

research and development capability required to internally develop a competitive e-vapor product, Altria again sought to acquire products in the hope of expanding sales.

By this point, FDA regulations imposed a significant constraint on Altria's options. Congress has designated the FDA as the only federal agency that "possesses the scientific expertise needed to implement effectively all provisions of the Family Smoking Prevention and Tobacco Control Act." Pub. L. No. 111-31, § 2(45), 123 Stat. 1776, 1781 (2009). Under that statute, as made applicable to e-vapor products via an FDA regulation known as the "Deeming Rule," all e-vapor products had to obtain FDA authorization before they could be sold to consumers (through a submission known as a Premarket Tobacco Product Application ("PMTA")).

The FDA made clear that e-vapor products would only be authorized to be sold if they were appropriate for the protection of public health because they generated positive health benefits for American consumers of tobacco products. But the FDA exercised its enforcement discretion to allow products that had been for sale in the United States on or before August 8, 2016 to remain for sale, pending PMTA approval, so long as an application was filed by a deadline set by the agency. That enforcement discretion could be revisited, and, regardless, the FDA was clear that any new or changed product without "8/8/16 status" could not be sold to consumers until after receiving PMTA approval, a multi-year process.

Recognizing that its existing cig-a-like products were not competitive, Altria, in late 2017, scrambled to acquire a pod-based product that had 8/8/16 status. Altria held unsuccessful exploratory discussions with JLI and, at the same time, scoured the globe for pod-based products with 8/8/16 status that it could acquire. As talks with JLI were going nowhere, in the fall of 2017, Nu Mark licensed the rights to an e-vapor product owned by a Chinese manufacturer that

had 8/8/16 status. Due to the product's 8/8/16 status, Nu Mark could not make material modifications to the newly acquired e-vapor product without waiting for PMTA approval.

Nu Mark rushed to rebrand the Chinese-made product as MarkTen Elite and to expand its availability to consumers in March 2018. But after initial optimism about its prospects, Altria realized by the summer of 2018 that Elite had many problems and was not converting adult smokers. Elite also was not effectively competing with other e-vapor products, including JUUL, which was successful in large part because of its proprietary nicotine salts formula that provided users with a satisfying, cigarette-like experience. Elite, by contrast, did not provide consumers with an experience similar to that of traditional cigarettes or other e-vapor products, like JUUL.

Despite Altria spending millions and using its distribution expertise to introduce Elite to consumers, at the time it was pulled, Elite had a trivial nationwide share of sales and little consumer appeal. In the four years before the business was wound down, Nu Mark had lost hundreds of millions of dollars — and it was projected to lose hundreds of millions more in the coming years. Altria also concluded that Elite, as well as Nu Mark's preexisting MarkTen products, could not obtain PMTA approval in their current form. Both MarkTen and Elite lacked a key element for obtaining PMTA approval — the ability

even in a best-case scenario, where Altria

had no anticompetitive effect. On January 28, 2020, Altria and JLI amended their support service agreement to eliminate some other aspects of the agreement, but Altria agreed to continue to support JLI in navigating the complex regulatory pathway to obtaining the

lose the support from Altria that it needs to obtain PMTA approval and to pursue its mission to convert smokers.

In sum, and as will be demonstrated at trial, consumer welfare will be served by denying the FTC the relief that it seeks and permitting Altria and JLI to proceed to provide consumers the benefits of their agreement.

RESPONSE TO THE SPECIFIC ALLEGATIONS OF THE COMPLAINT

All allegations not expressly admitted herein are denied. Altria does not interpret the headings and subheadings throughout the Complaint as well-pleaded allegations to which any response is required. To the extent such a response is required, Altria denies all allegations in the headings and subheadings of the Complaint. Use of certain terms or phrases defined in the Complaint is not an acknowledgment or admission of any characterization the Commission may ascribe to the defined terms. Unless otherwise defined, capitalized terms shall refer to the capitalized terms defined in the Complaint, but any such use is not an acknowledgment or admission of any characterization the Commission may ascribe to the capitalized terms.

Altria does not concede the truthfulness of third-party articles and news sources quoted or referenced in the Complaint. To the extent that a response is required, Altria denies all allegations of the third-party articles and news sources quoted in or referenced in the Complaint. Altria additionally denies that the Commission is entitled to any of the relief sought in the Notice of Contemplated Relief on page 16 of the Complaint. Altria reserves the right to amend and/or supplement this answer at a later stage of the proceedings as permitted by the Rules. Each paragraph below corresponds to the same-numbered paragraph in the Complaint.

I. NATURE OF THE CASE

1. The first sentence of Paragraph 1 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

Altria admits the allegations of the second sentence of Paragraph 1. Altria denies the allegations of the third sentence of Paragraph 1, except to admit that it began selling e-vapor products in 2013, that there has been a shift in consumer demand toward alternative nicotine products, and that it sought to meet this consumer demand. Altria denies the remaining allegations of Paragraph 1.

2. Altria denies the allegations of Paragraph 2, except to admit that JLI introduced JUUL, its pod-based e-vapor product, in 2015, and, by 2017, had obtained significant sales.

3. Altria denies the allegations of the first four sentences of Paragraph 3, except to admit that its Nu Mark subsidiary offered products in the e-vapor category, including the MarkTen and MarkTen Elite, and that Nu Mark expanded the availability to consumers of MarkTen Elite, a pod-based e-vapor product, in March 2018. Altria denies the allegations in the last sentence of Paragraph 3 and respectfully refers to its statements to the investment community for a more complete and accurate statement of their contents.

4. Altria denies the allegations of Paragraph 4.

5. Altria denies the allegations of Paragraph 5, except to admit that it did not reach an agreement with JLI until December 20, 2018.

6. Altria admits the allegations of the first sentence of Paragraph 6. Altria denies the remaining allegations of Paragraph 6 and respectfully refers to the Class C-1 Common Stock Purchase Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC, dated as of December 20, 2018 (the “Purchase Agreement”), the Relationship Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises LLC, dated as of December 20, 2018 (the “Relationship Agreement”), the Services Agreement, by and between Altria Group, Inc. and JUUL Labs, Inc., dated as of December 20, 2018 (the “Services

into certain amendments with JLI in January 2020 that removed some support that Altria had been providing to JLI, but maintained other support, including with respect to regulatory matters, which is ongoing. Altria respectfully refers to those amendments for a more complete and accurate statement of their contents.

12. Paragraph 12 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

13. Paragraph 13 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

II. JURISDICTION

14. Paragraph 14 sets forth legal conclusions to which no response is required.

15. Paragraph 15 sets forth legal conclusions to which no response is required.

16. Paragraph 16 sets forth legal conclusions to which no response is required.

III. RESPONDENTS

17. Altria admits the allegations of the first two sentences of Paragraph 17. Altria denies the allegations of the third sentence of Paragraph 17. Altria admits the allegations of the last sentence of Paragraph 17.

18. Altria admits the allegations of the first sentence of Paragraph 18, except notes that JLI has announced that its headquarters are moving to Washington, D.C. Altria denies the allegations of the second sentence of Paragraph 18.

IV. THE TRANSACTION

19. Altria denies the allegations of the first and third sentences of Paragraph 19 and respectfully refers to the Purchase Agreement, Services Agreement, Relationship Agreement, Voting Agreement, and Intellectual Property License Agreement for a more complete and

Inc., Altria Group, Inc., and Altria Enterprises, LLC, entered into as of January 28, 2020, and the Purchase Agreement (together, the “Amended Purchase Agreement”), Amendment No. 1 to Relationship Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises LLC, entered into as of January 28, 2020, and the Relationship Agreement (together, the “Amended Relationship Agreement”), Amendment No. 1 to Services Agreement, by and between Altria Group, Inc. and JUUL Labs, Inc., made and effective as of January 28, 2020, and the Services Agreement (together, the “Amended Services Agreement”), and the Ninth Amended and Restated Voting Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., Altria Enterprises LLC, certain Investors, the Key Common Holders, and each Additional Party, made as of January 28, 2020 (the “Revised Voting Agreement”), for a more complete and accurate statement of their contents.

26. Altria respectfully refers to the Revised Voting Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 26 are inconsistent with the Revised Voting Agreement, Altria denies such allegations.

27. Altria respectfully refers to the Amended Relationship Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 27 are inconsistent with the Amended Relationship Agreement, Altria denies such allegations.

28. Altria respectfully refers to the Amended Services Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 28 are inconsistent with the Amended Services Agreement, Altria denies such allegations.

V. INDUSTRY BACKGROUND

A. Altria Recognized the Need to Invest in E-cigarettes

29. Altria denies the allegations of Paragraph 29 as to Altria, except to admit that it

e-vapor products. Altria otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 29 and denies them on that basis.

30. Altria denies the allegations of Paragraph 30, except to admit that Nu Mark introduced the MarkTen e-vapor product in 2013, that it made certain acquisitions of e-vapor platforms, and that it expanded the availability to consumers of MarkTen Elite, a pod-based e-vapor product, in March 2018.

31. Altria denies the allegations in the first sentence of Paragraph 31, except to admit that it discussed the e-vapor category in certain investor presentations and internal incentive compensation plans, to which Altria respectfully refers for a more complete and accurate statement of their contents. The second sentence of Paragraph 31 purports to characterize and quote a statement by Howard Willard, Altria's former CEO, to which Altria respectfully refers for a more complete and accurate statement of its contents. (b) (1) - (c) (4) - (e) (6) - (f) (4)

41. The first sentence and third sentence of Paragraph 41 set forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations. Altria denies the remaining allegations of Paragraph 41.

42. Paragraph 42 sets forth legal conclusions to which no response is required.

VII. MARKET STRUCTURE

43. Paragraph 43 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

44. Paragraph 44 sets forth legal conclusions and characterizations of the Merger Guidelines and court decisions to which no response is required. To the extent that a response is required, Altria denies the allegations.

45. Paragraph 45 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations of Paragraph 45.

VIII. ANTICOMPETITIVE EFFECTS

A. Altria Agreed to Withdraw from Current and Future Competition in Exchange for the Opportunity to Share in JLI's Dominant Position

46. Altria denies the allegations of Paragraph 46 and respectfully refers to the testimony of the referenced witnesses for a more complete and accurate statement of its contents.

47. Altria admits the allegations of the first sentence of Paragraph 47, except to deny the characterization of individuals as "lead negotiators" for Altria. Altria denies the remaining allegations of Paragraph 47 and respectfully refers to the quoted term sheet for a more complete and accurate statement of its contents.

48. Altria denies the allegations of Paragraph 48 and respectfully refers to the testimony of JLI's former CFO for a more complete and accurate statement of its contents.

49. Altria admits the allegations of Paragraph 49, except to deny the characterization of individuals as “lead negotiators” for Altria.

50. Altria denies the allegations of Paragraph 50 and respectfully refers to the referenced draft talking points for a more complete and accurate statement of their contents.

51. Altria denies the allegations of Paragraph 51 and respectfully refers to the referenced draft talking points for a more complete and accurate statement of their contents.

52. Altria denies the allegations of Paragraph 52 and respectfully refers to the email sent by Billy Gifford and the term sheet markup for a more complete and accurate statement of their contents.

53. Altria lacks knowledge or information sufficient to form a belief as to the truth of this allegation and denies it on that basis.

54. Altria admits the allegations in the first two sentences of Paragraph 54, except to deny that the purpose of this discussion was to go over a “few key points of disagreement.” Altria denies the remaining allegations of Paragraph 54 and respectfully refers to JLI’s message for a more complete and accurate statement of its contents.

55. Altria denies the allegations of the first two sentences of Paragraph 55 and respectfully refers to the quoted letter for a more complete and accurate statement of its contents. Altria lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 55, and on that basis denies those allegations. Altria denies the remaining allegations of Paragraph 55.

56. Altria denies the allegations of Paragraph 56, except to admit that, on October 25, 2018, it announced that Nu Mark would be discontinuing certain of its e-vapor products, including MarkTen Elite and flavored MarkTen products (other than tobacco, mint, and

menthol), because of the concerns expressed by the FDA that pod-based systems and nontraditional flavors could be contributing to youth usage.

57. Altria denies the allegations of Paragraph 57 and respectfully refers to the quoted email for a more complete and accurate statement of its contents.

58. Altria denies the allegations of Paragraph 58, except to admit that, on December 7, 2018, it announced Nu Mark was discontinuing its few remaining products.

59. Altria admits the allegations in the first sentence of Paragraph 59. Altria denies the remaining allegations of Paragraph 59 and respectfully refers to the quoted emails for a more complete and accurate statement of their contents.

60. Altria denies the allegations of Paragraph 60, except to admit that it executed and announced the Purchase Agreement and other related agreements on December 20, 2018 and respectfully refers to those agreements for a more complete and accurate statement of their contents.

61. Altria denies the allegations in the first two sentences of Paragraph 61, and respectfully refers to the Purchase Agreement and other ancillary agreements for n4 (i)-(0 (r)3 (e)4

63. Altria denies the allegations of Paragraph 63, except to admit that it used its distribution network to expand the distribution of MarkTen Elite.

64. Altria denies the allegations of Paragraph 64 as to Altria, except to admit that, at times, Nu Mark used promotions in its failed attempt to successfully market MarkTen and MarkTen Elite. Altria lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations as to JLI, and on that basis denies them.

65. Altria denies the allegations of Paragraph 65, except to admit that Nu Mark

heat-not-burn device in May 2017 and received approval two years later in April 2019.

Moreover, Altria admits that preparing a PMTA requires a significant amount of resources — time, personnel, and money — and that the FDA has processes in place to assist small companies in preparing PMTAs and has committed to a streamlined PMTA approval process for small companies. Additionally, to the extent that portions of the allegations of Paragraph 71 rely on internal Altria documents and submissions made by Altria to the FTC during its investigation of the Transaction, Altria respectfully refers to those documents and submissions for a more complete and accurate statement of their contents. Altria lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations as to JLI, and on that basis denies them.

72. Altria denies the allegations of Paragraph 72 and respectfully refers to submissions made by Altria to the FTC during its investigation of the Transaction for a more complete and accurate statement of the requirements for selling an e-vapor product.

73. Altria denies the allegations of Paragraph 73.

74. Altria lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 74 and denies them on that basis.

75. Paragraph 75 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

76. Paragraph 76 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

X. VIOLATIONS

Count I — Illegal Agreement

77. Altria incorporates each response set forth above as though fully set forth herein.

78.

ELEVENTH DEFENSE

Nu Mark's discontinuation of certain e-vapor products did not unreasonably restrain trade or substantially lessen competition to the extent any such finding by the FTC implicates the scientific or public health expertise held by the FDA.

TWELFTH DEFENSE

These proceedings are invalid because the structure of the Commission as an independent agency that wields significant executive power, and the associated constraints on removal of the Commissioners and other FTC officials, violates the separation of powers.

THIRTEENTH DEFENSE

The structure of these administrative proceedings, in which the Commission both initiates and finally adjudicates the Complaint against Altria, violates Altria's Fifth Amendment Due Process right to adjudication before a neutral arbiter.

FOURTEENTH DEFENSE

These administrative proceedings violate Altria's Fifth Amendment Due Process right to adjudication before a neutral arbiter as applied to Altria because the Commission has prejudged the merits of the instant action.

FIFTEENTH DEFENSE

The Commission's procedures violate Altria's right to procedural due process under the Due Process Clause of the Fifth Amendment.

SIXTEENTH DEFENSE

The Commission's procedures arbitrarily subject Altria to administrative proceedings rather than to proceedings before an Article III judge in violation of Altria's right to Equal Protection under the Fifth Amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 27, 2020, I caused a true and correct copy of the foregoing Answer and Defenses to be filed through the Federal Trade Commission's E-Filing platform, which will send notifications of such filing to:

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The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W., Rm. H-110
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I HEREBY CERTIFY that, on July 27, 2020, I delivered via electronic mail a true and correct copy of the foregoing Answer and Defenses to the Complaint to:

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Notice of Electronic Service

I hereby certify that on July 27, 2020, I filed an electronic copy of the foregoing Answer and Defenses of Respondent Altria Group, Inc., with:

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I hereby certify that on July 27, 2020, I served via E-Service an electronic copy of the foregoing Answer and Defenses of Respondent Altria Group, Inc., upon:

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