

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Kahn, Chair**
 Noah Joshua Phillips
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro Martín Bedoya

In the Matter of

Altria Group, Inc.
a corporation;

and

JUUL Labs, Inc.
a corporation.

DOCKET NO. 9393

COMPLAINT COUNSEL’S REPLY TO RESPONDENTS’ ANSWERING BRIEF

John Newman
Deputy Director

Peggy Bayer Femenella
Acting Assistant Director

James Abell
Acting Deputy Assistant Director

Stephen Rodger
Deputy Assistant Director

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

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

Attorneys

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

ID – Initial Decision Page

IDF – Initial Decision Finding

CCAB – Complaint Counsel’s Appeal Brief

RAB – Respondents’ Answering Brief

CCRB – Complaint Counsel’s Post-Trial Reply Brief

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

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

PX – Complaint Counsel Exhibit

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

INTRODUCTION

On December 20, 2018, Altria Group, Inc. (“Altria”) acquired a 35 percent share in JUUL Labs, Inc. (“JLI”), the leading e-cigarette company in the United States, for \$12.8 billion (the “Transaction”). CCF¶¶33-34. [REDACTED]

[REDACTED] CCF¶¶858-60. Market observers immediately connected the dots: by shutting down Nu Mark, Altria was “clearing the decks” for its strategic investment in JLI. CCF¶¶1020-25.

The record in this case is clear: but for the Transaction, Altria would have continued to compete in the U.S. closed-system e-cigarette market and would still be competing today. The totality of the evidence shows that Respondents agreed Altria would exit the closed-system e-cigarette market. The harm to consumers caused by Altria’s exit is also clear: consumers lost the benefit of competition from Altria on price, innovation, and other key dimensions. *See Impax Labs., Inc. v. FTC*, 994 F.3d 484, 493, 495 (5th Cir. 2021) (market allocation agreements are the “*bête noire*” of antitrust law because they replace “the possibility of competition with the certainty of none”).

Supported only by the self-serving testimony of their own executives and a handful of cherry-picked documents, Respondents argue the Transaction and the Nu Mark shutdown were unrelated and that they therefore cannot be found liable for any competitive effects stemming from Altria’s exit. In the Initial Decision (“Decision”), the Court credited this biased testimony from Respondents’ executives while ignoring more reliable contemporaneous evidence, including evidence undermining these executives’ credibility.

Respondents’ explanations for the Nu Mark shutdown have continuously shifted as evidence has come to light undercutting each claim. Initially, Altria claimed it was discontinuing its pod-based products due to concerns about youth usage, but FDA Commissioner Scott Gottlieb

immediately noted the contradiction between Altria’s purported youth concern and its investment in JLI, the public face of the youth-vaping epidemic. CCF ¶¶1240-41. The Decision ignores these statements of Commissioner Gottlieb altogether. Next, Altria executives claimed its pod-based Elite product would never receive regulatory approval due to leaking pods, but Altria—after its executives testified to the contrary—admitted that it implemented a new gasket which addressed the leaking issue. CCF ¶¶1209-27. Then, Altria executives argued that nicotine salts were necessary for FDA authorization, but the FDA has recently approved e-cigarettes without nicotine salts. Finally, Respondents argue Altria shut down its e-cigarette business to fund Growth Teams, an innovation project dedicated to developing next-generation e-cigarettes. But this argument is nonsensical when comparing the \$30-\$100 million needed annually to fund the Growth Teams with the \$12.8 billion Altria spent on the JLI investment. These shifting and discredited claims undercut the credibility of Respondents’ executives’ testimony.

Moreover, the Decision asserts that any facts or evidence not cited in the opinion were not reliable or material. As a result, it ignores crucial contemporaneous evidence demonstrating the unreliability of Respondents’ claims, including Altria investor statements, and the actions of Respondents’ competitors, all of whom stayed in the e-cigarette market despite facing similar challenges to Altria. The Commission can now correct these errors and protect competition in the closed-system e-cigarette market. *See* Commission Rule 3.54(a), 16 C.F.R. § 3.54(a); *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948) (where party “testimony is in conflict with contemporaneous documents we can give it little weight”); *Gainesville Utils. Dep’t v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) (same); *In re Toys “R” Us, Inc.*, 126 F.T.C. 415, 567 n.39 (1998) (rejecting “self-serving” testimony that was contradicted by contemporaneous documentary evidence).

ARGUMENT

I. The totality of the evidence proves that Respondents agreed Altria would exit the closed-system e-cigarette market

Respondents admit it is “undisputed that JLI did not want Altria ultimately to compete.” RAB21. That is the essence of the agreement here. JLI made plain that to proceed with the Transaction, Altria had to commit to exiting the closed-system e-cigarette market. CCF ¶¶ 684-86, 720-24, 880-924. Altria made this commitment and exited almost simultaneously to closing the Transaction.¹ CCAB11-24; CCF ¶¶ 812, 848, 861. That agreement violates Section 1.²

A. JLI’s demand was not about antitrust clearance

The notion that JLI’s divest/contribute/cease to operate demand simply “proposed steps for obtaining HSR clearance,” ID38; *see also* ID64-65; RAB 2, 19, 21, is implausible on its face. Neither contribution nor “ceas[ing] to operate” would ever be remedies to an anticompetitive merger. *See In re Realcomp II*, No. 9320, 2007 WL 6936319, at *29 (F.T.C. Oct. 30, 2009) (rejecting ALJ’s conclusion that was “implausible on its face”). Moreover, this argument is contrary to clear testimony that the purpose of this term was to require Altria to exit. CCF ¶¶ 894-901.

Despite Respondents’ self-serving testimony that divestiture was the “most likely” route, Altria never took steps to explore a divestiture. CCF ¶¶ 939-40. Instead, it shut down its e-cigarette business immediately before the Transaction and agreed to take the riskiest option JLI placed on the table. This reckless approach and the divest/contribute/cease to operate term only

¹ Respondents’ suggestion that the Commission should not consider “plus factors” here, RAB22n.8, is unsupported. Plus factors are simply “economic circumstantial evidence” of a Section 1 violation. William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 395-96 (2011); *see also Wilcox v. First Interstate Bank*, 815 F.2d 522, 525 (9th Cir. 1987). 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). Here, both direct and circumstantial evidence support finding an illegal agreement.

² 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.

make sense in the context of the record as a whole: Altria was concerned its Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI prevented it from divesting or contributing its e-cigarettes before July 2020.³ CCF ¶927. Respondents never provided an alternative explanation for why the July 30 term sheet specifies that divestiture and contribution might not be “reasonably practicable,” thereby necessitating “cease to operate.”

B. JLI knew that “cease to operate” was one path Altria might take to fulfill its obligation to exit e-cigarettes

JLI’s argument that it did not know Altria might simply “cease to operate” its e-cigarette business is not credible. Respondents discussed this possibility, CCF ¶¶968-86, and it was *JLI* who first suggested this course of action *in writing* in the July 30 term sheet.⁴ CCF ¶894. Less than a week later, JLI sent a revised term sheet that added the word “shutdown” to the non-compete in reference to Altria’s e-cigarette products. CCF ¶913. The testimony is clear that JLI deliberately included “cease to operate” and understood its effect. Indeed, Valani testified that “cease to operate” was a “fail-safe” to ensure there were not “any outs in [Altria’s] commitment to not be [] competing.” CCF ¶¶907-09. Valani explained that how Altria fulfilled its obligation not to compete was “their problem, not ours.” CCF ¶900.

Notably, the notion that Altria might simply exit appears in writing again in Altria’s October 15 and October 30 term sheets, which specify that Altria could start “enhanced services” only after it contributed, divested, or “**otherwise exited**” its e-cigarette business. CCF ¶¶800-03, 828-29 (emphasis added). Altria assured JLI that “otherwise exiting” provided an alternative path to begin the desired { [REDACTED] } and avoided any

³ Contrary to Respondents’ suggestion, RAB14n.6, the evidence supports an inference that Altria made JLI aware of the PMI-related uncertainty before the July 30 term sheet. CCF ¶¶927-32.

⁴ Three days earlier, within days of speaking directly with Altria’s Willard, JLI’s investment adviser wrote to Pritzker that he was “under the impression that [Altria] would just shut down Mark 10” should the Transaction proceed. CCF ¶¶969-71.

potential HSR delays to the start of the non-compete and those enhanced services⁵ caused by Altria's entanglements with PMI. CCRB63-66; CCF¶¶809, 851, 932-35, 984-85.

JLI's contention that it did not expect Altria to exit before the Transaction is also a red herring. CC does not need to prove JLI knew the exact details of how and when Altria would fulfill their agreement for that agreement to be illegal.⁶ See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965).

C. Key negotiation documents support an inference of agreement

Key pieces of evidence support an inference of agreement. For example, in response to Altria's edits to the August 9 term sheet removing the divest/contribute/cease to operate requirement⁷ and allowing itself to compete unrestricted should HSR clearance not be granted, JLI provided a list of "foundational concepts" unequivocally stating that it was "not acceptable" for Altria to retain *any* e-cigarettes or right to compete. CCAB16-18. Respondents' suggestion that JLI objected only to Altria adding the right to compete with "under development" products before HSR approval, RAB14, 23, is inconsistent with the evidence. CCAB17-18.

JLI required "verification" that Altria was "aligned" with its exit demand before proceeding with the August 18 meeting, and the evidence supports an inference that JLI received such "verification." CCAB17-18. Willard's prepared opening remarks for the August 18 meeting stated that Altria's removal of divest/contribute/cease to operate was due to concern about

⁵ Respondents determined that the non-compete could not start at closing if Altria was still a competitor, but that it could start when enhanced services began. CCF¶¶851; CCRB65.

⁶ JLI witnesses explained that their shock at Elite's withdrawal was partly due to Altria telling the FDA that pods were significantly contributing to the youth vaping crisis—a statement that seemed inconsistent with Altria seeking to invest in JLI. PX7025-169-72, 215-16 (Burns IHT); PX7011-123-26 (Valani IHT); Pritzker (JLI) Tr. 749-50.

⁷ Respondents incorrectly characterize the divest/contribute/cease to operate term as a "post-antitrust clearance divestiture obligation," RAB23, but that term only required that divestiture/contribution/cease to operate occur "[p]romptly and in no event later than nine months following the [Transaction]." CCF¶¶684.

antitrust scrutiny, “not substantive disagreement.”⁸ CCFF¶729-30. Respondents emphasize that “cease to operate” was not in JLI’s August 19 term sheet, RAB14, but *of course* it wasn’t, given that Altria had just informed JLI the language raised antitrust concerns. *See In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014). The “cease to operate” option had already been put on the table; removing it from future term sheets to evade antitrust scrutiny did not un-ring the conspiracy bell. Moreover, the August 19 term sheet is consistent with an agreement to exit and the October 5 letter confirmed Altria’s commitment not to compete. CCAB19-20.

D. Altria’s justifications for pulling its products are pretextual

As discussed in more detail in Section II below, Altria’s purported justifications for pulling its e-cigarettes—which include youth vaping concerns, leaking pods, the lack of nicotine salts, poor commercial performance, an inability to secure PMTA approval, and a need to fund its Growth Teams—have shifted over time. CCAB20-22; CCRB76-87. These justifications are belied by the facts and plainly pretextual.

Indeed, the totality of the evidence shows that Altria only pulled Elite once it knew the JLI deal was proceeding. CCRB33-34, 39-42; CCAB21-22; CCRRFF¶953; CCFF¶777. Even Respondents acknowledge that an “absolutely final decision” on Elite was not made until the meeting with Gottlieb—which occurred after JLI confirmed the deal was on track. CCRRFF¶958; CCRB40-41.

Likewise, the evidence shows Nu Mark and its e-cigarette products were not failing. CCAB3-5, 22; CCFF¶¶1083-1131, 1496-515. MarkTen was the third best-selling U.S. e-cigarette brand in 2018, and Elite and MarkTen were growing in sales at the time they were

⁸ Respondents note that counsel attended the August 18 meeting and prepared subsequent term sheets, RAB24, but that is irrelevant and improper; Respondents cannot use privileged information as a sword and a shield. CCRB61-63.

discontinued. CCRB4. Nu Mark employees believed its existing products had a “role to play” and should remain on the market. CCFF¶¶1125, 1269, 1315-16, 1318-19, 1500.

Altria’s assertion that its products would not receive FDA approval is also flawed. First, Respondents rely heavily on Garnick, a lawyer not a scientist (RAB3, 9) and on the August 23 board presentation (RAB9-10, 24-25), the preparation of which was supervised by Altria leadership involved in the JLI negotiations. CCRRF¶732. Quigley and Murillo, who were not involved in negotiations, expressed concern that the presentation was “clearly only the bad news version,” inaccurate, and biased against Nu Mark. CCRB25-26; CCRRF¶732. Second, Altria’s claim omits key facts. The assessment that Elite could not convert smokers was based *solely* on market performance and comparison to JUUL. CCFF¶¶1301-09. In fact, Altria’s consumer studies showed Elite *and* MarkTen cigalikes *could* convert smokers. CCFF¶¶1311-15, 1320-22. Respondents point to MarkTen’s formaldehyde issue, but omit that Altria had developed a replacement battery—the BVR 2.8—to address that issue. CCFF¶¶1275-80. Altria’s MarkTen PMTA was already 75 percent complete, and Altria planned to use a data-bridging strategy to include the new battery in its initial PMTA. CCFF¶¶1264, 1295-96. Altria leadership approved proceeding with the MarkTen PMTA, and Nu Mark planned to submit it in the second or third quarter of 2020. CCRRF¶842. Respondents also omit that Altria planned to submit a PMTA for Elite 1.0 to keep it on the market while the FDA reviewed the PMTA for Elite 2.0, which was on track to be submitted in January 2022. CCFF¶¶1155, 1295-300.

Importantly, the Commission does not need to determine the likelihood of Altria’s withdrawn products obtaining FDA approval. Even if Altria believed its products would not be approved, it made no sense to pull them *four years* before the then-August 2022 PMTA

deadline.⁹ CCF¶1257. Those products could have stayed on the market for multiple years as Altria worked to introduce better products.¹⁰ PX7016-117-19 (Jupe Dep.); PX7004-67 (Willard IHT); CCF¶1043, 1155 (Quigley noting Willard “agreed it doesn’t make sense to close up shop while we build for the future”).

The notion that Altria would have withdrawn its remaining cigalikes (which accounted for over 80 percent of its sales, CCF¶1343-44, 1381) in December 2018 to fund its Growth Teams even absent the JLI Transaction is nonsensical, ID57, 84, 94, given that the Growth Teams would cost \$30-\$100 million annually versus the *\$12.8 billion* JLI Transaction.¹¹ IDF13, 657. Indeed, Altria’s October 5 internal announcement of the Growth Teams explicitly stated that going forward Nu Mark’s focus would be the “current products in the marketplace.” CCR¶962; CCRB34-37.

Altria only discontinued its entire e-cigarette portfolio [REDACTED] [REDACTED] CCF¶848, 859-60. Industry participants thought the decision made no sense, analysts immediately concluded that Altria’s withdrawal was due to an impending JLI deal, and Altria documents and testimony explicitly link the two. CCF¶1016-27, 1396-1407. Notably, the other major tobacco companies { [REDACTED] [REDACTED] } CCAB3, 23.

II. The Decision relies heavily on suspect testimony from Respondents’ executives

The evidence not only suggests that testimony relied on by the ALJ was unreliable, but also—taken as a whole—supports the conclusion that Respondents violated the antitrust laws.

⁹ It strains credulity that Altria pulled products with growing volumes in a critical, strategic segment out of concern those products would not win PMTA approval four-plus years later, especially considering that no other e-cigarette competitor exited the market.

¹⁰ The PMTA deadline ultimately moved to September 2020, meaning Altria could have kept its products on the market until that date, and well beyond if it submitted PMTAs for them. CCF¶198-201.

¹¹ Verve, a chewable nicotine product, was also discontinued in December 2018, yet Altria still pursued a PMTA and still competes in the oral nicotine space today with its On! product. CCR¶1093-94, 1128-29, 1662.

CCAB3-39. Unlike the cases cited by Respondents, where the court found no evidence to undermine the ALJ’s conclusions, here the ALJ ignored substantial evidence that Respondents’ testimony was unreliable. *See Impax*, 994 F.3d at 499-500 (appropriate for Commission to discount—and draw an adverse inference from—a witness’s change in story); *FTC v. Staples*, 970 F. Supp. 1066, 1085 (D.D.C. 1997) (court disregarded fact witness testimony contradicted by business document).

First, Respondents’ claims about Altria’s purported rationales for discontinuing its e-cigarette products have shifted over time, calling Altria’s credibility into serious question. Initially, Altria claimed it was removing Elite due to its belief that “pod-based products significantly contribute to the rise in youth use of e-vapor products.” CCF ¶987. It is impossible to square this claim with the fact that Altria was simultaneously negotiating an investment in JLI, whose pod-based JUUL was the face of the youth-vaping epidemic. CCRB38-39, 77-78. Indeed, the FDA itself informed Altria that its investment in JLI “contradict[s] the commitments [Altria] made to the FDA.” CCF ¶¶1239-42. Altria’s assertion that it removed Elite to “satisfy the FDA” is thus not credible. ID82. Moreover, Respondents concede that “Elite did not have a youth vaping problem.” RAB33. Notably, Altria did not mention the other various and shifting reasons Respondents have provided in this litigation. The fact that these alternate rationales only appear post hoc casts serious doubt on their credibility. CCRB77-84; *see Realcomp*, 2007 WL 6936319, at *28 & n.23 (observing that Respondents’ purported justifications “appear to be post-hoc rationalizations rather than actual reasons” where there was no contemporaneous evidence supporting the justification).

Respondents next claimed Altria removed Elite due to issues with leaking pods, but this story has also shifted over time. Altria executives first testified that a new gasket capable of

addressing the leaking issue was never implemented. CCAB25-26. This testimony was false: seven months later Respondents' counsel informed CC that the gasket had been implemented and that Elite units sold online featured the improved gasket. CCAB25-26. Altria now illogically claims that {

[REDACTED]

CCRRFF¶¶669-72. To put it mildly, this explanation strains credulity. The decision was important enough to be made by Altria's then-CEO, and purportedly risked running afoul of the FDA, Altria's "most important regulator." Willard (Altria) Tr. 1437.

With the leaking excuse no longer valid, Altria offered a third purported justification for shutting down its e-cigarette business—the lack of nicotine salts in most of its products.¹² Respondents claim that in the summer of 2018, Quigley¹³ and certain scientists experienced a "Eureka" moment purportedly discovering that nicotine salts were "required" for satisfaction and smoker conversion. RAB9. But this made-for-litigation explanation for Altria's alleged inability to compete in e-cigarettes was wholly absent from Quigley's IH testimony (and absent from other Altria executives' IH testimony). PX7003. In his IH, Quigley testified that he was unaware of any studies concluding that Altria's products lacked conversion potential.¹⁴ PX7003-153-56. Further, in an August 3, 2018, meeting with Altria leadership, Quigley advocated keeping MarkTen and Elite on the market, while working to develop improved products and achieve market "leadership" by 2025, and testified his goal was to "prove to [Altria leadership] that our

¹² MarkTen Bold cigalikes did contain nicotine salts. CCF¶1196.

¹³ Respondents rely heavily on Quigley, who changed his testimony as the case proceeded to trial. CCRRFF¶846.

¹⁴ The claim that nicotine salts are "required" for a successful e-cigarette is further undermined by the fact that the FDA has granted PMTA authorization to products without nicotine salts. *See* CC's Mot. Official Notice (Mar. 31, 2022) at 5-6.

cig-a-like business was meaningful.” CCRFF¶842. Quigley also believed there was a place in the market for Elite, even though its growth was less explosive than JUUL, testifying that he “could not understand why” Altria leadership would want to discontinue the product. CCRFF¶842. The changes in Quigley’s testimony over time severely undermine his credibility, and it was error for the Decision to rely on Quigley’s revisionist and contradictory trial testimony while ignoring the testimony from his IH. CCAB24-25; *Impax*, 994 F.3d at 499-500 (approving of Commission’s refusal to credit trial testimony that contradicted prior testimony).

Finally, the Decision also ignores evidence indicating the testimony of JLI executives was biased and unreliable. Both Pritzker and Valani are named defendants in the private antitrust litigation and stand to lose financially should they be found liable. *See In re Juul Labs, Inc., Antitrust Litig.*, 555 F. Supp. 3d 932, 962 (N.D. Cal. 2021). It was error for the Decision to ignore this clear bias.¹⁵ Moreover, as discussed above, it is not credible for JLI’s negotiators to assert that they had no idea that Altria would cease to operate its e-cigarette business, when *JLI* prepared the term sheet suggesting that option and the same witnesses testified that “cease to operate” was discussed with Altria. *See supra* §I.A.

III. Altria’s exit substantially harmed, and will continue to harm, competition

Even if the Commission concludes Respondents did not violate Section 1, the evidence is clear that Respondents violated Section 7. 15 U.S.C. § 18. The latter does not require a finding of a conspiracy, but instead that Altria’s exit was related to the Transaction. *See In re Juul Labs*, 555 F. Supp. 3d at 964; *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 n.32 (1962) (“Section 7 ... was intended to reach ... trade restraints outside the scope of the Sherman Act”). The evidence is overwhelming that, but for the Transaction, Altria would be competing in e-

¹⁵ The Decision simply ignores other highly relevant testimony from Valani and Pritzker in support of finding an illegal agreement. CCAB13-14.

cigarettes today. Indeed, in apparent attempt to avoid liability under Section 1, JLI executives all but concede this point: JLI was unequivocal with Altria that, if Altria was to acquire a stake in JLI, Altria could no longer compete in e-cigarettes. CCFF¶¶898-906. But under either analytical framework, the evidence of harm is clear: but for the Transaction, consumers would be benefitting from Altria’s competition on price, innovation, and other dimensions in e-cigarettes today.

A. CC is entitled to a presumption of anticompetitive harm

CC is entitled to a presumption of harm based on the market share statistics in the relevant market before and after the Transaction. CCFF¶¶1735-63. The ALJ found that the sale of closed-system e-cigarettes was the appropriate market in which to analyze the effects of the Transaction. ID16-22. Further, the ALJ took no issue with CC’s expert’s calculation that the market had a pre-Transaction HHI of 3,276, a level considered “highly concentrated” under the *Guidelines*. CCFF¶¶1754-55. The ALJ found that CC’s expert’s use of a 12-month rolling average to calculate Altria’s market share was appropriate and consistent with the *Guidelines*. CCAB28; *FTC v. Sysco*, 113 F. Supp. 3d 1, 54 (D.D.C. 2015) (“The FTC need not present market shares and HHI estimates with the precision of a NASA scientist.”).

Respondents’ challenges to CC’s post-Transaction market share calculations miss the point.¹⁶ The Decision’s reliance on “actual market data” to dismiss Dr. Rothman’s analysis was erroneous *precisely because* the post-Transaction data in this case is less reliable due to the presence of confounding factors. CCFF ¶¶1758-60; CCRRFF ¶1368. Since Respondents’ expert failed to account for these factors, the Decision should not have adopted his flawed analysis. Respondents’ suggestion that CC is required to establish which way these confounding factors

¹⁶ Notwithstanding Respondents’ arguments to the contrary, RAB30, Dr. Rothman’s concentration analysis does not depend on the proportional allocation of Altria’s pre-Transaction share. CCAB28-29.

cut is a red herring. The key point is that their presence meant that a simplistic “before and after” analysis of the market concentration levels is of little use in evaluating the Transaction’s impact on competition. CCAB31-32.

B. The Court’s focus on post-Transaction evidence was misplaced

The fundamental objective under Section 7 analysis is “to determine the [transaction’s] likely effect on competition compared to the but-for world in which the [transaction] is not allowed.” *FTC v. Peabody Energy Co*, 492 F. Supp. 3d 865, 917 (E.D. Mo. 2020). But for the Transaction, Altria would be competing in the e-cigarette market today. CCFF¶¶442, 701, 1390-400, 1718-21. Accordingly, the appropriate Section 7 analysis compares the world in which Altria exited the market (the actual world) with the world in which Altria remained in the market (the but-for world). CCFF¶1759. There can be no doubt that an e-cigarette market without Altria is significantly less competitive than a market with Altria. *See infra* §III.C. Respondents and the Court focus on post-Transaction evidence concerning the behaviors of third-party firms NJOY and Reynolds to argue the market is more competitive since Altria’s exit. RAB30-32; ID101-02. But the record shows that NJOY and Reynolds would have taken the same actions regardless of whether or not Altria exited. CCRRFF¶¶1710-11. Hence, this evidence does nothing to inform the fundamental question of whether the actual world is more or less competitive than the but-for world. CCFF¶¶1830-31; 2123-24.

C. A correct “but-for world” analysis shows that the Transaction creates a reasonable probability of harm to competition

The Decision ignores ample evidence that, but for the Transaction, Altria would have continued competing aggressively. First, Altria’s existing e-cigarette products were far more competitively viable than Respondents suggest. CCAB3-4, 22. Second, Respondents ignore Altria’s ongoing R&D projects, both on its own and in conjunction with PMI, which ceased with

the Transaction. These projects included (1) Smart Pods with Bluetooth capability; (2) [REDACTED]; and (3) advanced sensomics projects. CCFF¶¶1572-75, 1616-17.

Finally, Respondents ignore the potential *benefits* to competition that likely would have resulted from Altria’s collaboration with PMI on VEEV, the “Rolls Royce” of e-cigarettes. CCFF¶¶1686. The Decision suggests that an Altria-PMI partnership would have the same impact on competition as an Altria-JLI partnership. This is wrong: PMI does not currently compete in the U.S. e-cigarette market and is therefore not a horizontal competitor to Altria. CCFF¶¶2071. In fact, absent the Transaction, Altria likely would have [REDACTED] [REDACTED] } CCFF¶¶1692-93, 1708-10. PMI currently sells VEEV abroad and, by Altria’s own estimates, [REDACTED] }, and was sufficiently viable to go head-to-head with JUUL. CCFF¶¶1638-93, 1706, 1708-10; CCRRFF¶¶1627, 1630. Further, under the JRDTA, Altria could continue selling its own products and conducting its own R&D. Hence, a market with an Altria-PMI partnership is likely *more* competitive than the status quo ante, while the market with the Transaction is certainly less.¹⁷

D. Altria was an actual competitor in the closed-system e-cigarette market at the time of the Transaction

Respondents ask the Commission to ignore Altria’s competitive significance at the time of the Transaction, effectively arguing Altria should be treated as a nascent competitor or *de novo* entrant. This is both absurd considering the facts and improper as a matter of law.

¹⁷ Respondents cite *Aetna* for their argument that pre-transaction acts are not “effects” under Section 7. *Aetna* holds no such thing, but rather states “the Court need not specify the exact timeframe for considering ... effects,” and “the proper timeframe for evaluating the effects of the merger on future competition ‘must be functionally viewed.’” *U.S. v. Aetna, Inc.*, 240 F. Supp. 3d 1, 79 (D.D.C. 2017).

Altria had e-cigarettes on the market up until immediately before the Transaction—indeed, the [REDACTED] [REDACTED] CCFF¶¶858-60.¹⁸ Further, Altria was actively innovating to improve its existing products up until the Nu Mark shutdown in December 2018. For example, Altria implemented a new gasket in Elite just before the shutdown. CCFF¶¶1220-21, 1228-34. Additionally, Altria continued to work on the MarkTen BVR 2.8 battery up until the announcement that the product was discontinued in December. Gardner (Altria) Tr. 2684.

Further, as the court held in *Aetna*, Altria cannot avoid being treated as an actual competitor by manufacturing its own market exit before litigation. 240 F. Supp. 3d at 79-80, 90. If this were the case, then every firm seeking to engage in a problematic merger would have a clear roadmap to avoid antitrust scrutiny. But, as discussed above, shutting down a horizontally overlapping business is not an antitrust remedy—it does nothing to replace the competition lost as a result of the merger and indeed *guarantees* that consumers will lose the benefit of that competition in the relevant market.

Finally, as discussed above, CC does not need to prove that Altria’s products would have received PMTA approval.¹⁹ Altria’s existing products could have remained on the market for several years while awaiting the FDA’s determination; consumers lost the benefit of that competition. This argument also ignores the future competition Altria would have brought to the market through its innovation efforts. CCFF¶¶1538-74, 1690-91. As one Altria executive testified, with innovation efforts, “[y]ou’ve got to have a lot of different bets.” CCFF¶1560. Altria continued to place those bets to achieve its goal of future leadership. CCFF¶¶1538-730. In

¹⁸ The products Altria pulled in December 2018—the traditional flavors of cigalikes—accounted for most of Altria’s e-cigarette sales. CCFF¶¶1343-44, 1381.

¹⁹ In fact, the evidence suggests that Altria’s e-cigarette products were well-positioned for PMTA approval. *See* CC’s Mot. Official Notice (Mar. 31, 2022) at 6; CC’s Second Mot. Official Notice (May 24, 2022) at 5-6.

sum, the effects of the Transaction are clear: but for the JLI deal, Altria would have continued to compete in e-cigarettes while with the JLI deal, Altria has not competed at all.

IV. The written non-compete violates Section 1

Respondents' written non-compete violates Section 1 independently of their overarching agreement that Altria would exit the e-cigarette market. CCAB39 n.36; ID10.²⁰

First, the non-compete resulted in direct anticompetitive effects. CCAB41.

Second, Respondents' "regulatory services" justification is plainly pretextual given that it contradicts their other—also entirely speculative—claim that Altria would not have been able to secure regulatory approval for its own e-vapor products. *See McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015) (justifications "cannot be merely pretextual"); *see also* CCAB42-43. Recognizing this tension, Respondents argue in a footnote that Altria's hypothetical regulatory failure across a variety of product lines would be due solely to the lack of a "viable product." RAB41 n.23. But even if this conjecture were supported in the record (which it is not), it would still leave open the question of why JLI purportedly thought Altria had regulatory expertise in the approval of e-vapor products.

Third, Respondents have failed to refute the available less restrictive alternatives. CCAB42-43. CC identified two separate alternatives that were "either quite obvious or a proven success." *Impax*, 994 F.3d at 500. Hiring employees or consultants with the necessary expertise is both fairly obvious and something JLI has done in the past. CCFR¶¶1934-41; CCRFR¶¶1275-77. Respondents contend that "the value of Altria's support was in [its] methodologies and

²⁰ Respondents' assertion that CC has "abandoned its argument that the noncompete is not ancillary to a legitimate business integration," RAB41 n.22, is perplexing. Even assuming the non-compete met the requirements of the ancillary restraint doctrine, that would simply mean it was "exempt from the per se rule and analyzed under the rule-of-reason"—under which we are already proceeding. *Aya Healthcare Servs. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021).

institutional ‘know-how.’” RAB42. But they provide no evidence for the implausible suggestion that Altria was the only source of that type of “know-how.” Even if this regulatory expertise were somehow unique to Altria, Respondents fail to explain why they could not simply hire away Altria employees or locate former employees. Respondents also concede that Altria’s services to JLI could begin before the non-compete took effect, undermining the purported connection between the two terms. RAB40-41. Similarly, Respondents’ assertion that a firewall was not feasible lacks any supporting evidence. There is no evidence Respondents even explored that obvious alternative. CCF ¶¶1918-19.²¹

V. Respondents’ additional arguments fail

A. Closed-system e-cigarettes constitute a distinct product market

The Commission should reject Respondents’ attempt to disturb the ALJ’s findings on product market. Both “practical indicia” and the hypothetical monopolist test support the ALJ’s conclusion that the sale of closed-system e-cigarettes is a relevant product market. CCF ¶¶218-407. Respondents claim that “pods and cig-a-likes exist in separate markets.” RAB43. But the potential existence of narrower markets does not negate the existence of a broader market. *See Brown Shoe*, 370 U.S. at 325. Indeed, the *Guidelines* expressly state the agencies “may evaluate a merger in *any* relevant market satisfying the [hypothetical monopolist] test.” §4.1.1 (emphasis added). Dr. Rothman’s analysis shows that the closed-system e-cigarette market satisfies this test.²² Moreover, ordinary course evidence confirms that cigalikes and pods do in fact compete. CCRB103.

²¹ It is unclear what Respondents mean by their assertion that the rule of reason does not involve a “balancing” step because “the rule of reason operationalizes the balancing.” RAB42 n.25. It is well established that if a court finds both anticompetitive effects and procompetitive benefits at the end of the rule-of-reason analysis, it “must balance the anticompetitive and procompetitive effects of the restraint.” *Impax*, 994 F.3d at 492.

²² Respondents’ expert offered no opinion on whether cigalikes and pods compete in separate markets. CCF ¶2087.

B. Respondents' efficiencies defense fails

Respondents failed to demonstrate their claimed efficiencies can be independently verified. *See FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 73 (D.D.C. 2018) (“The court cannot substitute Defendants’ assessments ... for independent verification.”); *Guidelines* §10. Specifically, Respondents never explained how Altria’s regulatory services would accelerate or advance JLI’s PMTA applications; indeed, one JLI executive admitted that trying to value Altria’s regulatory assistance to JLI would be “super speculative.” CCFF¶1887. Respondents’ efficiencies claims therefore cannot be credited.

As noted above, Respondents have failed to explain why the Transaction was necessary to achieve any such regulatory assistance. Finally, even assuming Altria’s assistance to JLI was cognizable—and Altria’s exit from the market was a necessary precondition—the Commission still should not credit this claimed efficiency. To do so would impermissibly credit efficiencies that result from an anticompetitive reduction in output or service, which is exactly what the exit of Altria from the market is. *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176 (3d Cir. 2022).

C. The Section 7 claim is properly asserted against JLI

The Commission will need to include JLI in any order to effectuate appropriate relief under Section 7 and, for this reason, JLI is properly named as a respondent. *U.S. v. Coca-Cola Bottling Co.*, 575 F.2d 222, 227-31 (9th Cir. 1978); *see also Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1185 (N.D. Cal. 2001) (“[S]ellers may be joined in a section 7 action against a purchaser when the plaintiff seeks rescission or divestiture and the court needs jurisdiction over both the buying and selling company to fashion such equitable relief.”). Indeed, a court has already held that JLI is a proper defendant in a Section 7 claim arising from the Transaction. *See In re Juul Labs*, 555 F. Supp. 3d at 965.

D. The Proposed Order is appropriate and necessary to restore competition

To restore the competition lost by the Transaction, the Commission should order the complete divestiture of Altria's equity stake in JLI and the termination of all agreements associated with the Transaction. Once CC has established a violation of Section 7, "all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). Further, the Commission has "wide discretion" in its choice of remedy where there is a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946).

Because Respondents' conduct removed a competitor from the market, the Proposed Order is necessary to restore the competitive influence Altria exerted before its exit. *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1219 (11th Cir. 2012). Divestiture is not punitive—it is the "natural remedy" for a Section 7 violation. *du Pont*, 366 U.S. at 329.²³ Restoring competition requires creating a viable competitor, which may impact relationships not directly implicated in this litigation. *See Ford Motor*, 405 U.S. at 573-74. Respondents' bizarre suggestion that the provision preventing them from conspiring with horizontal competitors (Proposed Order, §§I.G, II.B) "would cripple" JLI's ability to compete should be rejected. RAB47.

Finally, Respondents' claim that "CC did not adduce any evidence concerning its proposed remedy" is simply false. RAB47. There is a wealth of evidence documenting the harm caused by the Transaction, CCF ¶¶ 1408-1730, all of which establishes the need for a full divestiture. There is also rich evidence relating to Altria's R&D, including the need to maintain a diverse portfolio of projects, CCF ¶¶ 409-531, 1463-92, 1553-693, and the market's entry

²³ *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("[c]omplete divestiture is particularly appropriate where ... acquisitions violate the antitrust laws").

barriers, CCF ¶¶ 1767-822, 1847-79. This body of evidence establishes both need to ensure the divested business is viable and what is required to do so.²⁴

VI. The FTC’s administrative proceedings are constitutional

A. The Supreme Court has rejected Respondents’ removability argument

Respondents’ efforts to evade *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), are unavailing. First, while *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and *Collins v. Yellen*, 141 S. Ct. 1761 (2021), struck down the removal requirements for the directors of the CFPB and FHFA, they declined to overrule *Humphrey’s Executor* and instead decided not to extend it “to the novel context of an independent agency led by a single Director.” *Seila*, 140 S.Ct. at 2192. Second, Respondents’ suggestion that unspecified changes to the FTC’s “enforcement, investigative, and prosecutorial authority” somehow abrogate *Humphrey’s Executor* (RAB44) fails to explain what these changes are or how they nullify controlling precedent.

B. The FTC’s enforcement process is constitutional

First, the clearance process does not create due process concerns because, as the Commission has explained, the FTC and DOJ have concurrent jurisdiction, and “[t]o the extent that the agencies choose to divide their workload, such that one brings an action rather than both doing so, this hardly gives a basis for complaint.” *In re Otto Bock HealthCare N.A., Inc.*, Docket No. 9378, 2019 WL 5957363, at *51 (F.T.C. Nov. 1, 2019). Moreover, the differences between the FTC’s administrative process and a federal court proceeding are not prejudicial: the Part 3 rules are largely modeled on the Federal Rules; legal conclusions by either the Commission or

²⁴ Dr. Rothman modeled the effect of Altria’s partial acquisition of JLI under the assumption that Altria continued competing. CCF ¶ 1525. Even under this assumption, the acquisition resulted in the loss of competition and harm to consumers. CCF ¶ 1525. This expert analysis further establishes why the “natural remedy” of full divestiture is particularly important in this case.

federal district court are reviewed *de novo* by a court of appeals; and any differences in the review of factual findings “is a subtle one” unlikely to affect the outcome. *Dickinson v. Zurko*, 527 U.S. 150, 162–63 (1999). Part 3 also gives respondents a significant advantage in that they can select which federal court of appeals reviews an adverse FTC decision. Indeed, many respondents appear to prefer the FTC’s administrative process and have fought aggressively to move cases there when the FTC initially filed in federal court. *See, e.g., FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

Second, “it has long been decided that an administrative agency can combine investigative and adjudicatory functions.” Op. Denying Resp.’s Mot. to Disqualify the Comm’n, *In re N.C. State Bd. of Dental Examiners*, No. 9343, 2011 WL 668509, at *6 (F.T.C. Feb. 16, 2011). The Supreme Court and other courts have consistently rejected due process challenges to this structure and cited the FTC as an appropriate example of an agency that combined the two roles. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 47-49 (1975).²⁵ Respondents’ primary authority, *Williams v. Pennsylvania*, 579 U.S. 1 (2016), involved a different circumstance in which a prosecutor in a criminal death penalty case subsequently adjudicated the same case after being appointed as a state supreme court justice. Given the former prosecutor’s “direct, personal role” in litigating the case, his participation on appeal “gave rise to an unacceptable risk of actual bias.” *Id.* at 10, 14. Nothing in *Williams* suggests any change to the settled law that agencies may permissibly serve in dual investigative and adjudicative roles.

Finally, a government antitrust enforcement action does not require adjudication by an Article III court. Respondents rely on *Stern v. Marshall*, 564 U.S. 462, 484 (2011), in which the

²⁵ *See, e.g., Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982) (“The combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies.”); *FTC v. Cinderella Career & Finishing Schs., Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (“It is well settled that a combination of investigative and judicial functions within an agency does not violate due process.”).

Supreme Court held that a state common law tort claim must be decided by an Article III court (rather than a bankruptcy court) because it involved the “private rights” of individual parties. Unlike the state tort claim in *Stern*, however, a government antitrust enforcement suit is not a “matter[] of private right, that is, of the liability of one individual to another under the law as defined.” *Id.* at 489. It is a matter of “public rights,” i.e., “those arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive.” *Id.* Indeed, the Supreme Court has long recognized that federal agencies can properly adjudicate claims in specialized substantive legal areas. *See Crowell v. Benson*, 285 U.S. 22, 50-51 (1932). The *Stern* Court expressly noted that it had “no occasion to and [did] not address” that long-established practice. 564 U.S. at 489 n.6.

CONCLUSION

For the foregoing reasons, CC respectfully requests the Commission reverse the Decision and issue the Proposed Order.

Dated: June 2, 2022

Respectfully submitted,

s/ James Abell

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2022, I caused a true and correct copy of the foregoing to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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

David Gelfand
Jeremy J. Calsyn
Matthew Bachrack
Linden Bernhard
Jessica Hollis
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
Tel: 202-974-1500
dgelfand@cgsh.com
jcalsyn@cgsh.com
mbachrack@cgsh.com
lbernhardt@cgsh.com
jholis@cgsh.com

Counsel for Respondent JUUL Labs, Inc.

Beth A. Wilkinson
James M. Rosenthal
Hayter Whitman
Megan Braun
Alysha Bohanon
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, D.C. 20036
Tel: 202-847-4000
bwilkinson@wilkinsonstekloff.com

jrosenthal@wilkinsonstekloff.com
hwhitman@wilkinsonstekloff.com
mbraun@wiklinsonstekloff.com
abonhanon@wilkinsonstekloff.com

Moira Penza
Ralia Polechronis
Meghan Cleary
Wilkinson Stekloff LLP
130 W 42nd Street, 24th Floor
New York, NY 10036
Tel: 929-264-7773
mpenza@wilkinsonstekloff.com
rpolechronis@wilkinsonstekloff.com
mcleary@wilkinsonstekloff.com

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

Counsel for Respondent Altria Group, Inc.

By: s/ James Abell
James Abell, Attorney

Counsel Supporting the Complaint