



Oral Argument Before the Commission: Altria/JUUL – September 12, 2022

Speaker 1:

All persons having business before the Federal Trade Commission are admonished to draw near and give their attention. God save the United States and this honorable Commission.

Chair Khan:

Good morning, everyone. The Commission is meeting today in open session to hear oral argument in the matter of Altria Group, Inc., and Juul Labs, Inc., docket number 9393 on complaint counsel's appeal of the initial decision issued by the administrative law judge. Respondent Altria Group is represented by Beth Wilkinson. Respondent Juul Labs is represented by David Gelfand, and complaint counsel is represented by Steven Roger. Complaint counsel and respondent will each have 45 minutes to present their arguments. Complaint counsel will make the first presentation and may reserve time for rebuttal. Counsel for the respondent will then proceed with their presentation and complaint counsel may then conclude the argument with a rebuttal presentation, provided they had reserved time. I want to remind all counsel that the argument should be limited to information that is public in its entirety. If you need to discuss material that is confidential, you should let us know, and we can then go into closed session at an appropriate time during the argument. The Commission already voted to close portions of this meeting in case it becomes necessary to discuss confidential information. Closed portions of the argument will not be webcast to the public. Mr. Roger, do you want to reserve any time for rebuttal?

Mr. Roger:

Yes, Madam Chair. I'd like to reserve 10 minutes, please.

Chair Khan:

Okay. Noted. When you're ready, you may begin.

Mr. Roger:

Good morning, Madam Chair, Commissioners. On December 20th, 2018, Altria, the largest tobacco company in the United States, acquired a 35% stake in the leading e-cigarette company, Juul Labs, Inc., for \$12.8 billion. Only two months before, Altria had announced it was pulling its pod-based e-cigarettes from the market. Its stated reason for doing so? Concern about youth vaping and pod products in particular. But behind closed doors, Altria was closing in on a deal with Juul, the market leader whose pod-based e-cigarette was the public face of the youth vaping epidemic. Less than two weeks before its

investment in JLI, Altria announced it was discontinuing its entire e-cigarette portfolio. Its stated reason for doing so? The poor performance of its products. But just a few months before, Altria told investors its e-cigarette volumes were growing and its newest products were getting traction with customers. To industry participants, Altria's decision made no sense, but Wall Street analysts immediately suspected Altria's withdrawal was linked to an impending deal with Juul and Wall Street was right.

This case, Commissioners, boils down to a fundamental fact for which there is overwhelming evidence, but for the transaction, Altria would've continued to compete in the 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. This agreement violated section one of the Sherman Act. In dismissing the section one claim, the initial decision found that Altria's sudden exit from the market was unrelated to any agreement with JLI. But in reaching this conclusion, the court failed to consider the record as a whole, ignored material evidence, and credited the post-talk self-serving testimony of respondent's executives. These errors require reversal of the initial decision. Even absent in agreement...

Speaker 2:

Forgive the interruption. The last thing you mentioned with respect to credibility, can you walk us through why you think we as commissioners who did not preside over the trial and didn't watch the witnesses testify in person and under cross are in a better position to judge credibility than the administrative law judge?

Mr. Roger:

Yes, Commissioner Phillips. As the Commission knows, you're reviewing the record de novo and that pertains to both facts and the inferences from facts. But I understand your question to be, why should you do that? In past instances where circuit courts have taken issue with the commission overturning an ALJ's decision, for example in Schering-Plough, it was a situation where the Commission in that case relied on evidence that was outside the record to undermine the ALJ's credibility determination in that case. In this case, we're asking the Commission to do no such thing. As I'll get to later in my presentation, the initial decision in this case didn't grapple with conflicting testimony between key respondent executives at trial and earlier in their investigational hearings. The failure to even attempt to reconcile the conflicting testimony is error. In addition, the initial decision ignored several critical documents altogether that corroborate complaint counsel theory and undermines the credibility of those particular witnesses.

Chair Khan:

Complaint counsel, on this section one argument, could you explain, so you're both alleging the existence of an unwritten agreement as well as a written covenant not to compete. Could you explain whether you're asserting that each of those is a section one violation or whether you're saying that as a whole, these are a section one violation? I can imagine that potentially affecting the legal standard under which either they'd be reviewed as a whole or individually.

Mr. Roger:

[inaudible 00:06:17] chair. Complaint counsel's allegation is that respondents agreed that Altria would exit the closed system e-cigarette market. I think it's best to look at it in two parts. Altria at the time was a current competitor, and so part of this agreement was to exit with their existing products and part of this agreement related to not to compete in the future. The non-compete provision of the transaction,

which there's direct evidence, it's embodied in the transaction agreement and I think there's no real question that there's an agreement there. We believe that that agreement, standing alone, that non-compete, violates section one. In addition, the agreement to exit with respect to Altria's then existing products, our position is that the totality of the evidence, the circumstantial evidence shows that the parties agreed that Altria would no longer compete with its existing products. Put simply, Chair, there are two aspects to the overall agreement and we think both violate section one.

Chair Khan:

Okay. You are claiming that there are two distinct violations of section one.

Mr. Roger:

Correct.

Chair Khan:

Okay. Originally, you proceeded with a rule of reason framework. In the appeal brief, footnote 37 notes that respondent's conduct may well amount to a violation under the per se rule or the inherently suspect standard as well. I understand your position is that well, at the end of the day, we think that we can show liability even under the rule of reason, but can you explain to us what your position is on whether this agreement, presumably the unwritten agreement, should be evaluated under either the quick look framework or the per se theory?

Mr. Roger:

Chair, our position is straightforward on that particular issue. The Commission voted out a complaint under the rule of reason. The counts, as articulated in the complaint, was under the rule of reason and complaint counsel presented a case at trial under the rule of reason. The purpose of the footnote was simply to indicate to the Commission that in the private litigation, the private litigants have asserted a per se violation. We believe the evidence adduced that trial, substantiates a violation of section one under the rule of reason.

Chair Khan:

But is your position that it also would warrant a per se analysis?

Mr. Roger:

Complaint counsel defers to the Commission as to whether or not there's a violation. Complaint counsel was instructed by the Commission to pursue a section one claim under the rule of reason, and that's what complaint counsel did.

Chair Khan:

Okay. Thank you.

Mr. Roger:

Now, even absent in agreement, the transaction itself is unlawful under section seven of the Clayton Act. In dismissing the section seven claim, the initial decision found that Altria's exit had not substantially lessened competition and was not reasonably likely to do so, but this conclusion was based on a fundamentally flawed analysis of the transaction's likely effects. In particular, the court failed to

engage in the critical inquiry that's at the heart of every section seven case. Does the transaction create a reasonable probability of harm as compared to the but-for world in which it did not occur? Then, the court engaged in a misguided before and after analysis that doesn't address that crucial question. This was error and should be reversed. Analyzed correctly, the evidence shows that but for the transaction, Altria would be competing aggressively today on price innovation in other key dimensions of competition.

Speaker 2:

Counselor?

Mr. Roger:

Let's turn...

Speaker 2:

The administrative law judge made some findings about what happened in the market after. It de-concentrated, prices decreased, output increased. Do you disagree with those factual findings?

Mr. Roger:

Complaint counsel's position is that those factual findings don't touch on the relevant question that the Commission needs to address in this case, which is whether or not, but for the transaction, competition is reasonably likely to have lessened. In this situation, what the administrative law judge did at the urging of respondents is look at various metrics, price, output, concentration before, and those same metrics after. That doesn't inform the question as to whether or not competition would be greater had Altria remained in the market. Ultimately, our position, Commissioner Phillips, is that those metrics are largely irrelevant. I'll add that even under respondent's expert's own analysis, the market today remains highly concentrated.

Speaker 2:

I understand your quibble with how the administrative law judge analyzed the question. What I'm asking is do you disagree with the facts, how he described the market before and after? Are you quibbling with that or with those?

Mr. Roger:

No. We certainly don't disagree that for example, that Vuse and NJOY introduced additional products to the market that had an effect on the market. We'd add, however, that those events were planned irrespective of Altria's plans. But an important point here, and it's one that complaint counsel's expert Dr. Rockman made, is that the reason it's problematic to evaluate the actual world is that it doesn't take into account confounding factors that influence the market. There are a number of examples of those confounding factors. For example, the negative press on vaping, particularly focused on Juul, that really reached a crescendo after the deal in 2019. In addition, there was a change in the minimum age to buy nicotine. There was the FDA's flavor ban. There were a number of confounding factors that affected the measures of the actual world, but we wouldn't disagree with respondent's expert's point that the market remains highly concentrated, or for example, that there were new products that entered.

Speaker 2:

Thank you.

Mr. Roger:

Now, turning to proof of agreement. The evidence shows respondents agreed Altria would exit the market for closed system e-cigarettes. The agreement, as I mentioned before, required Altria to stop selling its existing e-cigarettes and to refrain from competing in the future. Assessing the existence of an agreement requires considering the totality of the evidence and critically, circumstantial evidence is no less persuasive than direct evidence. Reviewed as a whole, the evidence establishes one, JLI demanded that Altria exit the market as part of any transaction. Two, Altria committed to JLI that would do so. Three, Altria withdrew its e-cigarettes from the market. And four, just days later, respondents closed the transaction. Let's begin with evidence from the deal negotiations. I'm pulling up a slide that is a timeline of key events from July and August 2018, and the following slide shows key events from September to December 2018.

The deal negotiations between the parties are shown on the bottom and Altria's efforts with respect to Mark Ten products are shown across the top. I'll just discuss a few of these events today, given the time, but complaint counsel's hope is that the timeline is helpful as you review the record. On July 30th, 2018, JLI sent an initial term sheet to Altria. This term sheet included a term requiring Altria to divest, contribute, or cease to operate its e-cigarette business no later than nine months after the transaction. Viewed within the context of the full record, the purpose of this term was to ensure Altria's exit. The court's finding that JLI included this term to propose steps for HSR clearance is implausible on its face. Neither contribution nor ceasing to operate are remedies to an anti-competitive transaction. While divestiture was one of the options placed on the table, respondent's claim that divestiture was the most likely option is incredible.

Altria never took steps to explore a divestiture of its products because it didn't believe it could do so. Altria's R&D agreement with Philip Morris International likely prevented it from divesting its e-cigarettes before July 2020. The court's finding also conflicts with testimony from JLI's executives. JLI board member Riaz Valani testified the term reflected the intent to have Altria "not be directly competitive in e-cigarettes." Valani added that JLI was "agnostic" as to how this end state would be achieved. Similarly, JLI board member Nicholas Pritzker testified that the goal was for Altria to not be competing against Juul and that he "didn't care how that would come about." In Valani's words, the cease to operate language was a fail safe reflecting JLI's desire that Altria "not have any outs in its commitment not to compete against Juul." JLI's claim that Altria had no idea Altria might simply exit the business doesn't withstand scrutiny.

After all, it was JLI that first suggested this course of action in writing in the July 30th term sheet. Less than a week later, JLI sent a revised term sheet that added the word shutdown to the non-compete provision. The concept that Altria might simply exit the market appears in writing yet again in the October 15th term sheet and in the final term sheet circulated on October 30th. These term sheets specified that Altria could provide JLI with so-called enhanced services, essentially marketing and distribution services, only after it divested, contributed or "otherwise exited" its e-cigarette business. Viewed in context, the purpose of these terms, cease to operate, shutdown, otherwise exit, is plain. Altria could not do a deal with JLI and remain a competitor in e-cigarettes. Now, the one time Altria wavered on this issue, JLI responded forcefully. In the August 9th term sheet, Altria removed the divest, contribute, cease to operate term and edited the non-compete to allow it to compete in e-cigarettes if HSR clearance wasn't granted.

JLI was not pleased. In response, JLI sent Altria a list of "foundational concepts," including the unequivocal statement it was "not acceptable" for Altria to retain any right to compete in e-cigarettes.

JLI did not care whether Altria divested its e-vapor business to a third party, contributed it to JLI, or simply shut it down. Only one thing mattered. Altria could not be allowed to compete against Juul if Altria owned a stake in the company. Now, Altria's response made it plain it understood JLI's position. In written opening remarks at an August 18th meeting between the parties, Altria explained that its removal of this provision was "driven by antitrust" and not by any substantive disagreement. Paradoxically, the court found it significant that the cease to operate language didn't appear in the August 19th term sheet. But given that Altria told JLI that the language raised antitrust concerns, it's hardly surprising that that provision was removed, but its removal does not un-ring the bell. JLI had already communicated its demand that Altria exit, and if necessary, find a way to cease to operate, which is precisely what Altria did.

I'd now like to turn to the behavior of Altria's senior executives. Behavior which suggests JLI's demand influence their approach to Newmark in the summer and fall of 2018. Only four days before receiving the July 30th term sheet, Altria's CEO told investors that Newmark was growing and its newest products, Elite and Bold, were getting traction with consumers. On August 1st, Willard and Altria's CFO, Billy Gifford, met with JLI to discuss the initial term sheet. Just two days later in a meeting with Newmark president Brian Quigley, Gifford suggested pulling Elite from the market. Quigley testified that this is the first time Altria leadership suggested pulling Elite, which Altria had launched just in February. The court dismissed the timing of Gifford's suggestion, relying on trial testimony from Quigley that it made sense. But Quigley told a different story at his investigational hearing. In fact, he said just the opposite. Quigley testified, he "could not understand why" Altria would shut down Elite, adding, "he didn't know what was happening." Did Quigley believe that Elite was without flaws? No. Did Quigley believe that Elite would overtake Juul? Again, no. But Quigley testified in his IH that he "did not feel it made sense" to walk away from the pod business. To put it bluntly, Quigley's trial testimony is incredible. And this isn't the only example of Quigley's trial testimony contradicting his IH. Other examples are cited in our appeal brief. Quigley's trial testimony deserves little weight... Yes.

Comm. Bedoya:

Counsel, quick question. Could you give us a little more information about how to square some of the descriptions of the market in complaint counsel's briefs from the descriptions and respondent's briefs? The complaint counsel describes MarkTen cigalikes and the Elite pods as growing in sales and generating positive margins when Altria discontinued them. But it's a very different story in the respondent's briefs. The market share is collapsing. Are both of these things true because the market as a whole was growing and the sales just weren't keeping up or what's going on there? And then secondly, if I could add one other fact-related question to this, how do you explain the spinning up of the growth teams? How is that consistent with an agreement to exit the market?

Mr. Roger:

For your first question, Commissioner Bedoya, what's going on at the time is JLI is growing exponentially. It is growing much, much faster than everyone else. As a result, everyone's share is falling and everyone's metrics look like they're decreasing if you're looking at the percentage of the pie, given what's going on with JLI. It's simply exploding. At the time, Altria and its Newmark products, they were the number three player in the market. They had a 10% share and that may not sound like much, but given what JLI had, they were still number three. In addition, its MarkTen brand, at the time, was the second-fastest growing brand in the market. I think that's what's going on. If we look at what's happening on an absolute basis, things are growing and things are looking up, but if you're looking at it vis a vis Juul, then that's where, if you want to look at it as a decrease, and I think that's the point that respondent council is making. Now, in terms of...

Comm. Bedoya:

Sorry, hold on one second. What about the margins? Because you say it's not just... I'm quoting from what's public here. It says generating positive margins. How is that consistent with what's in the respondent's public brief?

Mr. Roger:

Sure it is not, we don't dispute that the business was not profitable. Okay. I think when we're dealing positive margins, that's not taking into account a lot of overhead that distributed across the business. Just to be clear, the business was not profitable, but an important point complaint council wants to make is that Altria knew this and one, it was making more money year over year and two, Altria before the negotiations with Juul, was satisfied with Newmark's performance. Its executives year after year received six figure bonuses for the performance of Newmark and achieving the goals that the company was setting. In fact, the individual that ran the business up until June 1st, 2018, got promoted to be the head of the tobacco business based on his performance. I can't get into the challenges that other companies faced, but I think the commission can look at complaint. Council's proposed findings in that regard.

Now, as to the growth teams, at that point in time, Altria had announced the growth teams and that was, I guess, their plan to potentially develop long term products in the future, but it had no connection with what was going on with their current existing products. There was no announcement that when they announced the growth teams, that they were going to pull its existing products from the market. That only came much later on December 7th, when a deal with Juul was imminent.

Now, I'd like to turn to the issue of pretext. Well, first actually, before I do, I just want to make a quick point about self-interest. This is an area of evidence that the court also ignored. Before the JLI negotiations intensified, Altria told investors repeatedly that e-cigarettes were critical to its future given the long term decline in combustible cigarettes. Now, Altria consistently told its investors one, its goal was to lead the e-vapor category, two, that leadership wouldn't be achieved overnight and three, that it was well positioned to achieve this goal. Now, why did Altria believe it was well, excuse me, positioned to reach this goal? Before its deal with JLI, Altria told investors it had a diverse product portfolio, a pipeline of promising products and world class marketing sales, distribution, and regulatory capabilities. I'll add there's an obligation of truthfulness when making statements to investors. It is illogical that Altria would exit this critical market and sit on the sidelines, absent the transaction. Although other major tobacco companies face similar challenges in the e-vapor business, only Altria exited.

Now, turning to pretext. As we all know, Altria claims that it exited for independent reasons, but Altria's varied in shifting justifications are pretextual. Let's touch on each of Altria's purported justifications. First, Altria claims it removed Elite from the market to, "Satisfy the FDA," over youth vaping concerns. The initial decision credited this explanation. It didn't acknowledge that at the very same time, Altria was privately negotiating a substantial investment in JLI. The FDA, however, recognized this obvious tension writing to Altria that its transaction with JLI contradicted the commitments ultra made to the FDA. The initial decision ignored this letter altogether. Importantly, the court also ignored Altria's own documents, which make plain that its removal of Elite was tied directly to the likelihood of a deal with JLI. The relevant documents are confidential, but I'll direct the commission to paragraphs 1244 to 47 of complaint counsel's proposed findings and the exhibits cited they're in, particularly PX4203.

The evidence shows that Altria did not commit to removing Elite until after JLI confirmed that the deal was on track. Second, Altria claims its e-cigarettes were commercial failure. this simply isn't true. As we discussed in 2018, MarkTen was the third bestselling e-cigarette brand and the second fastest growing brand behind Juul. Now, it's true, Altria's e-cigarettes weren't selling nearly as well as Juul, but Newmark

executives believed its products had a "Role to play," and should remain on the market. Finally, Altria asserts the FDA would not have approved its products. The reason, they're purported inability to convert smokers, but this claim is based solely on MarkTen's market performance versus Juul. An Altria deck presented a month before it pulled Elite put it bluntly. "We can't haven't measured conversion potential of any of our products to effectively know what is working, what isn't and why," yet the court adopted Altria's claim that Elite could not convert smokers or obtain FDA approval due to its lack of nicotine salts.

In doing so, the court ignored conversion is only one factor in the FDA's analysis. Initiation risk is another. FDA guidance indicates that nicotine salts may increase initiation risk, particularly in adolescents. This is the fact the initial decision ignored altogether. The upshot, e-cigarettes without nicotine salts posed less initiation risk, which is an advantage in obtaining FDA approval. Moreover, Altria knew that Elite did not have a youth vaping issue. Tellingly, Altria's competitors, ITG, JTI sought PMTA approval for products that did not contain nicotine salts. As noted in complaint counsel's pending motions for official notice, the FDA has recently approved two such products, logic power and logic pro, making it clear that nicotine salts are not a prerequisite for FDA approval.

The court also accepted Altria's claim that MarkTen cigalikes could not convert smokers or obtain FDA approval because of their form factor. Yet, Altria's competitors, Reynolds, ITG, NJOY, JTI, they all sought PMTA approval for their cigalike products. Again, as noted in complaint council's pending motions, the FDA has approved five different cigalikes to date from three of Altria's former competitors.

Now, to be crystal clear complaint, council is not suggesting that because the FDA approved some cigalikes or certain e-cigarettes without nicotine salts, that Altria's products would have been approved. That's not something complaint council needs to prove. Our point rather is a simple one. Other competitors, even those with shares lower than Altria, did not withdraw their cigalikes or their cigarettes without nicotine salts from the market. Other competitors, those that weren't in talks to buy a significant stake in JLI, filed PMTA applications for their cigalikes and e-cigarettes without nicotine salts. This fact is not only telling, but suggests Altria's justification is mere pretext.

I'd like to turn now to competitive effects. This relates both to the section one claim and to the section seven claim, mostly focus on the section seven claim. Now, as I mentioned, even if the commission finds no agreement between respondents, the evidence is clear that the transaction itself violated section seven. If Altria's exit was related to the transaction, respondents are current competitors, Aetna and standard section seven analysis applies. Now, despite finding that complaint council had properly defined the relevant market and established that the market was highly concentrated, the initial decision held the transaction has not substantial less competition. This conclusion is contrary to law and inconsistent with the facts. As I mentioned at the outset, the initial decision adopted respondent's fatally flawed approach to competitive effects. As Dr. Rothman explained, a before and after comparison is inappropriate for the confounding factors that I mentioned in response to commissioner Phillips questions. The commission now has an opportunity to contract this legal error and engage in a proper section seven analysis. The transaction is so [inaudible 00:33:17]

Speaker 3:

Counsel, you're-

Mr. Roger:

Sure.

Speaker 3:

Is your-

Mr. Roger:

I'm sorry.

Speaker 3:

Position the same as what the ALJ articulated that the effects' analysis that would be done for the rule of reason claim under section seven is equivalent to this effects' analysis that is required under section seven, that these are the same analysis?

Mr. Roger:

I mean, I hesitate to say equivalent. I mean, the case law sets out standards. Certainly, the facts are the same and that you need, the commission would need to fit the evidence of effects into the relevant legal framework. For example, our position is that the transaction is presumptively competitive under section seven. There is no presumption in section one, for example, but in terms of the facts on the ground, in terms of the evidence, the evidence that we believe buttresses the presumption in the section seven context, all of that evidence on effects regarding price competition, innovation competition, the loss of the ability to introduce PMI's products through their R&D agreement, that's all relevant to both the effects' analysis under section seven and section one, but I certainly understand why the ALJ discussed effects in one place, given there is a lot of overlap between the two, if that makes sense.

Speaker 3:

I see. You're saying more or less, they shake out the same, but I guess as just matter of law, you think that the ALJ was correct to really only engage in the analysis one time and say, because it came out this way for section seven, that obviates the need to do the analysis under under section one?

Mr. Roger:

Complaint counsel doesn't take issue with that in particular. What we would say is in the section seven context, we believe we've established a presumption and the evidence of effects ... Lost you for a second. Buttresses that ... We're having technical issues here. Do you folks see me? Sorry.

Speaker 3:

We can hear and see you, for what it's worth.

Mr. Roger:

Sorry. I'll just keep going, even if I can't see you. Buttresses the presumption. In the section one rule of reason analysis, in the initial stage, complaint council, we bear the burden to show an anticompetitive effect and we don't have the benefit of a presumption in that case. The legal dance, if you will, is going to be a little different, but the facts are largely similar. In the limited time I'll have remaining, I want to emphasize ...

Commissioner Wilson:

I'm sorry, counsel. I'm sorry. Can I jump in for a moment?

Mr. Roger:

Of course.

Commissioner Wilson:

The initial decision identifies the losses that Altria was incurring year over year and then projected losses into the future. Those losses were incredibly significant in the aggregate. Is it reasonable to expect that this company would continue to incur mounting losses?

Mr. Roger:

Commissioner Wilson, what I'd say is this, is that this business was always losing money, but it was critical to all the major tobacco companies, including Altria, to have a significant business in e-cigarettes given the long-term decline in their traditional business. Altria was always crystal clear to its investors. It made statements about its prospects. Again, in response to one of the other questions I was asked by one of your fellow commissioners, even though they were losing money, they were giving bonuses to their executives and their tune changed only after negotiations with JLI began. With that, I'll reserve my remaining time for rebuttal.

Speaker 3:

Thank you, Mr. Roger. Ms. Wilkinson, when you're ready, you may begin.

Ms. Wilkinson:

Good morning chair con, commissioners and complaint counsel. In this matter, there was months of investigation and depositions by complaint counsel. There was a three week trial where judge chapel heard from a total of 20 live witnesses and considered many other depositions and IH testimony. There were 2,400 exhibits, extensive post-trial briefing and the court took great care to write 114 page opinion with an additional 145 pages of fact findings and credibility determinations. Despite that process, despite the value of this trial, complaint counsel comes to you and asks you to reverse and ignore all of those findings of facts and all of those credibility determinations. In the initial briefing and in the reply briefing, complaint counsel never addressed Commissioner Phillips question, which I believe is, what is the standard for you that you must consider when assessing credibility findings? Well, this commission and federal courts around the country have found that as the trier of fact, the ALJ has the opportunity to most closely scrutinize the witness' overall demeanor and their credibility.

Therefore, absent and a clear abuse of discretion, the commission will not disturb on appeal, the ALJs conclusions as to credibility. That's what the FTC said at Inray Horizon and you have similar findings in Schering-Plough. Never in the briefing, and I don't think this morning with all respect to my friend the complaint council, did he address and did the complaint counsel address how you could ignore or overrule those credibility findings? In this case, it's even more important because the credibility findings and the factual findings are inextricably intertwined because there is contemporaneous documentation that the court considered while also assessing the credibility of the witnesses. The story or the picture that complaint council is trying to paint for you, I like to compare to a puzzle. There's a 500 piece puzzle and they have taken 25 pieces, the same 25 pieces, by the way, that they used before the trial started. They're not introducing any new evidence or emphasizing any new evidence in front of you today. Those 25 pieces and said, "This is what the picture looks like."

We added the 475 pieces so that the court could see the entire picture and when you look at the entire picture, you consider all of the contemporaneous documentation that was written in Altria's files and also in JLI's files. The story that complaint counsel wants you to believe and the story they want to

rewrite makes no sense. I'd like to show you some of those pieces of evidence that they completely ignore, and also that the court below accounted for all of those. There's nothing that complaint counsel raised with you this morning that the court did not deal with.

Let's look at slide number three, if we could. The ALJ addressed this specifically and said that the chronology complaint council lays out fails to take into account important context for Altria's actions and instead merely juxtaposes negotiation events and business events, and then urges linkages that are not supported by evidence. In this regard, complaint counsel chronology appears to be impermissibly first, assuming a conspiracy, and then explaining the evidence accordingly and that's absolutely what they did with these 25 pieces of evidence that they used, I'm assuming, when they went to the commission to ask to have the complaint issued and they are the same 25 facts that they emphasized, regardless of all the other facts that came to light. For example-

Commissioner Phillips:
Counsel.

Ms. Wilkinson:
Yes.

Commissioner Phillips:

I understand your response on how we look at the credibility determinations made by someone else. What about the different explanations coming from the company at different times, investigation, trial, and so forth, about what, sorry, the company here being Altria, why it's doing what it's doing?

Ms. Wilkinson:

I don't think there were differing explanations. About why the products were being withdrawn, is that the question, Commissioner Phillips?

Commissioner Phillips:
Yes.

Ms. Wilkinson:

There has been complete consistency from the submissions in the white papers to the commission to the evidence at trial about why the products were withdrawn. Let's start with the first point, which is, there were two different withdrawals of products. Complaint counsel kind of ignores that. There was a withdrawal of only some products on October 25th, which was the result of a letter from the FDA commissioner on September 12th. That is not anywhere on the timeline that complaint counsel gives to you. As you know, Altria, their entire business is subject to oversight by the FDA regulators and Commissioner Gottlieb that entire year, not just in September, had been on top of this issue of youth vaping and he was very concerned about it.

When he wrote on September 12th, he said, all of the major companies, you will come in and discuss what you are going to do to assist with this. At that same time, Altria had completed 100 day assessment of its products, of Newmark. In fact, Mr. Quigley, who complaint counsel cites, was put in charge in may of Newmark to assess everything, to assess all of their products. By the end of that assessment, he said they did not have, and so did the other technical folks and the scientific folks not involved with the deal, they said they did not have products that were converting smokers. They did not

have products that were succeeding in the market and they would not be able to obtain PMTA approval. That came from people disconnected from the deal.

In October or in September, excuse me, when the FDA letter was written, the management team got together and they showed, they decided at that time, on September 27th, that they were going to tell the FDA commissioner that they wanted to withdraw their pod product, the Elite product, and only a portion of the cigalike products, only the non-traditional flavored products, not the tobacco flavored, but the flavors that some were saying could attract youth. I want to show you, I have a slide that shows you that exact document. Give me a moment, please.

Slide 21. This was introduced at trial and this is a slide from Mr. Quigley's own presentation to the senior management team. This is at a time when they're not negotiating with JLI. They are deciding what to do as a business and as I think Commissioner Bedoya raised, the growth teams were also being planned at the same time. They thought, they're not going to get the deal with JLI. Our products are not working. What are we going to do? We have to respond to the FDA here. Here, as you can see, they say, they're going to remove Elite and apex, that was another e-vapor product, from the marketplace and support removal of pod based systems with flavors. This was decided by management at that time and then a few days later on October 5th, they issue an internal memo about the growth teams and announced people are going to be moved, displaced. It's going to affect the Newmark business. In other words, it's going to shrink that business. All of this was decided, and it's all contemporaneous writings, before they decide to reengage with JLI.

This response is the same response that has been explained since the commission started to investigate this transaction, in our pretrial filings and throughout trial. That's the first pull of the products. The second, which was the actual shutdown of the Newmark business, happened on December 7th to 9th, and that was when the only remaining products were something called Verve, which is a disc, the chewable disc, which was not subject to the non-compete, but they shut that down anyway and they shut down the remaining cigalike, the tobacco flavored cigalikes, and that was done for two purposes and we've acknowledged the entire time. One was either to fund the growth teams because they were very expensive and since our products weren't succeeding, they wanted to take that money and put it into the growth team so they could start the long term development or to fund the JLI transaction if that were to actually be consummated.

There were two different independent business reasons at two different times for two different types of products. That, as far as I understand, and maybe complaint counsel will explain where that has been inconsistent, that's what every executive testified to. That's what all the documents that were written at the time show and indicate and there's no other explanation that the company has brought forward on why they pulled those products. The products were not successful, so it certainly made pulling the Elite product not a difficult decision. It was never got more than 1% of the market before it was pulled, officially pulled October 25th, but there's never been an alternative explanation.

Comm. Bedoya:

Counsel. I have a chronology question for you, if I may. I try to take notes on the different back and forth of it. On July 30th, JLI adds this cease to operate language, transmits it Altria. August 4th, JLI ads shut down to the non-compete. August 6th, the draft talking points for Altria described potentially exiting our own vapor business. October 15th, Altria adds to the term sheet language about otherwise exiting. You've got two times each company sending signals to the other, yet on October 25th, when Altria pulls the pods and flavored cigalikes, JLI describes this as not welcome, premature, hostile, generally says they're surprised. Then, when, on December 7th, when Altria pulls all cigalikes, JLI is again, surprised that any of this has happened so I understand

Comm. Bedoya:

And how someone might say that doesn't add up and how that points to an unwritten agreement. So you've got three things in writing and then you've got draft talking points and I understand we don't know whether or not those are actually used, but I'm counting three, maybe even four instances where the companies are communicating about shutting down that line. And then two moments of surprise, and maybe the first one you might potentially believe, but getting surprised twice in less than a month with a business partner you're about to cut a massive deal with strikes me as a little hard to process. So how am I wrong here?

Ms. Wilkinson:

Well, first of all, I think you're wrong because of what complaint council has led you to believe. You said there were three or four writings. There were hundreds of writings, Commissioner Bedoya. You were only shown these 25 puzzle pieces for the reason that you just pointed out, which is if that's all, that's what it looks like. There were term sheets that went back and forth. They totally ignored the subsequent term sheet. That first one, by the way, that was the July 30th says it's in the antitrust clearance section of the document. And it says-

Comm. Bedoya:

Sure, but cease to operate is not really a pro-competitive remedy. And so I don't really understand... That to me stands out that it is in the antitrust section because I don't see a scenario. Well, sorry, go ahead.

Ms. Wilkinson:

Yeah. No, I understand why you're saying that. If you read the document and is written, it makes sense, which is once we're in the HSR review period, they wanted to make sure that Altria would do what it was supposed to, and it was agreed to in advance. So the first step was in the review. If they tell you to divest, you're going to divest and agree to divest. If the commission doesn't raise any issue or allows you to contribute, then you will contribute. If the commission doesn't raise any issues, then you are to stop the business or stop. That is only after it's been through the HSR review, that they are not pick your favorite step or an alternative as complaint council. They are sequenced for a reason because they are saying, "This is what you will agree to if required during HSR."

Comm. Bedoya:

So council, let me just be blunt, so you're saying it's a coincidence that 13 days before the parties consummated this, that Altria pulled traditional Cig-a-likes, just a complete coincidence.

Ms. Wilkinson:

No, it's not. That's what I said. It was for two business reasons, but you're ignoring the first pull. Why, if that was the agreement to pull, why would they pull the products October 25th for the pods and why JLI was surprised? They were mad because it was Altria's way of saying pods could be problematic and all JLI makes is pods, so that's why they were shocked. There was no communication between the two. They never expected Altria to pull pods. And in fact, the pressure from the regulator was so great that JLI pulled its own pods on November 13th. Again, complaint council doesn't show you that on the timeline because the regulator was so upset about what was going on. JLI went in and said they were going to pull all their fruit flavored products from retail. So when complaint council says, "Nobody got out of the business." That's totally wrong.

At the time that that Altria did, they followed with a similar action. Now, why would they do that if the only point of pulling the products, our products, Altria's products was to consummate the deal? It makes no sense. JLI was making money off those products, was leading the market. As you heard complaint council said, by an enormous percentage, they were the market. And what happened? They pulled those products because the regulator was pressuring. Again, I don't mean that to sound like it was wrong, but they were pressure pressuring the companies to take substantial steps. So when you go back and talk about this first pull, that is totally different than the one that you're referring to when they remove the rest of the Cig-a-like products, excuse me, and Verve. You're not mentioning Verve, which they shut down, even though that wasn't a competitor product, but that was, and there was no dispute for one of two reasons: either to fund the JLI deal or to fund the growth teams.

So it's not like it was totally disconnected. No one ever said that. It was because we were going to have an investment in a different way of staying in the e-vapor market. It was either to partner with JLI or to fund our growth team so they can continue that long term process of developing the new products, which as you know, would then still need to be approved through the PMTA process. But when you go back to those other documents, I want to show you about the term sheets, all the things you didn't see, I'm going to show you slide 19, which occurs just a few days after when complaint council contends there was an agreement that somehow there would be closing down of the business. There were term sheets going back and forth through that August 19th period, and then the lawyers wrote up, what are any of the disagreements?

And they said there were no disagreements on these provision, and you see, they're highlighted that Jack, which is JLI, wants to make sure Altria confirms that except as to MarkTen and MarkTen Elite. So there was always a carve out, always in every one of these documents, there was a carve out that MarkTen and MarkTen Elite could continue to operate. And then the non-compete commences on signing. So when you say there was not a mention, and isn't this convenient, every single document written from day one has a carve out saying, even though you're going to have a non-compete MarkTen and MarkTen Elite, in other words, Cig-a-likes and pods can stay on the market. They're expressly exempted. And again, complaint council ignores that fact. That's true if you looked at the other iterations of the documents and even into the deal terms that are drafted in late October.

Speaker 4:

Council, can you explain to us why, if these products are understood internally to be so speculative, to be such business failures, Altria is negotiating to make sure that it can continue to market them.

Ms. Wilkinson:

Well, I think at that this... Remember it's an iterative process as I say, you're starting July 30th when, while the rank and file had done the review and realized there were all these problems with the products on kind of every level, Mr. Willard hadn't come to that conclusion, the CEO. So in fact, when Mr. Quigley gave him a big briefing on August 3rd and complaint council makes a big deal that the now CEO, Billy Gifford asked, "Why shouldn't we shut down this business?" First of all, he asked because they were losing hundreds of millions of dollars as commissioner Wilson alluded to. But Mr. Willard didn't agree with Mr. Gifford. They didn't stop the business. They continued it because they wanted to give. They were hoping that Elite would be successful. They would do much better if they owned the product that was successful than buying in and only owning 35% of the successful product.

So they were trying to keep that product on the market to see if it would succeed. It continued not to succeed. And it also, everyone, once they showed it to the board, realized all of the problems. So if you look at what they told the board, which it lists all the problems, it included some problems that it wasn't

wasn't converting smokers, but also that it had real technical issues like formaldehyde issues. So on slide 10, this is the one per cite, which I pulled for you only because it shows it wasn't just the pods that were problematic. This was a slide that was drafted initially by the regulatory folks at Altria and the scientists, and this is how they describe their concerns with the Cig-a-like product. They could manufacture it, but it wasn't having any meaningful risk reduction. In other words, it wasn't converting enough people that they thought it was meaningful and you can see that it wasn't well, excuse me, I messed up. Adult smoker conversion, they said wasn't meaningful. Meaningful risk reduction, go over to the left high exposure to formaldehyde a known carcinogen. Now, these, at that point were not harming consumers, but they were at higher levels than other products and one of the standards the FDA has for approving these products is that you have to have a risk reduction lower than other products.

Speaker 5:

Can I just interrupt with two questions? First, I want to go back you were making about the carve outs in the agreements. Were those intended to allow for future sales or were those about allowing for the clearing out of existing inventory that existed?

Ms. Wilkinson:

They were for future sales when they were drafting. As I said, this was an iterative process. They were allowed to stay on the market through the HSR review period. That was the point, but they weren't going to stay on forever. But if-

Speaker 5:

That's future sales of newly produced product, not existing inventory?

Ms. Wilkinson:

Yes.

Speaker 5:

Okay. And then the other question I have at the beginning of your argument, you framed the decision before the commission, primarily as one of deferring to the credibility findings of the ALJ, but I think the questions my colleagues have been asking are very good factual questions about evidence in the record, not about credibility determinations by the ALJ, so I'm wondering what your position is on the standard of review for the commission as to how we weigh evidence and how we analyze legal questions with respect to the ALJ decision.

Ms. Wilkinson:

Yes, I'll start again. The legal questions are reviewed de Novo. That's clear. On factual findings, there is some deference to the ALJ. What I was trying to say, and obviously inartfully was that it's not that the factual findings aren't very important. They are, but that the credibility findings are wrapped into that because all of these senior executives were asked about these documents and asked about their intent and everyone agreed. Every executive agreed that they did not. There was no agreement, but scientists came forward. Scientists from Altria that we presented... The commission complaint council didn't call them that said, including the slide I'm showing you, that these products had fundamental problems that they had identified and that they couldn't fix. This formaldehyde problem was a problem in November, the end of November, beginning of December, when they were deciding to shut down the rest of the

cite business. They could not figure out how to fix this formaldehyde problem because they had a dry puff problem.

And so, I can't imagine a company's going to make up a problem and write it down contemporaneously in documents saying they have a formaldehyde problem if they don't. So when you ask me about factual findings, that is a factual finding that the judge addressed, that there is contemporaneous evidence at the time by scientists who had nothing to do with the deal saying that these products were highly problematic and would not get approval for our PMTA. So yes, the standard is a little different for factual findings. I agree with that. But then if you're going to do that, you need to look at all the facts and not these 25 little points on a timeline that complaint council is trying to tell you tells the entire story. It does not. And that's why the ALJ went through all of the documents, all of the term sheets, all of those notes that they say, whether they were draft or not in the board meetings, why he went through the timeline that in September. There weren't negotiations, despite what complaint council said, the bottom of their slide, number six, they are talking about the September time period.

And they say at the bottom, "Altria and JLI negotiations..." That is untrue. That is untrue. There were no substantive negotiations in September. And in fact, you can tell, because when they put notes down there, the two facts, they don't say anything about negotiations. They said, September 10th, Altria board pres presentation. And they don't have any new fact until October 5th. When they say Altria's sends JLI the letter reconfirming their commitment, which was a letter trying to reopen negotiations, so there were no negotiations in that September time period when all these key decisions were made after the investigation of the products. The decision to stop the PMTA on Elite, that was made in September when there were no negotiations. The planning for the growth teams, all documented in September. The decision to pull the Elite pod product, and some of the Cig-a-likes made in December. And then of course discussed with the board and the FDA in October but the decision is documented and complaint. Council wants you to ignore all of those facts, and then the assessment that the court made of what those facts mean and the context of it. And you can't just take these few facts out of context and say, "That's what they show." And they just don't.

Speaker 5:

I think it's a good point that we have to look at the entirety of the record, and I'm glad that we have the entirety of the record available to us. I think everyone is entitled to point to the evidence that they think is the strongest in support of their particular cases, and I'd encourage you to extent that you think there is additional evidence as you have been doing to point to that, rather than saying that it generally exists. The question that I was asking really is about the framing of how we weigh that evidence, various pieces of evidence, some of which may be in tension with each other as a credibility framed question, rather than one of whether evidence meets a legal standard or how it is weighed within a legal standard. I think that's where there's a little bit of tension in your argument.

Ms. Wilkinson:

Well, first, you are not the trial court, so I would encourage you to not only weigh the evidence as you're talking about, but look at how the court did weigh the evidence because you're reviewing his factual findings. You're not totally starting de Novo and picking the facts and where you think. At least see where he reconciled, what you perceive as the tension in those facts. And I would tell you for the July 30th term sheet, it's not just the term sheet. Witnesses testified about that. Mr. Gifford did. Mr. Willard did. JLI executives did and hit their credibility was found on that type of testimony. So that is how it's intertwined, not just look at the term sheet and decide what we, the lawyers, think it means. The

witnesses were asked very specifically about what these facts documents mean, and the judge credited what those witnesses said.

So that's why I say the credibility findings are wrapped up in the factual findings because it wasn't just documents put down in front of the court. And let me just show you a few of the other documents that I think will give you good context. Let's look at slide number four, if we could. One of the key problems with the Altria products or the Nu Mark products is the name of the business is that they didn't have nicotine salts. Why does that matter? One is that they've realized that gives that smoker satisfaction feeling. Why does that matter? You want smokers to stop smoking and to use e-vapor because it reduces the exposure to harmful constituents by 98%. That's why these things are even allowed on the market because they want existing smokers to stop, feel like they're getting that experience, and then only be exposed to nicotine.

Altria didn't realize that that was the secret JLI did. That's why Juul product was so successful. And so this document, and May 29th is when they finally figure out this is by the scientist, Mr. [inaudible 01:04:23] Coble he wrote this memo, he's a scientist. And he said, "This is our problem in any new product, which would take years and years to develop. Regardless of the nicotine content, we need to have the salts." So it's that late into the process, after they've already launched Elite, the pods that they realize their fundamental technology is not going to work and is not going to make it successful. And it's why it doesn't succeed in the market. If you look at slide number five, Ms. Page Magness, who complaint council deposed. And she says here in July 6th, again, before they ever received the first term sheet from JLI that the key considerations, when they're talking about what their products are, conversion, satisfaction and ability to get through FDA, none of our products are anywhere near ready.

Juul is delivering on conversion and satisfaction. So again, this is what someone's saying who has nothing to do with the transaction, and she's writing it at the time. In most courtrooms contemporaneous evidence carries great weight. I understand that you have to assess witness statements post complaint differently. And I think that's totally fair. I don't disagree with complaint council. I disagree with where he comes out on it, but I don't disagree that you have to consider people's motives, but this is very powerful because it was written at the time. And it was their assessment. The same with slide number six, which is talking about Mr. Quigley's evaluation of Nu Mark. And he says that, "Nu Mark lacks quality pod products that are proven to deliver broadly against desires." Meaning smokers, "Desires for a satisfying, enjoyable nicotine process." And I do want to address Mr. Quigley because complaint counsel said that he was testifying one way in his IH in a different way at trial.

And that's just not true. So let's take a look at slide number 32. Complaint council quotes you one part of the IH to say that he didn't quite understand why the product was being pulled. And then here in the same IH, Mr. Quigley says there were a lot of wart on elite 1.0, that's the product that's on the market outside of the leaking. "And we did not believe that elite would get FDA approval through the PMTA pathway." So he understood that that product was not going to be successful. And he also said on slide 33, that he thought he was the right decision to pull it off the market, so I don't understand how complaint council says he did not say these things when he was initially deposed during his IH. He's asked at that point, "I understand given the circumstances that it should have been pulled." And he refers to the FDA. "It appeared as though the FDA something needed to be done to fix youth usage." So he himself in the IH tells them the very first time that that's the reason that those products were being pulled and why he agrees with it. In terms of how did I-

Comm. Bedoya:

Council, just a quick question, pure fact question here. I had thought that the first time... Do you agree this was the right decision to pull MarkTen lead off the market at that point in time, given the

circumstances. Yes, but I believe the [inaudible 01:07:56] that complaint counsel was referring to, had to do with his reaction on August 3rd or thereabouts, but the FDA letter about the vaping came much later than that. Did it not?

Ms. Wilkinson:

Yes, your honor. And that's the point? I'm sorry if I didn't make that clear or sorry, Commissioner Bedoya, I'm used to saying your honor.

Comm. Bedoya:

It's fine. Don't worry.

Ms. Wilkinson:

I'm sure both fit. You're correct. The August 3rd comment that complaint counsel is referring to is literally just the question by Mr. Gifford during the briefing that he couldn't understand why Mr. Gifford would even ask the question, but it's irrelevant because Mr. Willard, the CEO said, "No, go ahead and keep going with Elite." So it doesn't matter that Mr. Gifford asked the question. Mr. Willard was the lead negotiator with JLI at the time. If he thought, oh, this is a good time to pull the product and stop it on August 3rd, he could have said it. And he didn't. He said the opposite despite the question from Mr. Gifford. Does that make sense? There's just a meeting and he's giving the briefing and Mr. Gifford says, at the end, "These things aren't making any money. Why don't we just stop and pull them from the market?" And Mr. Gifford said, "I understand, but we're going to keep going. Let's see how they do." And he gave Mr. Quigley the permission to go. The decision to pull them didn't happen, you're right, until after the FDA letter. And this is saying at that point, did you understand why they were being pulled? And he said, "Yes. I thought it was the right decision." So why does it matter?

Comm. Bedoya:

Yeah. I guess I thought the probative piece of the IH for Mr. Quigley was that he was surprised on August 3rd to hear this given the timing of the negotiations. And so might he eventually agree given he's employed by Altria that this is the right decision? Seems like there's reasons why he might, but what is probative to me at least is the surprise given that he is CEO of MarkTen would be most familiar with how the product was doing it or am I misinterpreting something? Is there something I'm missing here?

Ms. Wilkinson:

I'm not sure, but I think so. I think what you're missing is he's saying during the briefing, he's surprised by the question, but that's not about the negotiations. He's not saying it has anything to do with the JLI negotiations. He's saying, "I don't know why they're saying, pull the product." He's not saying, "I think the product is doing a good job." He thought they should keep the product on the market so they had something in the market even though it was unsuccessful. He was not a fan of Elite. He identified in that chart I showed you from his briefing where he identified that same day, the problems that they had no good pods. So he wasn't saying Elite was good. He was going to say, "Just keep it in there because we don't have anything else. We have no other product that is competing." And if you look at what happened to market share, even from that time period, it went down and why did it go down?

Let's look at slide 11. Initially Altria put all of its resources into distributing Elite. Why? They wanted to have a successful pod. So they put all the marketing money, marketing power they had, their distribution chain, everything. So you can see if you look at the red line, go down to the beginning of 18. It's still, despite that... This is all MarkTen, by the way. We're including Cig-a-like. It keeps going down

and down. It's only 4.7% of the market counting the Cig-a-likes, which we're 90% of any success Altria had, so it was less than 1%. And it went down in August and September after those initial pushes for distribution and discounting and all those things that any company would do. Right when you launch a product, you want customers to try it.

Speaker 6:

Council, I understand you're saying as a general matter that these were two distinct lines of decision making,

Chair Khan:

... into independent processes. It does seem like there are various areas where these do seem to intersect. So even with Mr. Willard, you noted, he was kind of lead negotiator with JUUL. And in some of the talking points that were prepared for him, he noted, Altria has come a long way to accommodate JUUL, including by demonstrating flexibility with our existing vapor business. And if necessary, if we establish this partnership, then we expect that Altria will potentially exit our own vapor business. I mean, why shouldn't we understand this as, really two rivals discussing one exiting the market? I mean, it seems like decisions about exiting the market were not purely being made based on this FDA process.

Ms. Wilkinson:

Well, I think you mean your FTC process because that's where the HSR review was going to happen. But he was saying... First of all, those were notes, and the record shows that nobody says that's actually what was discussed with JLI at the meeting. But even if you were to presume it was, he was saying, we're being flexible that we might eventually exit. Meaning after the HSR review, if the FTC tells us that we have to divest or we have to contribute, we will do so. And if they don't care, then we will close the business. That's what that first sheet said.

So even if you interpret that as what they intended, and that these notes somehow say, that's what they're going to do, even though you would be ignoring all the subsequent negotiations, all the subsequent writings of what the term sheets actually said, no one disputes that Altria was going to get out of the business eventually, because they were going to get access to all of JLI's trade secrets. And JLI didn't want us to be able to use Altria to use those trade secrets to develop its own competing product. So there's no dispute, that's not an unlawful agreement. That is an agreement... You are right, but it's not unlawful to say, "We'll go through the HSR process, and if no one has a problem with it, we'll close down that business." Even if that's what they intended, that is not an unlawful agreement.

Chair Khan:

But if that was going to be necessary and kind of inevitable, as you're suggesting, why would it be such a concession, they would frame it that way, in terms of a point of flexibility?

Ms. Wilkinson:

Because they want to keep developing new products. If you go back to the August 9th term sheet that Altria sent, they actually tried to expand the carve out from just the existing business and developing products. So they were trying to get as much as they could, they wanted to keep doing those products and developing new products while they were investing. And JLI said, "No, we've talked over and over again that we don't want you to develop new products because you'll have access to our trade secrets." That's what this was about. Nobody ever thought that on JLI's side, and sadly on the Altria side, that these products were actually competitive.

I mean, you'd have to assume that they somehow feared the current products, if they did, why were they in the carve out? And why the contemporaneous documents from JLI, that were introduced at trial, say that they thought these products were totally unsuccessful? I'm out of time. I would love to show you that other JLI document, but I want to give my colleague from JLI the last few minutes of my time if that's okay with you, Chair Khan.

Chair Khan:

Okay.

Ms. Wilkinson:

Can we just take a minute for him to switch seats so he'll be right here? Thank you. I'll just turn off the video for a moment.

Mr. Gelfin:

Thank you very much. Can you see me okay, and hear me? All right, good afternoon, Chair Khan and honorable commissioners. I just have a few minutes here. I think this conversation-

Comm. Slaughter:

Counselor... Oh, there you are. Okay, I was going to say, we could hear you, but not see you, but now you have appeared.

Mr. Gelfin:

Okay, great. Thank you. I just wanted to point out that this conversation demonstrates the challenge of trying to condense a three week trial down into a very quick conversation. There was an enormous amount of evidence. My client had four witnesses in the record of this case, two testified live, two by deposition who had been involved in these negotiations. They were very consistent, both with each other and with the documents. Every conversation we had, and everything we asked for about this non-compete and about this divestiture, et cetera, were going to be presented to the FTC. That's what this was all about. The term sheet on July 30th, and incidentally complaint counsel says, "Well, there was another one on August 4th," I know you pointed to that Commissioner Bedoya. That was conforming changes. And it really wasn't a different term sheet, it's not like there had been a round of negotiations.

So I think you just have to consider those together, the carve out from the non-compete worked along with what could be the divestiture, or at that time, somebody said cease to operate. I appreciate how provocative that term is. It fell out very quickly, it never returned to the term sheets. But in any event, what my client explained through this three week trial, and there is just nothing contrary to this, is that everything that was going to happen here was going to be presented to you all, to the investigating staff, and ultimately to the commission. It's not that cease to operate was going to be a remedy, it would be a way of implementing a non-compete if there were no other problems with that. My client couldn't-

Comm. Bedoya:

Counsel?

Mr. Gelfin:

Yeah, please.

Comm. Bedoya:

Forgive me for interrupting so early, but we have a little time. The July 30th term sheet didn't just say cease to operate, it said divest, which certainly makes sense. But contribute as well, and like cease to operate, that's not really a remedy that would keep competition alive elsewhere in the marketplace. So wondering if you can explain that? But really my question to you is the same I put to your co-counsel. So you're saying that, even though JLI used the term cease to operate, even though the modification used the term shut down on August 4th, JLI, even though the draft talking points from Altria, "Potentially exit our own vapor business," even though on October 15th, Altria discusses otherwise exiting and puts that in writing in the term sheet, on October 5th JLI was surprised. Right? So they were completely surprised, premature hostile, not welcome.

But then what I'm having a lot of trouble believing is that, after that, after pulling flavor, and pulling flavored traditional Cigalikes and the pods, less than two months later, your client is again, completely surprised that the party opposite them the negotiating table pulls the traditional Cigalikes. So that is what you're saying, is that you never discussed this. And even though you're about to cut this massive business deal with the other party, you are surprised not once, but twice. So is this what you're saying?

Mr. Gelfin:

Well, this is why we had a three week trial, Commissioner. The second time wasn't so much surprise, as not even noticing it honestly. Those were Cigalike products and our executives testified, they barely even noticed that. But yes, they didn't have advanced notice of this. The evidence is clear. Every single piece of testimony in the record of this case is clear that we were carving those things out of the non-compete so that they could be retained by Altria. It's not that we were shocked and freaking out in December, we didn't know it was coming, it's fine. We had allowed Altria to continue to conduct their business, new sales, as well as inventory sales, as Commissioner Slaughter asked.

Now I want to just make one other point, I think I probably have 10 seconds. This idea that the ALJ here just did some kind of before and after even thinking about but-for, is completely wrong. That judge was very careful about but-for. The problem here is the complaint counsel and their economist didn't even look at the after. And of course it's relevant to a competition analysis that a market has become more competitive, or as this was originally framed, JLI was this dominant player. Their share has been dropping like a rock ever since this transaction was entered into, and for the complaint counsel and their economists to say, it's so irrelevant to a competition analysis, and present to this body a record that has zero evidence, or zero acknowledgement, even, by complaint counsel of anything that's happened in the market post-transaction, and insisting that the burden's on us to show that everything would've been different if the transaction hadn't been... That's not the standard, commissioners and Chair Khan. That is highly relevant to whether there's any competitive effect. This market has tons of products. My client's seeing it every day, their share keeps going down. It's not in the record, what's their latest market share.

Commissioner Phillips:

Counselor?

Mr. Gelfin:

Please.

Commissioner Phillips:

I want to move to a topic that is in your briefing, and that hasn't yet come up thus far in oral argument. And that is your constitutional quivel with the removal protections that we, as commissioners, enjoy. My

question to you is... And if it's Ms. Wilkinson who should speak to it, then she can come on, I hope that's okay with my colleagues. The Supreme Court has walked up to the Humphrey's Executor precedent in SAYLA law, they have walked up to the Humphrey's Executor precedent in Collins versus Yellen, and each time they have not gone to overturn that precedent. That is the precedent that concerns us, the FTC. Why should we as commissioners go where they have not gone?

Mr. Gelfin:

And you foresaw that I would defer to Ms. Wilkinson on that. So with that, I just want to thank the commission for their attention on this. And I'm sorry I had to sort of speed talk my way through it, this is a very challenging format for this particular conversation. I'm going to take you off video for a second.

Ms. Wilkinson:

Commissioner Phillips, I'll answer your question. One, we think they will do so, and that we are alleging the proper standard. We know you're not going to agree, we're putting it in the record so that we protect that issue because I mean to be frank with you, I don't want to argue with you, I understand that. But that is there because we think there are constitutional issues with the current process, and we want to be able to argue that on appeal if we have to do so.

Commissioner Phillips:

Thank you, Counselor. And my apologies to my colleagues.

Madam Secretary:

And that is time.

Chair Khan:

Thank you. So now we will go back to Mr. Rogers for any rebuttal presentation. Mr. Rogers, I'm told that you had earlier continued for 31 more seconds after, so your time is being adjusted accordingly.

Mr. Roger:

Understood, Chair Khan. At the outset, complaint counsel wants to say that we completely agree with respondents, that the commission should look at the entire record in this case, we don't walk away from that. Altria's counsel suggests that our case is built on 25 puzzle pieces, that's simply not true. As Mr. Gelfin indicated, we don't have a lot of time here, and so we only highlight a few pieces of the evidence, but we agree. We encourage the commission to look at the entirety of the record, look at the IH testimony, particularly of Mr. Quigley. And so there's no disagreement there. A number of issues I want to touch on, first regarding consistent explanation. I'd have to respectfully disagree with Altria's counsel, that they've been consistent. During the investigation and during the IHs, the testimony from all the executives was about leaking.

Elite leaked, that's why they needed to pull it. There was a fix that was created, but they never implemented the fix because Elite was so terrible, that turned out to be simply false. Altria's counsel had to send a letter to complaint counsel indicating that the testimony of several of its executives was simply not true. What is the truth? Altria implemented the fix for Elite and sold it into commerce. In addition, we've heard a lot about nicotine salts, we certainly heard about a lot about nicotine salts at the trial. You'll see, in the ALJ's findings and in the briefing, references to a eureka moment about nicotine salts.

You will not find any such reference in any of the testimony in the IHs from all of the Altria executives, that frankly was made for litigation.

Now, the point I want to make, and this is an important one, we are not saying that certain scientists within Altria had concern about the lack of nicotine salts in conversion, because we don't necessarily disagree that nicotine salts contribute to conversion. And I'm going to get the formaldehyde in a second. We don't contend that these products are perfect, far from it. But what respondent's counsel wants the commission to do is take a leap from, there are problems with these products, to them just throwing their hands up and we're going to get out of the business. And that's the gap that's problematic. That particular gap is simply what's not there.

Now turning to the point regarding the surprise that's been addressed on a couple of occasions, was JLI surprised by the October 25th letter? You bet they were. On October 25th, the letter that went to the FDA, and then they announced it publicly, said the following, quote, "based on the publicly available information from FDA and others, we believe that pod-based products significantly contribute to the rise in youth use of e-vapor products." And then Altria added the following, "Although we don't believe we have a current issue with youth access to our pod-based products, we don't want to risk contributing to the issue." And so it's hardly a shock, frankly, that Altria, the market leader that only sells pod products, reacted the way that it did. And so what happened was, Altria, their executives, the deal negotiators, they call up the JLI negotiators within a couple hours and say, "Don't worry about the letter we just sent, we're still absolutely interested in the deal." And then they proceeded just as always.

Altria's counsel wants the commission to focus on the letter from the FDA in September. We agree it's important, it was a letter that was sent to all the major e-cigarette companies. And there's a lot in the record and in their argument about the FDA being its most important regulator, and we need to do exactly what the regulator says. But nowhere did Altria's counsel, or as I mentioned in my initial presentation, did the ALJ address the second FDA letter, when Altria was in-effect called into the principal's office and asked to explain that their transaction's consistent with the statements it made in that particular letter.

Next I want to talk about Mr. Quigley, regarding the slide 25 in respondent's presentation. And this is a good example, frankly, where we encourage the commission to look at the entirety of the record. And here you just actually need to look at the full answer that Mr. Quigley gives, because respondent slide omits the rest of Quigley's answer. He goes on to testify that Altria planned to submit a PMTA for Elite 1.0 to keep it on the market, for the hopes of getting Elite 2.0 approved. And see what this is talking about is the new market executives, and Quigley in particular, had what he called a bridge plan. And what that means is, under the FDA's regulatory regime, in order to keep a product on the market, you had to submit a PMTA by the deadline. And if you submitted by the deadline, then you could keep the product on the market until the FDA's decision.

So the idea was to submit applications for both the first and second generation device. The purpose of applying for a PMTA for the first was to keep the current product on the market, because it's grandfathered, and if you're a competitor, you don't want to have your products off the shelf. And the purpose of applying for the second PMTA was to secure FDA approval. So nowhere in that answer, in respondent slide, does Mr. Quigley suggest that they should not apply for a PMTA for the current version of the Elite product. As for slide 33, and Mr. Quigley testifying about pulling Elite, what Mr. Quigley didn't say is that pulling Elite made any sense, given that Altria invested in JLI, again, the face of the youth vaping epidemic, and a company that only sought pod products. Moreover, at that point in time, Quigley wasn't privy to JLI's demand that Altria exit the market, and he didn't participate in the JLI negotiations.

I want to talk a little bit about some of the slides that are in the August, I believe, 25th presentation, 2018, that are in the slides for oral argument for respondents. For one, and this is sort of, I guess, a more high level point, which is that, that particular presentation, Mr. Quigley testified that that presentation had only the, quote-unquote, "Bad news version of the story." That was his email to the Altria negotiators. And what were some of the examples? Well, one, if we want to just talk about formaldehyde, what that omits, for one, is that Altria had already developed a new battery, they called it the BVR 2.8, to solve this particular problem. Not only that, but its internal studies showed that the dry puff prevention that this new battery incorporated, successfully reduced formaldehyde.

Moreover, the FDA allows product changes that address quality or safety issues without requiring PMCA approval. Many e-cigarette manufacturers have made quality and safety changes to their products, including Altria. As we previously discussed, they made changes to its gasket on Elite in order to reduce leaking. In addition, some of the other errors that Mr. Quigley made, one, the deck didn't reflect that Elite's new gasket would reduce leaking. In addition, he said it was flat out incorrect because it didn't state that, not only were MarkTen Cigalikes growing, but the second fastest growing brand. But Mr. Quigley, wasn't the only one that took issue with this particular presentation. Joe Marillo, senior VP of regulatory affairs, he sent an email on this particular presentation and commented that the point that Elite could not convert smokers was only an opinion based on market performance versus JUUL, and that, at best, it should have a question mark and not an X. And Mr. Garnick and the CEO, Willard, did not make those changes. In terms of the HSR revision point-

Commissioner Phillips:
Counselor?

Mr. Roger:
... once again... Oh, sorry.

Commissioner Phillips:
Sorry.

Mr. Roger:
Mr. Phillips?

Commissioner Phillips:
Because you only have a very little amount of time, I do want to come back to your response to the answer given by respondent's counsel on the constitutional question. There's a colloquy that takes place in SAYLA law, if I read it right, where the chief justice is talking about how the Humphrey's Executor court describes the FTC in 1935, and Justice Kagan is talking about the FTC, either her view of it then, or her view of it today. How do you want us to think about where they seem to leave it? With Justice Roberts hanging the precedent on this description of the FTC in Humphrey's Executor, the quasi-legislative, quasi-judicial, and what we're doing in this case?

Mr. Roger:
So as I think you've already pointed out Commissioner Phillips, both [inaudible 01:33:08] and Collins sort of distinguished the agents that are issued in those cases versus the FTC. And I think some of the key factors, in terms of Humphrey's Executor, is still maintain today. The commission is a body of experts,

there's multiple commissioners, they're not just a single one drawn from both sides of the political ire. And here, I don't think Altria, or JLI to the extent they joined in the constitutional claims, identified any specific changes to the FTC's authority since then, that would render Humphrey's Executor inapplicable. And so our position, frankly, simply put, is that Humphrey's Executor remains good law. As you've noted, they've declined to overturn it, and it would be inappropriate for the commission to do so here.

Commissioner Phillips:

All right.

Mr. Roger:

With that, not to overturn it, that is, but to issue a decision in direct conflict with that binding precedent.

Commissioner Phillips:

Thank you, Counselor.

Madam Secretary:

And that is time.

Chair Khan:

Thank you, Madam Secretary. Thank you Mr. Roger, Ms. Wilkinson, and Mr. Gelfin, for your presentations. We are now adjourned.

Mr. Roger:

Thank you, Chair Khan, commissioners.