

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

In the Matter of

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

and

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

Respondents.

Docket No. 9393

**POST-TRIAL BRIEF OF RESPONDENTS
ALTRIA GROUP, INC. AND JUUL LABS, INC.**

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INTRODUCTION

Complaint Counsel seeks to undo an investment by which Respondent Altria Group, Inc., whose operating company is the largest manufacturer of combustible cigarettes in the United States, invested \$12.8 billion to acquire 35 percent of Respondent Juul Labs, Inc. (“JLI”), the maker of JUUL, a leading e-vapor product. The investment closed more than two-and-a-half years ago on December 20, 2018.

There is no dispute that the actual agreement between Altria and JLI included a limited noncompete, prohibiting Altria from developing new e-vapor products while providing services to JLI post-transaction. There is no dispute that since the investment, Altria has provided those valuable services, helping JLI seek critical FDA approval for its product—services that require access to JLI’s trade secrets and confidential information. There is also no dispute that, since the investment, pod-based products with nicotine salts have continued to be favored by almost all e-vapor customers, and that Altria both lacked such a product and could not attempt to launch one in any reasonable time frame given FDA’s stringent regulatory scheme. And there is no dispute that since the investment, the e-vapor category has become more and more competitive with prices falling, output rising, and JLI’s market share dramatically declining.

Complaint Counsel nonetheless presents these facts as antithetical to the antitrust laws, contending that Altria and JLI secretly conspired to remove Altria’s products as a precondition of the transaction and that Altria’s reasons for removing its on-market products amounted to pretext. In the complaint that initiated this action, the pretrial brief filed before the administrative hearing, and the opening statement before this Court, Complaint Counsel promised that it would prove this secret conspiracy.

Complaint Counsel failed to do so.

Take Complaint Counsel’s promise that it would show that Altria and JLI secretly agreed to a deal by which Altria would remove its products from the market as a precondition for entering into a transaction. At trial, this contention fell apart. Complaint Counsel skipped over parts of the negotiating history and then, when the actual individuals involved came to testify about the

negotiations, avoided asking them what was said across the table. But Respondents' Counsel did—and every witness confirmed, under oath, that there was no such secret agreement.

The same is true for Complaint Counsel's claim that Altria's reasons for removing its products were all pretextual. Complaint Counsel said it would show that there was a "sudden" shift within Altria—after JLI supposedly demanded the market exit—from believing in its existing products and innovative tobacco product subsidiary, Nu Mark, to giving up on them. Complaint Counsel even went so far as to say it would show that a presentation to Altria's Board of Directors about the problems with Nu Mark's products was an intentionally false attempt to paper the record after Altria concluded it would need to pull those products to complete the deal with JLI. Again, these baseless contentions fell flat at trial. Complaint Counsel ignored Altria's long struggles in developing an innovative product—struggles recognized internally before negotiations with JLI took off. Complaint Counsel ignored Altria's "Eureka moment" in June 2018—again, before negotiations heated up—when Altria's scientists and, in turn, leadership discovered that the products lacked what they needed to compete. And Complaint Counsel ignored the fact that the Board materials were prepared by regulatory personnel and scientists who had no involvement in the negotiations, long before the exchange of term sheets that Complaint Counsel alleges is evidence of a secret agreement.

Finally, there is Complaint Counsel's attempt to stitch together a theory of anticompetitive effect in the face of falling prices, rising output, and a far less concentrated market. Here Complaint Counsel relies most heavily on its economic expert—but once again is forced to resort to inventions and misdirection. Complaint Counsel's economic model and Section 7 theory rely on a claim that Altria had at least a 10 percent market share in Complaint Counsel's alleged market at the time of the transaction. Putting aside that Altria had exited prior to the signing of the transaction agreements, Complaint Counsel's numbers don't add up. Complaint Counsel contends that cig-a-likes and pods appeal to the same consumers and thus are in the same market, defying both the government's own practice of defining the market by reference to the narrowest product market and extensive testimony and evidence that market participants viewed these product segments as separate. Complaint Counsel also relies on Altria's average share from October 2017 to

September 2018 when the best evidence—cited by Complaint Counsel itself—shows that Altria’s share was steadily plummeting before the transaction, was well below 10 percent in the market alleged by Complaint Counsel, and was only about one percent or less in a narrower pod-based product market. And Complaint Counsel and its expert ignore the readily available real-world evidence of increased competition post-transaction, even to test the assumptions used in its expert’s model.

The Court had the chance to hear directly from the executives who negotiated Altria’s investment in JLI, the businesspeople responsible for marketing the products at issue, the scientists and regulatory personnel who advised them on the prospects for commercial and regulatory success in this highly regulated market, and third-party market participants. Their evidence overwhelmingly confirms there was no antitrust violation and that Altria’s exit from the market was justified by independent business reasons. And, once the products were discontinued, the market did not miss them. To accept Complaint Counsel’s theory, the Court would have to conclude that every one of these witnesses was lying under oath.

The senior-most individuals responsible for negotiating the transaction appeared before the Court. For Altria, the Court heard directly from Howard Willard, Altria’s former CEO, and Billy Gifford, its then-CFO, along with Altria’s general counsel, Murray Garnick. For JLI, the Court heard directly from Nicholas Pritzker and Riaz Valani, two directors personally involved in the negotiations. These witnesses confirmed for the Court that there was no secret agreement. Similarly, JLI’s former CEO Kevin Burns confirmed at his deposition that there was no such agreement. Instead, the documentary record of the negotiation means exactly what it says: all parties expected and assumed that the transaction would be reviewed by the FTC, that any divestiture or other disposition of Altria’s products as a result of the transaction would take place only after the transaction closed, and that until then Altria could continue marketing its existing products.

Business executives with responsibility for marketing and distributing the products in question also came before the Court, both for Altria and for JLI. For Altria, the Court heard directly from Brian Quigley, who oversaw Nu Mark in the critical period in 2018; Jody Begley, Quigley’s

predecessor; Craig Schwartz, Nu Mark's head of operations; and Scott Myers, the leader of Altria's distribution company. For JLI, the Court heard directly from Joseph O'Hara, who oversaw competitive analysis and intelligence for JLI in 2018, and Bob Robbins, who was head of sales for JLI in 2018. The Altria executives explained how Nu Mark struggled for years to develop a competitive e-vapor product in the cig-a-like segment, unaware that Nu Mark's existing products lacked the key attributes necessary to compete in the emerging pod-based market that relied on nicotine salts. And the JLI executives explained how JLI did not view Altria's products as a threat. Indeed, Nu Mark's challenges were so significant that as a result of a 100-day review process begun in June 2018 and thus before the key period of negotiations with JLI, Altria determined to downsize Nu Mark, suspend development work, and start over with "Growth Teams"—teams that would try to come up with leapfrog products that Altria could potentially market five to ten years down the line (a tall order given Altria's poor track record with innovation).

The Court also heard from key scientists and regulatory officials. Richard Jupe, Altria's Vice President of Product Development, Dr. Bill Gardner, Altria's then-Senior Principal Scientist, and Joe Murillo, Altria's then-Senior Vice President of Regulatory Affairs, testified at length about the significant issues Nu Mark products faced that made it highly unlikely they could obtain regulatory approval. Murillo, who became JLI's Chief Regulatory Officer after the transaction, also explained the significance of FDA's regulatory scheme and how Altria provided invaluable assistance to JLI in seeking to meet FDA's requirements.

The Court also heard from Willard and Gifford about their decisions to withdraw Nu Mark's products from the market. They explained that they decided to remove Elite, the company's pod-based product, and non-traditional flavors of MarkTen cig-a-like in response to FDA's letter raising concerns about those products, and in light of the significant regulatory and commercial issues confronting the products. As for the later decision to shut down Nu Mark and remove the remaining traditional-flavored cig-a-likes, it was made in connection with annual budgeting, after years of losses and with no prospects of profitability in the future. Complaint Counsel offers nothing but conjecture in response. In all cases, these decisions were independent of any potential transaction with JLI and made without any input from JLI or with any notice to JLI. Every JLI

witness involved in the negotiations confirmed that the company had no prior discussions with Altria about these decisions, nor were they aware of Altria's actions until they became public. Complaint Counsel offered no evidence to the contrary.

Lastly, the Court heard from third-party market participants, including competitors whose nicotine salts-based products have enjoyed far greater success than Altria's Elite pod product and which have engaged in aggressive price competition in the pod-based market since the transaction. These third parties all made clear that the market is highly competitive today and that Elite was an inferior product.

No matter the point of view, the record is clear: Altria's products were no competitive threat to JLI, their removal did not make the market less competitive, and the market remains highly competitive today.

Complaint Counsel failed to meet its burden. The Court should dismiss the complaint in its entirety.

FACTS

I. Background

A. **Altria established Nu Mark in 2012 to compete in the innovative product space, but lacked innovation capabilities and struggled out of the gate.**

Altria Group, Inc. is the parent of multiple tobacco companies, including Philip Morris USA, the largest cigarette company in the United States and the manufacturer of Marlboro.¹ As numerous witnesses testified at trial, Altria has been aware for many years of the secular decline of cigarette use and the importance of offering existing cigarette consumers alternatives that do not depend on burning tobacco to deliver nicotine and that may therefore pose lower health risks than cigarettes.² But as numerous witnesses also testified, Altria has a poor track record in developing such alternatives.³ Some of the early failures, even before the emergence of e-vapor products,

¹ FF ¶¶ 127-31.

² FF ¶¶ 140-41 (Willard (Altria) Tr. 1320, 1325; Jupe (Altria) Tr. 2212; Gifford (Altria) Tr. 2709).

³ FF ¶¶ 1558, 1560-61 (Schwartz (Altria) Tr. 1913 (product innovation is not a "core competency" for Altria)); FF ¶ 191 (Murillo (Altria/JLI) Tr. 2940-41 (every internal development project that Nu Mark pursued over the course of five years had failed to "yield[] fruit.")); FF ¶ 1561 (Jupe (Altria)

included an ultra-low nicotine cigarette called De-Nic and a battery-powered device called Accord that heated rather than burned sticks of tobacco.⁴ In particular, as witnesses involved in Altria’s development efforts over the years made clear, despite considerable investment, Altria repeatedly found that it was not having “success with [its] internally developed products.”⁵

In 2012, Altria established a new operating company—Nu Mark—devoted to developing and marketing innovative tobacco products for adult tobacco consumers, in particular e-cigarettes.⁶ One year after its formation, Nu Mark introduced its first “e-vapor” product in the form of a cig-a-like, a type of e-vapor product intended to “emulate the look of the cigarette.”⁷ Nu Mark branded its cig-a-like offering as the MarkTen King Size.⁸ But the product was not “satisfying enough to drive conversion from a traditional cigarette.”⁹

In April 2014, Nu Mark acquired the e-vapor business of Green Smoke, Inc. and incorporated Green Smoke’s technology into a new iteration of the MarkTen brand, the “MarkTen XL,” also a cig-a-like.¹⁰ But that product struggled, too.¹¹ And, by “early 2015,” it was clear to Nu Mark leadership, including Joe Murillo, then President and General Manager of Nu Mark, that

Tr. 2213 (“[W]e make very good cigarettes . . . but to significantly reduce the risk, I would say we have not had that innovation success.”)).

⁴ FF ¶¶ 146-54 (Jupe (Altria) Tr. 2207 (noting that consumers “rejected [Accord] based on [its] taste, flavor,” and bulky size; “they were smoking a cigarette out of a pager”)).

⁵ FF ¶ 144 (Willard (Altria) Tr. 1332-33); *see also* FF ¶¶ 1560-61 (Jupe (Altria) Tr. 2213).

⁶ FF ¶ 132 (Murillo (Altria/JLI) Tr. 2898).

⁷ FF ¶ 7 (Jupe (Altria) Tr. 2136); *see also* FF ¶ 195. A “cig-a-like” is a type of “closed system” product. FF ¶ 9. Closed systems use device-specific cartridges that are prefilled with a liquid nicotine solution (called “e-liquid”) that the device vaporizes when in use. These systems are referred to as “closed” because their cartridges are not “refillable” by the consumer. FF ¶ 9. “Open system” products, by contrast, have open tanks that users manually fill with an e-liquid that may be produced by any number of suppliers. FF ¶¶ 19, 23-24.

⁸ FF ¶ 195.

⁹ FF ¶ 198 (RX0175 (Altria) at 003).

¹⁰ FF ¶¶ 199-200.

¹¹ FF ¶ 283 (Gifford (Altria) Tr. 2734 (noting that MarkTen sales “increase[ed] slightly through time” but never took off)); FF ¶ 760 (O’Hara (JLI) Tr. 624 (the MarkTen XL was “[a]bsolutely not” “successful”)); FF ¶ 283 (RX0562 (Altria) at 007 (MarkTen XL sales, starting at a low baseline, actually declined throughout most of 2015)).

“cig-a-like products were not going to be of sufficiently deep and broad appeal . . . to convert large numbers of [smokers].”¹² As a general matter, the thin, cylindrical cig-a-like format was “underpowered” and ineffective at “deliver[ing] . . . nicotine to the consumer.”¹³

Nu Mark’s bottom line bore that out: From 2014 to 2016, Nu Mark lost over \$500 million.¹⁴ And Nu Mark’s late 2016 introduction of MarkTen Bold—another cig-a-like with moderately higher nicotine content—did not stem the financial bleeding.¹⁵

Nu Mark tried to improve its e-vapor portfolio by launching a series of internal development efforts. But innovation is easier said than done, and Altria came to abandon these internal efforts well before the transaction.¹⁶ As Richard Jupe, Altria’s Vice President of Product Design and Development, explained to the Court, as a company focused on selling rolled tobacco leaves in a highly regulated environment, Altria simply “didn’t have the right talent, the right skills, the right experiences” to succeed in developing innovative products.¹⁷ Or as Brian Quigley, the President of Nu Mark, put it, “we had . . . a long history of failure trying to do anything other than what we had proven to do successfully for decades.”¹⁸

Indeed, by 2017, Jody Begley, who headed Nu Mark from mid-2015 until the spring of 2018, recognized that without “substantial volume growth in the cig-a-like form,” Altria was “going

¹² FF ¶ 289 (PX7007 Murillo (Altria/JLI) IHT at 117).

¹³ FF ¶ 11.

¹⁴ FF ¶ 1077.

¹⁵ FF ¶ 1505 (Jupe (Altria) Tr. 2228-29 (explaining that Bold ultimately “was not satisfying” because it did not have “enough salt”)); FF ¶ 295 (RX0746 (Altria) at 019 (showing that Bold had only a minor impact on MarkTen’s bottom line, largely stealing share from the original MarkTen cig-a-like and boosting the MarkTen brand’s total share by less than two percent in stores where it was sold)).

¹⁶ FF ¶ 1581 (Murillo (Altria/JLI) Tr. 2940 (noting that Project Panama was discontinued after Altria came to the conclusion it lacked “the bandwidth and knowledge base to develop that sort of a product”)); FF ¶ 1589 (PX7016 Jupe (Altria) Dep. at 60 (Project Hudson never got “to a point where [Altria] thought [it] would commercialize it”)).

¹⁷ FF ¶ 848 (Jupe (Altria) Tr. 2319).

¹⁸ FF ¶ 848 (PX7041 Quigley (Altria) Dep. at 148-49).

to continue to lose \$70 million a year on the [MarkTen] cigalike.”¹⁹ But far from seeing volume growth, the cig-a-like segment was “stagnant.”²⁰ As Begley testified, there simply was not “a lot of incremental interest among adult smokers” in e-vapor.²¹ That would come to change by late 2017, however, as adult smokers turned en masse to a new product format—pods.

B. In 2015, JLI launched a pod-based e-vapor product that mimics the nicotine experience of cigarettes.

Respondent Juul Labs, Inc., founded in 2007 by two Stanford students, is a Silicon Valley-style technology company.²² Its mission: “[T]ransition the world’s one billion smokers off of combustible cigarettes and eliminate their use.”²³ Fueled by that objective and its start-up culture, JLI assembled “a deep bench” of innovation talent at its San Francisco headquarters.²⁴

In 2015, JLI introduced a pioneering pod product into the stagnant closed-system e-vapor category.²⁵ While most of the U.S. players in the e-vapor industry acquired their products, JLI “is one of the few companies that is responsible for the design and manufacturing of its own product,” which it called JUUL.²⁶ Critically, as depicted below and as the Court saw firsthand with the samples provided during the hearing, JUUL was not shaped like a cigarette. As Altria would later come to learn, “smokers who want[] to convert to non-combustible tobacco products d[o] not want to appear to be smoking a cigarette,” which makes the cig-a-like form “just wrong for conversion.”²⁷ JUUL, with its sleek aesthetic, “resolved for at least many adult smokers . . . the social friction of being viewed as a smoker, . . . allow[ing] them to leave some of that baggage on

¹⁹ FF ¶ 392 (PX7022 Begley (Altria) Dep. at 225).

²⁰ FF ¶ 291 (Begley (Altria) Tr. 1055).

²¹ FF ¶ 281 (Begley (Altria) Tr. 1066).

²² FF ¶¶ 204-05, 215. JLI was originally incorporated as Ploom, Inc. in 2007. It was later renamed Pax Labs, Inc. On June 30, 2017, Pax Labs renamed itself Juul Labs, Inc., and spun out Pax Labs, Inc., as a separate stand-alone corporation. JLI retained the e-vapor assets. FF ¶¶ 205-09.

²³ FF ¶ 212 (Robbins (JLI) Tr. 3243).

²⁴ FF ¶¶ 203, 215; *see also* FF ¶ 848.

²⁵ FF ¶¶ 208, 214-36.

²⁶ FF ¶ 214 (Valani (JLI) Tr. 907).

²⁷ FF ¶ 1392 (PX7036 Garnick (Altria) Dep. at 135).

the sidelines.”²⁸ Far from a matter of aesthetics, as Complaint Counsel sought to suggest, JUUL’s unique form factor “really solve[d] a problem” for adult smokers.²⁹



JUUL’s revolutionary design was paired with two features that allowed it to deliver superior satisfaction. The first was a superior battery to JUUL’s cig-a-like predecessors, which provides more power and more vapor, thereby allowing JUUL to overcome the weak inhale/exhale experience that was a central drawback of the cig-a-like form.³¹

Pairing that innovation with the second feature, the use of nicotine salts, allowed JUUL to crack the code on providing smokers the satisfaction necessary to replicate the nicotine experience provided by cigarettes.³² As Complaint Counsel acknowledged in its opening statement, the “key” to JUUL’s success was “its inclusion of nicotine salts” (the product of nicotine mixed with an

²⁸ FF ¶ 223 (Begley (Altria) Tr. 1095); *see also* FF ¶ 16 (Gardner (Altria) Tr. 2604); FF ¶ 222 (Crozier (Sheetz) Tr. 1555-56).

²⁹ FF ¶ 31 (Begley (Altria) Tr. 1079).

³⁰ FF ¶ 221 (RX0279 (Altria) at 011, 052).

³¹ FF ¶ 225.

³² FF ¶ 224.

organic acid).³³ And that “key” was corroborated by a trove of evidence at trial.³⁴ As was reiterated at trial over and over, nicotine salts are essential to the delivery of nicotine satisfaction.³⁵

Because JUUL could deliver the nicotine experience provided by cigarettes, it was succeeding in the critical area where Nu Mark was not: converting adult smokers from smoking to vaping.³⁶ JUUL also catalyzed a dramatic decline in cigarette sales, nearly doubling the annual rate of decline from an average of 3 to 4 percent per year to 4 to 6 percent in some retail chains, with others reporting that “at least 30% of smokers who tried JUUL did not return to smoking traditional cigarettes.”³⁷

Within two years of JUUL’s arrival on the market, there were a growing number of e-vapor products that had broken with the cig-a-like mold to offer superior, more powerful, less stigmatizing products.³⁸ And as consumer interest in pods grew, market participants uniformly recognized pods as a distinct market segment with a different consumer base.³⁹

³³ Tr. 34; *see also* FF ¶ 614.

³⁴ *See, e.g.*, FF ¶ 227 (Gardner (Altria) Tr. 3086-87 (key to providing “the experience the smoker was looking for” was “nicotine salts” and a “lower pH”)); FF ¶ 226 (Crozier (Sheetz) Tr. 1556 (“[N]icotine salts [lead] to greater nicotine satisfaction than products that [do not have salts].”)); FF ¶ 231 (PX7030 Wexler (Turning Point Brands) Dep. at 43-44 (use of nicotine salts enabled JUUL to be “the first [product] on the market to get as close to a cigarette as they did” in terms of the “rapid” uptake of nicotine)).

³⁵ FF ¶¶ 226-33 (Crozier (Sheetz) Tr. 1556; Gardner (Altria) Tr. 3086-86; Jupe (Altria) Tr. 2284; Quigley (Altria) Tr. 2007); *see also* FF ¶¶ 398, 478, 571, 614-27, 683-86, 712, 743, 1330-37, 1504.

³⁶ FF ¶ 236 (Robbins (JLI) Tr. 3243; PX7039 Robbins (JLI) Dep. at 189-91; Willard (Altria) Tr. 1359; Gifford (Altria) Tr. 2828; PX7036 Garnick (Altria) Dep. at 163-64).

³⁷ FF ¶¶ 234-35.

³⁸ FF ¶¶ 297-300.

³⁹ FF ¶ 1408 (Quigley (Altria) Tr. 2034 (Nu Mark separated pods and cig-a-likes in its internal market analysis because “different product forms . . . were behaving differently in the market” and reflecting different “consumer trends.”)); FF ¶ 1412 (PX7025 Burns (JLI) Dep. at 199-200 (“We really didn’t look at the cigalike products as a product category that we were competing against.”)); FF ¶ 1403 (PX7030 Wexler (Turning Point Brands) Dep. at 51 (“[p]od system[] [users] are significantly younger” than cig-a-like users, by a matter of decades)).

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, 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:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Dated: August 23, 2021

s/ Beth Wilkinson

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