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

**COMMISSIONERS:** **Lina M. Khan, Chair**
**Rebecca Kelly Slaughter**
**Alvaro M. Bedoya**

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| **In the Matter of**<br><br>**Altria Group, Inc.,**<br>**a corporation;**<br><br>**and**<br><br>**JUUL Labs, Inc.,**<br>**a corporation.** | **Docket No. 9393**<br>**REDACTED PUBLIC VERSION** |

# ORDER TO RETURN CASE TO ADJUDICATION, VACATE INITIAL DECISION, AND DISMISS COMPLAINT

This proceeding is before the Commission on Complaint Counsel's appeal of an Initial Decision of the Chief Administrative Law Judge ("ALJ") that recommended dismissing the Complaint in its entirety. ID (Feb. 15, 2022) 263.[1] The proceeding arose in response to the December 2018 purchase by Respondent Altria Group, Inc. ("Altria") of a 35% stake in Respondent Juul Labs, Inc. ("JLI") in exchange for a $12.8 billion all-cash investment (the "Transaction") and Altria's preceding withdrawal of its closed system electronic cigarette products from the market. The Respondents have moved to dismiss the proceeding as moot due to Respondent Altria's having relinquished its investment in Respondent JLI. Respondents' Mot. to Take Off. Notice and to Dismiss This Litig. as Moot, or in the Alternative, to Stay the Litig. (Mar. 6, 2023) ("March 6 Motion"). Respondents also moved to withdraw the proceeding from adjudication, and the Commission granted the motion. Respondents' Mot. to Withdraw Matter from Adjudication to Discuss Settlement ("March 21 Motion"); Order Taking Off. Notice and Withdrawing Proceeding from Adjudication (May 4, 2023); Order Extending Withdrawal from Adjudication (June 20, 2023). For the reasons explained below, the Commission has determined to return the proceeding to adjudication for the purpose of dismissing the proceeding as no longer in the public interest and vacating the Initial Decision. 15 U.S.C. § 45(b). The Commission also clarifies certain issues of law that arose in the context of the Initial Decision.

[1] We use the following abbreviations in this Order:

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| Compl. | Complaint |
| ID | Initial Decision |
| IDF | Initial Decision Findings of Fact |
| Tr. | Evidentiary hearing transcript |

## I. BACKGROUND

Complaint Counsel allege that, in the Transaction and in an unwritten agreement leading up to it, the Respondents unlawfully agreed that Altria would cease competing in e-cigarettes, in violation of Sherman Act Section 1 and FTC Act Section 5. Compl. ¶¶ 1-7, 46-69, 77-79. Complaint Counsel also allege that the Transaction was an illegal acquisition in violation of Clayton Act Section 7 and FTC Act Section 5. Compl. ¶¶ 80-82. An evidentiary hearing took place before the ALJ, who issued the Initial Decision recommending dismissal of the Complaint in February 2022. Complaint Counsel timely appealed.

Significant market developments have occurred since Complaint Counsel filed their appeal. Most prominently, on March 6, 2023, Altria moved the Commission to take official notice that Respondent Altria had relinquished its stake in Respondent JLI, fully unwinding Altria's 2018 investment, and that the Respondents had terminated certain relationship and services agreements that Altria and JLI had entered related to the investment. March 6 Motion at 1. Based on these developments, Respondents moved to dismiss the proceeding as moot and no longer in the public interest. *Id.* Complaint Counsel opposed the motion to dismiss. *See* Compl. Counsel's Opp. to Respondents' Mot. to Dismiss this Litigation as Moot, or in the Alternative, to Stay the Litigation, and Resp. to Respondents' Mot. to Take Off. Notice at 2-7 (Mar. 15, 2023). Complaint Counsel argued that a respondent's voluntary cessation of unlawful conduct does not moot an enforcement proceeding and that meaningful relief remains to be ordered. *Id.* at 2-6. Complaint Counsel took no position on Altria's request for official notice. *Id.* at 2 n.2.

The Commission granted Altria's request for official notice of facts pertaining to the unwinding of the Transaction. Order Taking Off. Notice and Withdrawing Proceeding from Adjudication (May 4, 2023) at 4. The Commission also granted Respondents' motion to withdraw the case from adjudication. *Id.*

Other market developments occurred during the pendency of the appeal. In November 2022, the Commission took official notice that Altria had exercised its option to terminate a written non-compete agreement that Respondents had entered into as part of the Transaction and that had formed part of Complaint Counsel's Sherman Act Section 1 claims. Order Granting Respondent Altria Group Inc.'s Mot. for Off. Notice of Termination of the Non-Compete (Nov. 10, 2022) at 1-2. And, in August 2022, the Commission took official notice of a June 23, 2022 decision by the Food and Drug Administration ("June 23, 2022 FDA Decision") that denied marketing authorization for all JLI products sold in the United States, and a July 5, 2022 FDA order ("July 5, 2022 FDA Order") that stayed the effect of the June 23, 2022 decision pending further FDA review. Order Granting in Part Compl. Counsel's Third Mot. for Off. Notice (Aug. 24, 2022) at 3.

For the reasons discussed below, we are dismissing the Complaint on the ground that pursuit of the case no longer serves the public interest. We also vacate the Initial Decision because our dismissal deprives Complaint Counsel of the ability they would otherwise have had to obtain review of the decision. Finally, we clarify our view of several matters of law that arose in the context of that Initial Decision, as explained in Section IV below.

## II. DISMISSAL OF THE COMPLAINT

We have determined that the Respondents' full, voluntary unwinding of Respondent Altria's investment in Respondent JLI, coupled with the terminations, respectively, of (1) the Respondents' relationship and services agreements, and (2) Respondent Altria's written non-compete agreement that it formerly had with JLI, render the pursuit of this proceeding no longer in the public interest. None of the business relationships that had triggered the filing of the Complaint remains in place. Simultaneously, the competitive landscape may be in flux, with JLI's ability to continue marketing its e-cigarette products in the United States in question. *See* June 23, 2022 FDA Decision and July 5, 2022 FDA Order. We reject Respondents' assertion that this case is moot because, as Complaint Counsel explain, there is additional relief that could be granted to remedy an illegal transaction.[2] Given these developments during the pendency of Complaint Counsel's appeal and limited Commission resources, we have determined to dismiss the Complaint.

## III. VACATUR OF THE INITIAL DECISION

Because Complaint Counsel perfected their appeal yet the Commission has not ruled upon it, the Initial Decision has not become a final decision of the Commission and therefore lacks precedential effect. *See* 16 C.F.R. § 3.51(a) (identifying the conditions under which an initial decision becomes a decision of the Commission in the absence of Commission review); 16 C.F.R. § 3.51(b) (an initial decision is not considered final agency action subject to judicial review);[3] *Olson v. Fed. Mine Safety & Health Rev. Comm'n*, 381 F.3d 1007, 1014 (10th Cir. 2004) ("[I]nitial decisions by ALJs . . . often are not treated as binding precedent by the agency itself. In other words, they are not regarded as legally binding inside the agency in future proceedings raising the same issue.") (quotation omitted).[4]

Nonetheless, the Commission has vacated initial decisions when it questioned the ALJ's rationale for dismissing a case but ordered dismissal on other grounds such as mootness or lack

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[2] Antitrust remedies should halt the unlawful conduct, prevent its recurrence, and remedy the harm inflicted by the illegal act, including harm inflicted on competition and market participants. For example, in 2021 the Commission returned to its longstanding practice of requiring prior approval for future acquisitions by merging parties that pursue unlawful mergers. https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers

[3] The Commission has announced that it will amend 16 C.F.R. §§ 3.51(a), 3.51(b), and 3.54(a), *inter alia*, effective upon publication in the Federal Register. *See* https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-approves-publication-federal-register-notice-revisions-parts-0-4-commissions-rules-practice. The amendments will not apply to Commission adjudicative proceedings that were initiated prior to the date of the amendments. *See* https://www.ftc.gov/system/files/ftc_gov/pdf/p072104-amendments-to-part-3-rules-frn.pdf at p. 1. Citations to the amended regulations refer to their text as it stood prior to the pending amendments.

[4] When the Commission does rule on the merits of an appeal, it reviews the ALJ's findings of fact and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented. . . ." 16 C.F.R. § 3.54(a). On appeal from an initial decision, the Commission exercises all the powers which it could have exercised if it had made the initial decision. *Id*.

of public interest. *See, e.g., Jerrold Elecs. Corp.,* 63 F.T.C. 205, 211, 222-24 (1963) (ALJ dismissed the complaint, discounting the expert testimony; the Commission dismissed for lack of evidence, but observed that the ALJ's comments "may lead to misapplication of well established principles in the conduct of future cases. Thus, in light of our disposition of this case, the initial decision will be set aside."); *First Buckingham Comty. Inc.*, 73 F.T.C. 938, 945, 947 (1968) (Commission disagreed with the ALJ's grounds for dismissing the complaint and ruled the ALJ's action *ultra vires*; Commission dismissed the complaint on the alternative grounds that the offending conduct had ceased, and vacated the initial decision); *Quaker Oats Co.,* 63 F.T.C. 2017, 2023-24 (1963) ("[w]ithout necessarily agreeing with all of the analysis" in the initial decision, the Commission dismissed the complaint on grounds that the public interest did not warrant entry of a cease and desist order; initial decision vacated).

The Commission's vacatur practice exemplifies the principle that, where a losing party has been prevented from obtaining review of a decision, vacatur is appropriate to ensure that those who "have been prevented from obtaining the review to which they have been entitled [are] not . . . treated as if there had been a review." *Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *see also A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961) (applying *Munsingwear* in the administrative context). Here, we are not deciding the substance of Complaint Counsel's appeal of the Initial Decision. Instead we are dismissing the proceeding because intervening developments in Altria's relationship with JLI and in the competitive landscape have substantially diminished the public interest in pursuing the case. For these reasons we have determined to vacate the Initial Decision.

## IV. POINTS OF LAW

Below we write to clarify the Commission's position on certain points of law.

Before turning to issues raised by the Initial Decision, we observe that the alleged unwritten agreement between Altria and JLI – a horizontal understanding that Altria would cease competing with JLI in e-cigarettes – could properly have been pled under the rule of *per se* illegality.[5] Agreements by horizontal competitors to divide markets, customers, or territories have long been held *per se* illegal. *See Palmer v. BRG of Ga., Inc.,* 498 U.S. 46, 50 (1990) (per curiam) (market division agreement "unlawful on its face"); *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (horizontal territorial allocation a "classic example[] of a *per se* violation of § 1," a "naked restraint[] of trade with no purpose except stifling of competition") (cleaned up); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir.1991) (market allocation illegal *per se*); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) (customer allocation illegal *per se*). An alleged agreement that Altria would exit the market and cede it to JLI is functionally indistinguishable from a market allocation scheme, which enforcers and courts have long treated as a *per se* violation of the antitrust laws. *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (while even price-fixing schemes leave some forms of competition remaining, market allocation agreements are especially problematic because they remove *all* competition between the participants); *see also Impax Labs,*

[5] The Complaint in this proceeding pled the Commission's Section 1 case under the rule of reason. Compl. ¶ 79.

*Inc. v. FTC,* 994 F. 3d 484, 493 (5th Cir. 2021) (discussing market allocation agreements as the "*bête noir* of antitrust law" and potentially even more pernicious than price-fixing agreements) (quoting Joshua P. Davis & Ryan J. McEwan, *Deactivating Actavis: The Clash Between the Supreme Court and (Some) Lower Courts*, 67 Rutgers U.L. Rev. 557, 559 (2015)).

The alleged unwritten agreement for Altria to exit the market – separate and apart from Respondents' formal, written non-compete agreement – seems to be a naked elimination of competition of a type that warrants *per se* condemnation. It does not appear to be reasonably related to any integration of economic activity nor reasonably necessary to achieve an integration's procompetitive benefits, circumstances that together courts have sometimes held can warrant rule of reason treatment. *See Broad. Music, Inc. v. Columbia Broad. Sys.,* 441 U.S. 1, 20-21 (1979); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986). Such an agreement is not ancillary to procompetitive economic activity and is subject to *per se* condemnation. We note that private plaintiffs who challenged Altria's alleged agreement to exit the e-cigarette market brought a *per se* claim that the court determined was properly pled. *In re Juul Labs, Inc., Antitrust Litig.*, 555 F. Supp. 3d 932, 959-62 (N.D. Cal. 2021) (denying motion to dismiss).

The ALJ undoubtedly would have addressed certain issues differently under a *per se* theory. For example, proving a *per se* claim would not have required a showing of anticompetitive effects. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985); *Ariz. v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343-44 (1982); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). However, because the Commission's Section 1 case was litigated under the rule of reason, the ALJ required a showing of likely competitive harm. ID 261.

Turning to issues raised by the Initial Decision, we first express our views on the appropriate approach for analyzing whether parties have acted by agreement, as required under Section 1 of the Sherman Act. Then we clarify certain aspects of the analysis of competitive effects.

### A. Conspiracy: Finding Agreement

The ALJ found that Complaint Counsel had failed to prove the existence of an unwritten agreement between Altria and JLI that Altria would cease competing with its e-cigarette products. ID 85. We write to comment on certain aspects of the evaluation of conspiracy evidence under Section 1 of the Sherman Act.

As is common in Sherman Act cases involving alleged conspiracies, Complaint Counsel's proof turned on circumstantial evidence and the inferences to be drawn therefrom. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998) (noting that "it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators . . . and from other circumstantial evidence . . . .") (citation omitted); *accord, ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553 (8th Cir. 1991); *see also Benco Dental Supply Co.*, 168 F.T.C. 415, 438 (2019) (Initial Decision), *decision of the Commission pursuant to 16 C.F.R. § 3.51(a)*. It is for that reason that "circumstantial evidence is the lifeblood of antitrust law." *In re Flash*

*Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1147 (N.D. Cal. 2009) (quoting *United States v. Falstaff Brewing Corp*., 410 U.S. 526, 534 n.13 (1973)).

It is a bedrock principle that "[n]o formal agreement is necessary to constitute an unlawful conspiracy." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Rather, "[t]he essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words." *Id.* at 809-10; *see also Benco*, 168 F.T.C. at 438 (an agreement can be inferred from proof that, "knowing that concerted action was contemplated and invited," the defendants "gave their adherence to the scheme and participated in it") (quoting *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939) and citing *Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948)). The question is whether "the circumstances are such as to warrant a [factfinder] in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *Am. Tobacco*, 328 U.S. at 810.

As an aid in evaluating circumstantial evidence, factfinders consider so-called "plus factors," which are "economic actions and outcomes, above and beyond parallel conduct by oligopolistic firms, 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). For example, Complaint Counsel argued that Altria's exit from the e-cigarette market was against Altria's economic interest and therefore a plus factor that pointed toward an agreement. ID 76; CC Post-Tr. Br. at 47-50. Complaint Counsel also pointed to other plus factors such as the conspirators' alleged common motive to conspire. ID 75-76.

The ALJ was uncertain whether to consider plus factors in a case that did not turn on allegations of parallel conduct by the members of the alleged conspiracy. ID 75 ("As this is not a parallel conduct case, it is unclear that 'plus factors' have any application."). He nonetheless applied the plus factor analysis "for the sake of completeness." *Id.* (quotation marks omitted). In order to dispel any ambiguity in future cases, we now clarify that factfinders must consider plus factors, meaning behaviors or outcomes inconsistent with independent action, when evaluating the inferences to be drawn from ambiguous circumstantial evidence. It is unimportant whether such evidence is overtly labeled a plus factor or simply treated as evidence that can support an inference of conspiracy. *See Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (finding, without reference to "plus factors," that a manufacturer's depriving itself of a profitable sales outlet is "suspicious" and supported an inference of conspiracy); *In re Flat Glass Antitrust Litig*., 385 F.3d 350, 360 (3d Cir. 2004) (identifying "evidence implying a traditional conspiracy" as among the types of plus factors) (citation omitted). What matters is that, when evaluating a claim of conspiracy based in whole or in part on circumstantial evidence, the factfinder carefully considers the inferences that flow from a showing of common motive, actions against economic interest, pretext, opportunities to conspire, or other behaviors and outcomes more consistent with coordination than with unilateral action. In evaluating *post hoc* explanations of executives for conduct consistent with agreement, the factfinder should consider the presence or absence of corroboration along with traditional elements of credibility. *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 396 (1948) (denials of concerted action receive "little weight" when they conflict with contemporaneous documents); *accord, Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978); *In re High Fructose Corn*

*Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002); *see also FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2023 WL 2346238, at *25 (N.D. Cal. Feb. 3, 2023) (according little weight to subjective statements by defendant's employees in the course of litigation, because "the bias affiliated with such *ex post facto* testimony is widely recognized and unavoidable").

We reiterate that antitrust conspiracy evidence must be evaluated in its totality. *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); *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (In antitrust cases, "[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."). Furthermore, the proponent of an inference of conspiracy need not exclude all possibility of independent action to prevail. *Toys "R" Us, Inc.*, 221 F.3d at 934-35. Ultimately, the proponent must present evidence sufficient to allow the fact-finder to infer that the conspiratorial explanation is more likely than not. *Apple, Inc.*, 791 F.3d at 315 (quoting *In re Publ'n Paper Antitrust Litig.,* 690 F.3d 51, 63 (2d Cir. 2012)); *see also Toys "R" Us, Inc.,* 221 F.3d at 935.

Thus, when Complaint Counsel allege a Sherman Act Section 1 conspiracy, the Commission will evaluate direct and circumstantial evidence of agreement, including plus factors, and will analyze such evidence as a whole in light of the reasonable inferences to be derived therefrom, in order to determine whether proof of coordinated conduct renders the conspiracy more likely than not.

### B. Competitive Effects: "But For" Analysis

In analyzing the Transaction's competitive effects, the ALJ took into account post-Transaction commercial developments in the relevant market for closed-system e-cigarettes. ID 91, 101-104. Specifically, the ALJ found that e-cigarette prices and market concentration both fell, and that output increased, after the Transaction. *Id.* The ALJ concluded that "the closed system e-cigarette market has become more competitive" and that "the evidence fails to prove that the Transaction has substantially harmed or is reasonably likely to substantially harm competition." ID 104.

Complaint Counsel challenge the manner in which the ALJ used the post-Transaction evidence. Complaint Counsel assign as error what they see as the ALJ's reliance on a "before and after" comparison of the pre- and post-Transaction worlds. Complaint Counsel's Appeal of the Initial Decision 30-33. They argue that the correct comparison in an antitrust case is not between the pre- and post-transaction worlds ("before and after"), but rather between a world with the transaction and one without, otherwise known as a "but-for world" comparison. *Id.* Respondents characterize the Initial Decision differently; they contend that the ALJ did in fact consider a "but for world" in which the Transaction did not take place and examined post-Transaction market evidence as probative of "but for" conditions. Respondents Altria Group, Inc. and JUUL Labs, Inc.'s Answering Br. in Resp. to Compl. Counsel's Appeal 30-31.

To avoid doubt, we clarify that in a Clayton Act § 7 merger challenge, the proper comparison is between the actual world and the but-for world in the absence of the transaction at issue. *See FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 917 (E.D. Mo. 2020) ("[t]he Court's

objective is to determine the [transaction's] likely effect on competition compared to the but-for world in which the [transaction] is not allowed") (citing *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979) ("[W]hen examining a merger, a court must necessarily compare what may happen if the merger occurs with what may happen if the merger does not occur.")). The difference between "but for" and "before and after" formulations is subtle but important. For example, here, the ALJ found competitive harm unproven because the closed system e-cigarette market "has become more competitive" after the Transaction, ID 104, but the pertinent question is whether it would have become still more so in the absence of the Transaction.

### C. HHI Presumption

When government enforcers challenge a merger on the grounds that it will lead to undue concentration in a market, courts follow a familiar path when evaluating its lawfulness under Clayton Act § 7. In these instances, the government generally defines a relevant product and geographic market and shows that the transaction will lead to undue concentration in that market. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). By so doing, the government establishes a presumption that the transaction will substantially lessen competition in violation of § 7. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *Heinz*, 246 F.3d at 715 (quoting *Baker Hughes*, 908 F.2d at 982); *United States v. Anthem*, *Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017). If the government succeeds in establishing a *prima facie* case, the burden shifts to the merging parties to rebut it. *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 166 (3d Cir. 2022). Should the parties succeed on rebuttal, the burden of production shifts back to the government "and merges with the ultimate burden of persuasion, which is incumbent on the Government at all times." *Id.* (quoting *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016)).

One common way for the government to establish the presumption of illegality is by showing a projected change in the Herfindahl-Hirschman Index ("HHI"), a measure of market concentration that is derived by summing the squares of the market share percentages of participants in the relevant market. *Anthem*, 855 F.3d at 349; *see also Otto Bock HealthCare N. Am., Inc.*, 168 F.T.C. 324, 336 (2019). Citing the 2010 Horizontal Merger Guidelines, Complaint Counsel argued that a merger that increases the HHI by more than 200 points to a level exceeding 2,500 creates a presumption that the transaction is unlawful. Complaint Counsel argued that these tests were met. Their expert, Dr. Dov Rothman, relied on pre-Transaction HHI figures using market share data from the twelve-month period beginning in October 2017 and ending in September 2018, when Altria began withdrawing e-cigarette products from the market. ID 88. The ALJ correctly accepted this approach. ID 89-90.

Using Dr. Rothman's HHI measures, the relevant market was highly concentrated pre-Transaction, with an HHI of 3,276, and the Transaction caused an HHI increase of 652. PX5000 at ¶ 89 Table 2. These figures far exceed the thresholds needed for application of the presumption that the Transaction may substantially lessen competition. *See, e.g., Hackensack Meridian Health*, 30 F. 4th at 172; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016). However, the ALJ declined to apply the presumption. ID 92. He reasoned that, *inter alia*, Altria's pre-Transaction market share was dropping during the twelve-month period during which the shares were measured, assertedly lessening the predictive value of the pre-Transaction HHI. ID

90. The ALJ found that a reversal in the relative market shares of cigalikes versus pod-based systems meant that Altria's market share decline was likely to persist. *Id.*[6]

Having accepted Complaint Counsel's market share analysis, the ALJ should have applied the presumption and found that Complaint Counsel established a *prima facie* case. *See Baker Hughes*, 908 F.2d at 982 (showing that a transaction will lead to undue concentration establishes a *prima facie* case); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (same); *Hackensack Meridian*, 30 F.4th at 172 (government may establish a *prima facie* case on HHI numbers alone). Factors that are claimed to undermine the predictive value of the HHI analysis are properly considered on rebuttal. *See, e.g., Heinz*, 246 F.3d at 715 (to rebut presumption, the defendants must produce evidence that shows that the market share statistics give an inaccurate account of the probable effects on competition) (quotations omitted); *Chi. Bridge & Iron Co.*, 534 F.3d at 423 (Respondent may rebut *prima facie* case by "producing evidence to cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects."); *Baker Hughes,* 908 F.2d at 982-83. The ALJ thus erred by failing to find a presumption that the Transaction was unlawful.

### D. Altria's Role as an Actual Competitor

In determining that Complaint Counsel had failed to show harm to competition from the Transaction, portions of the ALJ's analysis treated Altria as a potential, not an actual, competitor in the closed-system e-cigarette market. *See, e.g.,* ID 106-08 (applying the actual potential competition doctrine, which looks to harm from eliminating a firm that may have entered the relevant market through alternative means absent the acquisition). *But cf.* ID 106-07 (suggesting that the result would be the same "[r]egardless of whether Altria is considered an actual competitor or an actual potential competitor"). The ALJ concluded that Complaint Counsel had failed to demonstrate that Altria would launch a competing e-cigarette product "in the near future" or to identify a timeframe for probable "entry" and that Complaint Counsel therefore failed to show harm to competition from the Transaction. ID 111-12.

In our view, the ALJ should have treated Altria as a current competitor as of the date of the Transaction and need not have invoked the "actual potential competition" doctrine. First, Altria had withdrawn its cigalike products from the market only days prior to finalizing the Transaction, rendering it appropriate to treat Altria as a current competitor. IDF ¶¶ 687, 691, 948; *see United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 76, 90 (D.D.C. 2017) (including in

[6] The ALJ also disagreed with the post-Transaction HHI that Dr. Rothman calculated. ID 90-92. Because JLI did not acquire Altria's market share – Altria simply exited – the calculation of post-Transaction market shares required assumptions about where Altria's share went. Dr. Rothman reallocated Altria's market share proportionally to the remaining competitors according to their market shares. ID 90. This approach implied significant reallocation to JLI, then the share leader. The ALJ rejected this approach as "not economically sound," ID 91, crediting the assertion of Respondents' expert Dr. Kevin Murphy that Altria's share shifted to cigalike products, not pod-based products such as JUUL. *Id.* Complaint Counsel, however, would have achieved much the same results with less restrictive assumptions. Even If JLI won only half of its proportionate share of Altria's business – indeed if JLI won *none* of Altria's business – and Altria's remaining share were redistributed proportionally among the other firms, HHI would increase by more than the threshold of 200 points that supports a presumption of anticompetitive harm.

market concentration figures the share of a defendant that had recently exited; "[C]ourts routinely view competitors that may have one foot in and one foot out of the market as actual competitors, and evaluate the anticompetitive effects of a merger using the standard tools of antitrust analysis."). Indeed, the ALJ elsewhere determined that "Complaint Counsel's economic expert witness properly treated Altria as an existing competitor." ID 89.

Second, Altria, through its Growth Teams, was engaged in an intensive, multi-million dollar R&D effort to develop and launch new products, an effort that the Transaction halted. IDF ¶¶ 601, 657; Garnick Tr. 1660; PX7026 (Gardner Dep.) at 176. Altria was also engaged in e-cigarette development activities with research partner Phillip Morris International under an E-Vapor Joint Research, Development, and Technology Sharing Agreement ("JRDTA"). IDF ¶ 887. [redacted] PX3210 at 02.[7] Altria's development efforts were credible and expansive. They offered present competitive benefits, and their loss harmed competition. *See In re Illumina, Inc.*, No. 9401, 2023 WL 2823393, at *43-44 (F.T.C. Mar. 31, 2023) (*petition for rev. pending*) (noting that a cognizable harm to competition occurs when a transaction forecloses current R&D that is aimed toward future commercialization of a product; harm is "current and immediate, not speculative, although the effects on commercialized sales may not be felt immediately"). Thus, the ALJ should have treated Altria as an actual competitor.

Although we do not believe the ALJ should have applied the "actual potential competition" doctrine, we note that when he did so, the ALJ indicated uncertainty regarding whether the doctrine required "clear proof that independent entry would have occurred" but for the transaction, or simply a "reasonable probability" of such entry. ID 108 n.34 (citing *B.A.T. Indus.*, 1984 WL 565384, at *10, for the "clear proof" standard, and *McWane, Inc.*, 2014 WL 556261, at *32-35 (F.T.C. Jan. 30, 2014), for the "reasonable probability" standard). To ensure that the Initial Decision does not sow confusion, we note that we view "reasonable probability" as the controlling inquiry. A reasonable probability of competitive harm suffices to condemn a transaction under Section 7's overall standard, *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984), and the bar rises no higher when proving a threat to potential competition. *See Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) (potential entry inquiry stresses probability because "the question under Section 7 is not whether competition was actually lessened, but whether it 'may be' lessened substantially"); *Meta Platforms, Inc.*, 2023 WL 2346238, at *22 (applying a "reasonable probability" standard); *see also United States v. Penn-Olin Chem. Co*., 378 U.S. 158, 175 (1964); *cf. United States v. Koziol*, 993 F.3d 1160, 1186 (9th Cir. 2021) ("A reasonable probability is, of course, less than a certainty, or even a likelihood.") (quotation omitted). Finally, under general principles of administrative law, the transaction's challenger need demonstrate such probability by a preponderance of the evidence. *See Steadman v. S.E.C.*, 450 U.S. 91, 98, 102 (1981); *Meta Platforms, Inc.*, 2023 WL 2346238, at *22 (rejecting the need for "clear proof").

[7] As Altria's Vice President for Product Design and Development Richard Jupe wrote, "Subsequent to today's announcement [of the JLI transaction], it is important to convene a communications approach for internal and external recipients to ensure a rapid and comprehensive closure to product development work associated with e-vapor." PX1022.

### E. Competitive Effects: Importance of Innovation Efforts

As suggested in Section IV.D above, we believe that the Initial Decision failed to grapple with the loss to competition that occurred when Altria disbanded its Growth Teams, [redacted] and agreed to cease e-cigarette R&D as part of the Transaction. In rejecting Complaint Counsel's showing of harm to competition, the ALJ gave these competitive harms little to no weight. ID 99-100 (dismissively characterizing Altria as "not a competent innovator of e-vapor products"), 106-10 (employing an actual potential competition analysis and focusing solely on entry by commercialized products in the near future). Consequently, the ALJ essentially disregarded the elimination of ongoing, large-scale R&D efforts (estimated at approximately $30 million annually per Growth Team, perhaps $100 million per year, IDF ¶ 657) as a competitive consequence of concern.

We believe that to effectively protect and promote fair competition in the Nation's economy, which is characterized by constant technological change, Clayton Act jurisprudence must acknowledge and weigh merger-related losses to R&D and the resultant harms to innovation. *See United States v. Anthem, Inc.*, 855 F.3d at 361 (A "threat to innovation is anticompetitive in its own right."); *Illumina, Inc.*, 2023 WL 2823393, at *27, *43-44 (*petition for rev. pending*) ("Respondents' position that we should ignore vigorous, current R&D competition merely because it is not yet commercialized would eliminate the ability of enforcers and courts to protect consumers from anticompetitive pre-commercialization conduct with egregious, long-term consequences in a world of continuous technological advance."); *Union Carbide Corp.*, 59 F.T.C. 614, 656 (1961) (finding it particularly important to arrest monopoly "in an infant industry which appears destined for far greater expansion and growth[,]" because "[s]trong and vigorous competition is the catalyst of rapid economic progress").

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Accordingly,

**IT IS HEREBY ORDERED THAT** this matter is returned to adjudication; and

**IT IS FURTHER ORDERED THAT** the Initial Decision dated February 15, 2022 is hereby **VACATED**; and

**IT IS FURTHER ORDERED THAT** the Complaint is hereby **DISMISSED.**

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: June 30, 2023