II.2.b.

³⁴⁴ See *supra* § II.2.b.

³⁴⁵ See *supra* § II.2.b.

7 makes it clear that it applies to partial acquisitions such as the instant case.³⁴⁶ In one of the seminal merger cases, which involved an acquisition of a 23 percent stock interest, the U.S. Supreme Court held that “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.” *United States v. E. I. du Pont de Nemours & Co.*, 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).

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). 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). Courts typically assess whether a merger violates Section 7 by determining the relevant product market, the relevant geographic market, and the merger’s probable effects on competition in those relevant markets. *See, e.g., Penn State Hershey*, 838 F.3d at 338–47; *Peabody Energy*, 492 F. Supp. 3d at 883–907.³⁴⁷

³⁴⁶ “There is no doubt . . . that [Clayton Act § 7] can apply to acquisitions of a part of the stock of another corporation. This is true . . . regardless of whether the acquisition is sufficient to control that corporation and regardless of whether it appears to be a step toward control.” Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1203 (4th Ed. 2013-2018); *see also Horizontal Merger Guidelines* § 13.

³⁴⁷ Courts and the Commission also rely on the *Horizontal Merger Guidelines* for guidance in assessing how the challenged transaction may harm competition. *See supra* n.184.

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 9434806, at *165–66 (F.T.C. Mar. 1, 2010). Under this framework, the government 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.

Respondents can then rebut the presumption of harm “by producing evidence to cast doubt on the accuracy of the government’s” evidence. *Polypore*, 2010 WL 9434806, at *165; *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).

b. The Transaction Is Presumptively Unlawful in the Market for Sales of Closed-System E-Cigarettes in the United States

The Transaction presumptively violates Section 7 of the Clayton Act because it significantly increased concentration in the already highly concentrated market for the sale of closed-system e-cigarettes in the United States. “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). 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; *Merger Guidelines* § 5.3. Here, the Transaction results in an HHI of 3,276 and an increase in HHI of 652, well above the threshold for presumed harm.³⁴⁸

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.

Figure 1 Market Shares and HHI Table in PX5000 at ¶ 89 (Rothman Report)

These market share statistics demonstrate the Transaction is presumptively anticompetitive. *See Tronox*, 332 F. Supp. 3d at 207; *Staples II*, 190 F. Supp. 3d at 128; *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 42-43 (D.D.C. 2017). Courts consistently enjoin transactions with high changes in concentration, like this Transaction. *See, e.g., Heinz*, 246 F.3d

³⁴⁸

Although Dr. Rothman’s HHI calculation required “an assumption about where Altria’s sales go as a consequence of its exit,” Dr. Rothman showed in his report that the Transaction increased concentration even if substitution would have been different from proportional shares. PX5001 at ¶ 72, n.174 (Rothman Rebuttal Report) (“For example, if all of Altria’s share goes to Reynolds, the change in HHI would be 460.”).

at 716 (HHI increase of 510 “creates by a wide margin, a presumption that the merger will lessen competition.”). Although the Transaction involves a partial acquisition of a 35 percent equity interest, the potential for anticompetitive harm is at a minimum equal to or even greater than that of a typical full merger because here Altria completely exited the market as a result of the Transaction.^{349, 350}

c. Evidence of Competitive Harm Bolsters the Presumption

There is extensive additional evidence that the Transaction harmed and will harm competition in the U.S. market for the sale of closed-system e-cigarettes. The *effect* of the Transaction was the complete elimination of Altria as a competitive presence in the closed-system e-cigarette market in the U.S. Altria’s exit harmed—and will continue to harm—competition by eliminating meaningful price, shelf-space, and innovation competition as well as fully eliminating consumers’ ability to choose *any* Altria e-cigarette product.³⁵¹ Testimony of Altria executives as well as their public statements make clear that Altria would not have exited the strategic e-cigarette category absent the Transaction, particularly in light of that category’s growing threat to Altria’s core combustible cigarette business.³⁵² This additional evidence that the Transaction will harm competition further strengthens the presumption, thus increasing the burden Respondents must shoulder on rebuttal. *Sysco*, 113 F. Supp. 3d at 23 (“The more

³⁴⁹ See *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.”); see also Areeda & Hovenkamp, *Antitrust Law* ¶1203c (“Furthermore, the acquiring firm’s market decisions might now be affected not only by their impact on its own operations but also by their impact on its investment—both on dividends and on capital value—in its competitor. Competition at the borderline of profitability may be abandoned if it seems likely to result in an investment loss.”).

³⁵⁰ Evidence from Altria makes clear that the decision to “stop making all evapor products” was made in order to “start preparing for the post [Transaction] Altria.” PX4277 (Altria) at 1 (“Howard [Willard]/Billy [Gifford] have decided to announce the decision to stop making all evapor products [...] Billy [Gifford] is going to want the [Leadership Team] to start preparing for the post [Transaction] Altria.”). Altria’s Murray Garnick also testified that the decision to discontinue commercialization of Nu Mark products was made in anticipation of the Transaction with JLI. PX7036 (Garnick (Altria) Dep. at 212-14).

³⁵¹ See *supra* § II.2.b.i.

³⁵² See *supra* § II.2.b.i.

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).

Evidence that Altria and JLI competed vigorously before the Transaction further 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 131.³⁵³ As discussed above, Respondents competed on a number of dimensions including price, innovation, and shelf space.³⁵⁴ JLI’s relentless drive to become the number one e-cigarette company led it to take a very aggressive posture in the market.³⁵⁵ In turn, Altria focused more and more of its efforts on competing with JLI to gain market share, including aggressive price promotions.³⁵⁶ But for the Transaction, the intense rivalry between Altria and JLI would have continued, to the benefit of consumers.³⁵⁷ This loss of head-to-head competition in the U.S. closed-system e-cigarette market further strengthens the presumption that the Transaction harmed and will harm competition.

The Transaction also harmed competition by eliminating the future competition between Altria and JLI in the “but for” world.³⁵⁸ The *effect* of the Transaction was the complete shutdown of Altria’s Nu Mark division, which deprived consumers of the future benefit of meaningful price, innovation, and shelf space competition—as well as immediately reducing consumer

³⁵³ See also *Merger Guidelines* § 6.2. (“A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.”).

³⁵⁴ See *supra* § II.2.b.i.

³⁵⁵ See *supra* § I.5; II.b.1.

³⁵⁶ See §§ I.4.b, II.2.b.i.

³⁵⁷ See, e.g., PX2289 (JLI) at 21 (May 2018 JLI internal slide titled “US Landscape: Competitive Analysis Framework” concluding that Altria’s MarkTen Elite was one of only four products that had “[l]ong-[t]erm [v]iability” to compete against JUUL).

³⁵⁸ See PX5000 at ¶¶ 130-33 (Rothman Report).

options—in the U.S. closed-system e-cigarette market.³⁵⁹ And Altria would have continued to compete in the market but for the Transaction because the e-cigarette category is strategically critical to Altria,³⁶⁰ and the company had already been competing in the market.³⁶¹ This additional evidence of harm based on the loss of future competition further strengthens Complaint Counsel’s *prima facie* case.

d. Respondents Cannot Rebut the Strong Presumption of Illegality

With the presumption firmly established, the burden shifts to Respondents to rebut the presumption by “produc[ing] evidence that ‘show[s] that the market-share statistics [give] an inaccurate account of the [Transaction’s] probable effects on competition’ in the relevant market.” *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975); *Tronox*, 332 F. Supp. 3d at 197; *Staples II*, 190 F. Supp. 3d at 115.³⁶² Here, Respondents carry a heavy burden given the strength of the *prima facie* case. *See Staples II*, 190 F. Supp. 3d at 115 (“The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully.”) (quoting *Baker Hughes*, 908 F.2d at 991). Respondents will be unable to rebut the presumption of competitive harm, as neither entry or expansion, nor any claimed efficiencies, can redeem the Transaction.

³⁵⁹ Respondents were actual, present competitors at the time they entered the Transaction. Altria ended its active participation in the closed-system e-cigarette market immediately prior to, and in anticipation of, the Transaction and was intent on competing in the future. *See supra* n.347.

³⁶⁰ *See supra* § I.4.

³⁶¹ *See Polypore*, 686 F.3d at 1211 (firm that had previously attempted to enter market treated as actual competitor); *Aetna*, 240 F. Supp. 3d at 76 (firm that left market during pendency of antitrust challenge treated as competitor); *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651 (1964) (firm preparing to enter market treated as actual competitor); *FTC v. Warner Communications*, 742 F.2d 1156 (9th Cir. 1984) (firm with intent to leave market was still a competitor).

³⁶² Although the burden of production shifts to Respondents, the burden of persuasion remains with at all times with the FTC. *Tronox*, 332 F. Supp. 3d at 197; *Staples II*, 190 F. Supp. 3d at 116.

i. Entry or expansion will not be timely, likely, or sufficient to counteract the anticompetitive effects of the Transaction

Respondents “carry the burden of showing that entry or expansion 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 (internal quotations omitted); *see also Sysco*, 113 F. Supp. 3d at 80; *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 47 (D.D.C. 2009). Respondents cannot meet that burden here.

First, *de novo* entry into the U.S. closed-system e-cigarette market would require a significant upfront investment and would take multiple years. A new entrant or current competitor 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 develop and obtain PMTA approval for a new product or an improved version of an existing product.³⁶³ Product development requires significant upfront investment and takes multiple years. Competitors, as well as Respondents’ executives, uniformly testified that developing a product and submitting a PMTA costs millions of dollars.³⁶⁴ Further, the timeline for product development is slow given the engineering complexity of e-cigarette products,³⁶⁵ and the timeline for submitting a PMTA and receiving FDA approval can take more than three years.³⁶⁶ The high cost and complexity of the PMTA process are particularly burdensome on small producers and constitute a significant hurdle for small or inexperienced competitors.³⁶⁷ Altria’s exit from the e-cigarette market does nothing to change these strenuous requirements for entry.

³⁶³ See *supra* § I.1.d.

³⁶⁴ [REDACTED]; [REDACTED]; PX7011 (Valani (JLI) IHT at 181-82); [REDACTED]; PX7017 (Magness (Altria) Dep. at 31-32).

³⁶⁵ PX2043 (JLI) at 4.

³⁶⁶ PX8010 (Folmar (ITG) Decl. ¶ 8) (PMTA preparation for new product is “at least 18 months to 2 years”); PX8009 (Garner (Reynolds) Decl. ¶ 45) (studies required in PMTA take 1-3 years to complete); PX7016 (Jupe (Altria) Dep. at 341) (timeline from data gathering for PMTA through FDA review could take 3 years).

³⁶⁷ PX7017 (Magness (Altria) Dep. at 89).

Moreover, additional barriers further render entry or expansion unlikely to offset the anticompetitive effects of the Transaction. In the U.S. closed-system e-cigarette market, reaching consumers and developing brand awareness is difficult and costly given federal prohibitions against advertising of tobacco and nicotine products through mass media channels.³⁶⁸ This means that shelf space in retail stores is the primary way to advertise, drive brand awareness, and sell products.³⁶⁹ In many convenience stores, large tobacco companies already control significant closed-system e-cigarette product shelf space, and smaller producers, such as NJOY, face significant difficulties obtaining space for their products.³⁷⁰ Large tobacco companies are further able to leverage their shelf-space advantage by providing retailers rebates on traditional cigarettes, which are still the largest driver of foot traffic to convenience stores today.³⁷¹

Lastly, the few existing competitors in the U.S. closed-system e-cigarette market do not expect to expand rapidly. Reynolds—currently the second-largest closed-system e-cigarette producer behind JLI—expects to increase its sales of closed-system e-cigarettes “very slowly”³⁷² while ITG does not plan to pursue a PMTA for any products besides its existing *blu* products.³⁷³ Although some of these existing competitors such as Reynolds, ITG, and NJOY may have grown since the Transaction, that growth has not necessarily *replaced* what consumers lost with Altria’s exit from the market due to the Transaction.³⁷⁴ Sales volume and share growth that would have occurred even if Altria had remained in the market are not “expansions” that offset the harm

³⁶⁸ PX7004 (Willard (Altria) IHT at 31-32); PX2233 (JLI) at 4; [REDACTED].

³⁶⁹ See *supra* § I.1.d; see also [REDACTED]); PX7009 (Burns (JLI) IHT at 20-21); PX7016 (Jupe (Altria) Dep. at 118-119).

³⁷⁰ [REDACTED]); see also PX7009 (Burns (JLI) IHT at 37-38); PX7030 (Wexler (Turning Point Brands) Dep. at 62); PX7033 (O’Hara (JLI) Dep. at 131-32).

³⁷¹ PX7033 (O’Hara (JLI) Dep. at 131-32); PX8011 (Eldridge (ITG) Decl. ¶ 31); [REDACTED]); PX2000 (JLI) at 1; PX2051 (JLI) at 24; [REDACTED]).

³⁷² PX8008 (Huckabee (Reynolds) Decl. ¶ 52).

³⁷³ PX8010 (Folmar (ITG) Decl. ¶ 8).

³⁷⁴ PX5001 at ¶ 62 (Rothman Rebuttal Report).

from Altria's exit because they are not transaction-specific.³⁷⁵ In view of these facts, Respondents cannot meet their burden to establish that entry or expansion would be timely, likely, or sufficient to offset the anticompetitive harm caused by the Transaction.

ii. The claimed efficiencies are insufficient to rebut the presumption of harm

Respondents cannot satisfy the heavy burden they bear to substantiate their efficiencies claims. They must submit evidence sufficient to permit an independent party to “verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.” *Horizontal Merger Guidelines* § 10; *see also Penn State Hershey*, 838 F.3d at 349 (describing “rigorous standard that applies to efficiencies, which must be merger-specific, verifiable, and must not arise from any anticompetitive reduction in output or service”); *United States v. H&R Block*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); *FTC v. Staples, Inc. (“Staples I”)*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997); *Staples II*, 190 F. Supp. 3d at 137 n.15. Moreover, “high market concentration levels,” like those presented by the Transaction require “proof of extraordinary efficiencies.” *Heinz*, 246 F.3d at 720-21. No court has permitted an otherwise unlawful transaction to stand as a result of claimed efficiencies. *See, e.g., Wilhelmsen*, 341 F. Supp. 3d at 72 (citing *CCC Holdings*, 605 F. Supp. at 72); *Sysco*, 113 F. Supp. 3d at 82. The result should not differ here as Respondents have failed to meet their burden and substantiate their efficiencies claims.

³⁷⁵ *See Horizontal Merger Guidelines* § 9 (“This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.” (emphasis added)).

a. Respondents' Claimed Efficiencies Cannot be Verified

Courts have consistently held that efficiencies are only cognizable if “it is possible ‘to verify by reasonable means’ the likelihood and magnitude of each asserted efficiency.” *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Horizontal Merger Guidelines* § 10); see also *Sysco*, 113 F. Supp. 3d at 82. Because “[e]fficiencies are inherently difficult to verify and quantify” . . . ‘it is incumbent upon the merging firms to substantiate efficiencies claims.’” *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Horizontal Merger Guidelines* § 10).

Respondents’ efficiencies claims are particularly weak in this case because all but *one* of the purportedly pro-competitive benefits present in the Services Agreement were terminated with the signing of the Amended Services Agreement.³⁷⁶ As discussed above, regulatory services were *the only* area in the Services Agreement to survive the Amended Services Agreement,³⁷⁷ but Respondents have failed to substantiate any efficiencies claims related to such services. [REDACTED]

[REDACTED] }³⁷⁸ but Respondents have not provided any information to substantiate that the estimated savings were realized.³⁷⁹ [REDACTED]

[REDACTED]³⁸⁰ but has failed to provide any evidence to support this bold claim.³⁸¹ In fact, an internal JLI document suggests that the company would not have been able to measure the time savings from Altria’s regulatory support until the application was

³⁷⁶ See *supra* §§ I.3, II.2.b.ii.

³⁷⁷ See *supra* §§ I.3, II.2.b.ii.

³⁷⁸ [REDACTED].

³⁷⁹ [REDACTED]; PX7008 (Cullen (JLI) IHT at 127-28).

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³⁸¹ PX7008 (Cullen (JLI) IHT at 122-24).

complete.³⁸² According to one JLI employee, any such estimates would be “super speculative.”³⁸³

Respondents also fail to substantiate any efficiencies claims related to the services that were discontinued after the Amended Services Agreement, such as services related to distribution support, sales services support, fixtures, and database access.³⁸⁴ Respondents have not provided any information supporting the estimated cost efficiencies they claim to have achieved while these services were in effect.³⁸⁵ It is Respondents’ burden to substantiate efficiencies claims, but here Respondents have failed to substantiate any claimed efficiencies to allow for their verification.

b. Respondents’ Claimed Efficiencies Are Not Merger-Specific

Respondents’ efficiencies defense also fails because they are unable to demonstrate their claimed efficiencies are merger-specific. *See Sysco*, 113 F. Supp. 3d at 82-84 (holding that, despite the “rigor and scale of the analysis,” defendants’ efficiencies claims are inadequate because they are not merger-specific); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998) (“In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could be accomplished without a merger”); *Horizontal Merger Guidelines* § 10. As courts have explained, “a ‘cognizable’ efficiency claim must represent a type of cost-saving that could not be achieved without the merger.” *H&R Block*, 833 F. Supp. 2d at 89; *see also Sysco*, 113 F. Supp. 3d at 82. If a company can achieve its purported cost savings alone or via a less anticompetitive alternative, such as a licensing agreement, then

³⁸² PX2029 (JLI) at 1.

³⁸³ PX7033 (O’Hara (JLI) Dep. at 187-188).

³⁸⁴ PX7008 (Cullen (JLI) IHT *passim*); PX5000 at ¶¶ 157-75 (Rothman Report).

³⁸⁵ *See supra* § II.2.b.ii; *see also* PX5000 at ¶¶ 157-75 (Rothman Report).

the efficiencies are not merger specific. *H&R Block*, 833 F. Supp. 2d at 90; *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998); *Horizontal Merger Guidelines* § 10 n.13.

There is ample evidence that JLI could have achieved many of the purported benefits of the Services Agreement without the assistance of Altria. For regulatory services, JLI could have hired independent scientific and regulatory specialists to provide the services Altria provided.³⁸⁶ In fact, on several occasions, Altria provided this regulatory support to JLI through third-party vendors with whom JLI could also have contracted directly.³⁸⁷ JLI has also hired numerous individuals with scientific and regulatory experience, including individuals *from* Altria, and could have done so absent the transaction.³⁸⁸ JLI had alternatives with respect to many of the discontinued services as well: JLI could have reduced its shipping costs by using a third party,³⁸⁹ [REDACTED],³⁹⁰ and could have invested in fixtures and additional distribution on its own.³⁹¹ Accordingly, any claimed efficiencies also fail the merger-specificity requirement.

e. The Transaction Also Eliminated Altria as a Potential Competitor to JLI

The Transaction also substantially lessened competition by eliminating the potential for future competition between Altria and JLI. The direct effect of the Transaction was the complete exit from the closed-system e-cigarette market by Altria; however, Altria would have been a significant competitor to JLI but for the Transaction.

“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

³⁸⁶ PX7008 (Cullen (JLI) IHT at 129-30).

³⁸⁷ PX7010 (Gifford (Altria) IHT at 123); PX7008 (Cullen (JLI) IHT at 130).

³⁸⁸ PX7010 (Gifford (Altria) IHT at 122); PX7011 (Valani (JLI) IHT at 170); PX7008 (Cullen (JLI) IHT at 129); PX7024 (Crosthwaite (Altria/JLI) Dep. at 35-36).

³⁸⁹ PX2219 (JLI) at 1; PX7008 (Cullen (JLI) IHT at 58, 67).

³⁹⁰ [REDACTED]; [REDACTED].

³⁹¹ PX7005 (Danaher (JLI) IHT at 75-76); PX7009 (Burns (JLI) IHT at 77-78, 191-92, 194-95); PX7008 (Cullen (JLI) IHT at 92-93); PX7039 (Robbins (JLI) Dep. at 220).

██████████ }³⁹⁴ (3) Altria is uniquely positioned to enter the market because there are few other companies that possess Altria’s resources and FDA expertise,³⁹⁵ and (4) no other potential entrant could leverage anything close to Altria’s tobacco portfolio to gain retail space for its products.³⁹⁶ Moreover, { ██████████

██████████ }³⁹⁷
Altria’s position in the e-cigarette market stands in stark contrast to the facts of *Steris*, in which the FTC’s challenge failed based on insufficient evidence that the potential entrant would have entered the relevant market absent the transaction. *See FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 977-84 (N.D. Ohio 2015). Here, however, the evidence is clear: Altria *had already been competing* in the closed-system e-cigarette market and, but for the Transaction, it would have continued to do so in the future. *See United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 658-59 (1964); *Polypore*, 686 F.3d at 1214; *Aetna*, 240 F. Supp. 3d at 76. Today, Altria is not competing against JLI—still the market leader—in the closed-system e-cigarette market because of the Transaction, which “necessarily foreclosed . . . the independent entry” of Altria in the U.S. closed-system e-cigarette market, resulting in significant anticompetitive effects. *Yamaha Motor*, 657 F.2d at 977.

4. The Appropriate Remedies are the Complete Divestiture of Altria’s Equity Stake and the Immediate Termination of the Non-Compete Agreement

An effective remedy in this case must restore the level of competition that was lost when Altria agreed with JLI to exit from the e-cigarette market and entered into the non-compete agreement with JLI precluding future competition. To restore competition lost because of

³⁹⁴ ██████████ }
██████████ }.

³⁹⁵ *See supra* § I.4.b.

³⁹⁶ *See supra* § I.4.b.

³⁹⁷ ██████████ }); *see also supra* § II.2.a.iii.

anticompetitive acquisitions, courts favor structural remedies, including for acquisitions of a minority equity stake. *United States vs. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (requiring complete divestiture of the 23% stake in General Motors that DuPont had acquired, and overturning district court’s remedy that would have allowed DuPont merely to divest the voting rights of the stock and commit not to enter into preferential trading relationships with General Motors); see also *Horizontal Merger Guidelines* § 13. As the Supreme Court explained, “complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court’s mind when a violation of § 7 has been found.” *Du Pont*, 366 U.S. at 328, 330-31; accord *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 859-60 (6th Cir. 2005). The Commission also “must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.” *In re PolyGram Holding, Inc.*, 136 F.T.C. 310, 379-80 (July 24, 2003) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). Moreover, “all doubts as to the remedy are to be resolved in [Complaint Counsel’s] favor.” *Du Pont*, 366 U.S. at 334.

The simplest and most effective way to remedy the anticompetitive harm arising from the Transaction is to restore Altria to the position it occupied before agreeing with JLI to halt all competition between the two firms. Thus, Altria must have both the *ability* and *incentive* to resume competing aggressively in the closed-system e-cigarette market. Altria’s full divestiture of its equity stake in JLI coupled with the immediate termination of the Non-Compete agreement will achieve these objectives. Altria will be free to bring its considerable expertise, resources, and strategic partnerships to bear in a sustained effort to achieve a market leadership through competition.

CONCLUSION

For the foregoing reasons, the evidence presented at trial and admitted to the record will establish that the Transaction violates Section 1 of the Sherman Act, Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act, as alleged in the complaint, and will justify entry of an Order by the Court granting the relief sought therein.

Dated: May 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I 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.

May 19, 2021

By: s/ James Abell
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PX1275	PX1276	PX1277-- REDACTED
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PX2394	PX2411-- REDACTED	PX2451
PX2459	PX2471	PX2477
PX2485	PX2486-- REDACTED	PX2488

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