

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.

CITY AND COUNTY OF DENVER,

Plaintiff,

v.

JUUL LABS, INC. F/K/A PAX LABS, INC.;  
EONSMOKE LLC;  
ALTRIA GROUP, INC.;  
ALTRIA CLIENT SERVICES LLC;  
ALTRIA GROUP DISTRIBUTION COMPANY;  
NU MARK LLC; AND  
NU MARK INNOVATIONS, LTD.;

Defendants.

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**COMPLAINT**

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. JURISDICTION AND VENUE..... 6

III. PARTIES ..... 7

IV. ALLEGATIONS OF FACT..... 10

    A. JUUL: Runaway Commercial Success and Public Health Disaster ..... 10

        1. Redesigning “the most successful consumer product of all time” ..... 10

        2. Following Big Tobacco’s footsteps: Nicotine Salts ..... 16

        3. JLI designed JUUL products to contain and deliver as much nicotine as possible ..... 22

    B. Following Big Tobacco’s Playbook, JLI Launched JUUL with a Blatantly Youth-Oriented Campaign ..... 27

        1. JLI learned from Big Tobacco the importance of hooking kids. .... 27

        2. JLI’s advertising strategy was [REDACTED] to capture young nonsmokers, not adult smokers. .... 32

        3. JLI’s “Vaporized” campaign was intentionally youth-focused. .... 35

        4. JLI hosted parties and pop-up “JUUL Lounges” to create a youthful brand and gave away free samples to get youth hooked..... 44

        5. By using viral advertising, JLI ensured that Its advertising campaigns would reach youth and outlast JLI’s own efforts..... 48

    C. JLI and Its Officers and Directors Knew JLI’s Aggressively Youth-Oriented Advertising Was Hooking Kids But Continued It Anyway ..... 58

D. JLI’s Early Labeling and Advertising for JUUL Products Omitted the Fact that JUUL Products Contain Nicotine. .... 63

E. In Another Page from Big Tobacco’s Playbook, JLI Used Flavors to Hook Kids..... 64

F. JLI also used JUUL’s Discreet and Tech-Inspired Design to Attract a New Generation of Youth to Nicotine..... 74

G. Eonsmoke, Riding on JLI’s Coattails, Promoted JUUL and Its Own “JUUL-Compatible” Products ..... 79

H. The Proliferation of “JUULalikes” and Next-Generation Products Targeting Youth..... 93

I. JLI and Altria Join Forces to Protect JUUL’s Market Domination .....101

1. Before conspiring with JLI, Altria tried to corner the youth e-cigarette market .....101

2. JLI and Altria Decide to Work Together to Expand JUUL’s Reach and Cover-Up JLI’s Youth Marketing .....106

3. Following JLI’s Journey Closely: Formation of the Youth Marketing Cover-Up Enterprise.....110

4. Late 2017–August 2018: Early Coordination of Altria with the Youth Marketing Cover-Up Enterprise .....113

5. September–December 2018: Further Coordination of the Youth Marketing Cover-Up Enterprise .....125

6. Publicly Announcing the Ties Between the Youth Marketing Cover-Up Enterprise Defendants .....131

J. The Cost of JUUL’s Success .....150

K. Vaping in Schools .....161

L. Impact of the Youth Vaping Crisis on Plaintiff City and County of Denver .....170

M. No Federal Agency Action, Including by the FDA, Can Provide the Relief Plaintiff Seeks Here .....178

V. CAUSES OF ACTION.....	179
COUNT ONE — VIOLATIONS OF COLORADO PUBLIC NUISANCE LAW .....	179
COUNT TWO — VIOLATIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (“RICO”), 18 U.S.C. § 1961 <i>ET</i> <i>SEQ.</i> .....	183
A. Description of Defendants’ Youth Marketing Cover-Up Enterprise .....	184
B. The Enterprise Sought to Fraudulently Deny Having Marketed to Youth in Maintaining and Expanding JUUL’s Youth Market Share .....	185
C. Predicate Acts: Mail and Wire Fraud.....	188
D. Plaintiff Has Been Damaged by the Youth Marketing Cover-Up Enterprise Defendants’ RICO Violations.....	200
PRAYER FOR RELIEF.....	201
JURY TRIAL DEMANDED.....	202

## I. INTRODUCTION

1. One of the great public health success stories over the past nearly two decades has been a reduction in youth tobacco use and nicotine addiction. Youth smoking rates plummeted from 28% in 2000 to 7.6% in 2017.<sup>1</sup> This success has been the result of years of litigation and strict regulation. It is also due to a powerful public health message that Big Tobacco can no longer dispute or contradict: smoking kills.

2. This incredible progress towards eliminating youth use of tobacco products has now largely been reversed due to e-cigarettes and vaping. Between 2017 and 2018, e-cigarette use increased 78% among high school students nationwide, from 11.7% of high school students in 2017 to 20.8% of high schoolers in 2018.<sup>2</sup> Among middle school students, e-cigarette use increased 48% between 2017 and 2018.<sup>3</sup> The increase in youth nicotine vaping from 2017 to 2018 was the largest for any substance tracked by the national Monitoring the Future surveys over the past forty-four years.<sup>4</sup>

3. Youth vaping rates continued to climb from 2018 to 2019, such that vaping prevalence more than doubled among each grade level surveyed—eighth, tenth, and twelfth

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<sup>1</sup> Meredith Berkman, *Testimony of Meredith Berkman, Parents Against Vaping E-cigarettes*, U.S. House Committee on Oversight & Reform (July 24, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019.07.24%20Berkman-PAVe%20Testimony.pdf>.

<sup>2</sup> Jerome Adams, *Surgeon General's Advisory on E-cigarette Use Among Youth*, CDC (Dec. 2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

<sup>3</sup> *2018 NYTS Data: A startling rise in youth e-cigarette use*, FDA (Feb. 2, 2019), <https://www.fda.gov/tobacco-products/youth-and-tobacco/2018-nyts-data-startling-rise-youth-e-cigarette-use>.

<sup>4</sup> Richard Miech, Ph.D. et al., *Trends in Adolescent Vaping, 2017-2019*, 381 *New Eng. J. Med.* 1490-91 (Oct. 10, 2019), <https://www.nejm.org/doi/full/10.1056/NEJMc1910739>.

graders—in the past two years.<sup>5</sup> In 2019, more than five million middle and high school students reported current use of e-cigarettes, including more than one in every four high schoolers.<sup>6</sup>

4. Consistent with these national numbers, youth in the City and County of Denver (“Denver” or “Plaintiff”) are vaping at high rates—rates which continue to climb. In 2013, only 11% of high school students in Colorado Region 20, which encompasses Plaintiff’s community, had ever tried e-cigarettes.<sup>7</sup> By 2017, that number had jumped to 40% of high school students.<sup>8</sup> Colorado has the highest rate of youth vaping in the nation.<sup>9</sup>

5. According to the Centers for Disease Control and Prevention (“CDC”) Director Robert Redfield, “The skyrocketing growth of young people’s e-cigarette use over the past year threatens to erase progress made in reducing tobacco use. It’s putting a new generation at risk for nicotine addiction.”<sup>10</sup> Former U.S. Food and Drug Administration (“FDA”) Commissioner Scott Gottlieb described the federal statistics as “astonishing,” and both the FDA and the United States

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<sup>5</sup> *Id.*

<sup>6</sup> *Youth Tobacco Use: Results from the National Youth Tobacco Survey*, FDA (Nov. 6, 2019), <https://www.fda.gov/tobacco-products/youth-and-tobacco/youth-tobacco-use-results-national-youth-tobacco-survey#1>.

<sup>7</sup> *2013 Healthy Kids Colorado Survey Results: Region 20 High School Summary Tables* at 52, Colo. Dep’t of Pub. Health & Env’t (2013), [https://drive.google.com/file/d/0B\\_NVoyuCwHvoaW5nTGIGZGFvVUk/view](https://drive.google.com/file/d/0B_NVoyuCwHvoaW5nTGIGZGFvVUk/view).

<sup>8</sup> *2017 Healthy Kids Colorado Survey Results: Region 20 High School Summary Tables* at 76, Colo. Dep’t of Pub. Health & Env’t (2017), [https://drive.google.com/file/d/1Od5tWXlu\\_sFMiFj2KexKB8kL3DnDBZvG/view](https://drive.google.com/file/d/1Od5tWXlu_sFMiFj2KexKB8kL3DnDBZvG/view).

<sup>9</sup> Sawyer D’Argonne, *CDC Study: Colorado youth use vaping products, e-cigarettes at twice the national average*, Aspen Times (July 31, 2018), <https://www.aspentimes.com/news/cdc-study-colorado-youth-use-e-cigarettes-vaping-nicotine-products-at-twice-the-national-average/>.

<sup>10</sup> Amir Vera, *Texas governor signs law increasing the age to buy tobacco products to 21*, CNN (June 8, 2019), <https://www-m.cnn.com/2019/06/08/health/texas-new-tobacco-law/index.html#:~:targetText=Supporters%20say%20increasing%20the%20minimum,go%20in%20effect%20September%201.?r=https%3A%2F%2Fwww.google.com%2F>.

Surgeon General (“Surgeon General”) have characterized youth vaping as an “epidemic.”<sup>11</sup> The Secretary of the U.S. Department of Health and Human Services (“HHS”) declared that “[w]e have never seen use of any substance by America’s young people rise as rapidly as e-cigarette use [is rising].”<sup>12</sup>

6. A major cause of this epidemic is Defendant JUUL Labs, Inc. (“JLI”), the maker of the JUUL e-cigarette. JLI entered the e-cigarette market in 2015 and, by 2019, controlled over 70% of it.<sup>13</sup> Over one million JUUL e-cigarettes were sold between 2015 and 2017.<sup>14</sup> In 2017, JLI’s e-cigarette products had generated over \$224 million in retail sales, a 621% year-over-year increase.<sup>15</sup> By June 2018, sales had skyrocketed another 783%, reaching \$942.6 million.<sup>16</sup> The e-cigarette category as a whole grew 97% to \$1.96 billion in the same period, largely based on

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<sup>11</sup> Angelica LaVito, *FDA chief Gottlieb threatens to pull e-cigarettes off market if ‘astonishing’ surge in teen use doesn’t slow*, CNBC (Nov. 16, 2018), <https://www.cnbc.com/2018/11/16/fda-chief-gottlieb-threatens-to-pull-e-cigarettes-off-market.html>; Jayne O’Donnell, *FDA declares youth vaping an epidemic, announces investigation, new enforcement*, USA Today (Sept. 12, 2018), <https://www.usatoday.com/story/news/politics/2018/09/12/fda-scott-gottlieb-youth-vaping-e-cigarettes-epidemic-enforcement/1266923002/>.

<sup>12</sup> Jan Hoffman, *Study Shows Big Rise in Teen Vaping This Year*, N.Y. Times (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/health/ecigarettes-teens-nicotine-.html>; Rajiv Bahl, *Teen Use of Flavored Tobacco was Down, But E-Cigarettes Are Bringing It Back Up*, Healthline (Jan. 9, 2019), <https://www.healthline.com/health-news/flavored-tobacco-use-rising-again-among-teens#An-unhealthy-habit>.

<sup>13</sup> Richard Craver, *Juul ends 2018 with 76 percent market share*, Winston-Salem J. (Jan. 8, 2019), [https://www.journalnow.com/business/juul-ends-with-percent-market-share/article\\_6f50f427-19ec-50be-8b0c-d3df18d08759.html](https://www.journalnow.com/business/juul-ends-with-percent-market-share/article_6f50f427-19ec-50be-8b0c-d3df18d08759.html).

<sup>14</sup> Melia Robinson, *How a startup behind the ‘iPhone of vaporizers’ reinvented the e-cigarette and generated \$224 million in sales in a year*, Bus. Insider (Nov. 21, 2017), <https://www.businessinsider.com/juul-e-cigarette-one-million-units-sold-2017-11/>.

<sup>15</sup> *Id.*

<sup>16</sup> Angelica LaVito, *Popular e-cigarette Juul’s sales have surged almost 800 percent over the past year*, CNBC Health & Sci. (Sept. 11, 2018), <https://www.cnbc.com/2018/07/02/juul-e-cigarette-sales-have-surged-over-the-past-year.html>.

JUUL’s market success.<sup>17</sup> The JUUL e-cigarette’s rise to become the dominant product on the e-cigarette market was so rapid, and so complete, that the act of vaping is now often referred to as “juuling.”

7. As JUUL’s popularity skyrocketed, Defendant Eonsmoke, LLC (“Eonsmoke”) explicitly traded on JUUL’s market share, promoting its own products as “JUUL compatible,” initiating a successful “Doit4juul” social media campaign, and offering its JUUL-compatible pods in flavors including “Sour Gummy,” “Pineapple Crush,” and “Pink Lemonade.”<sup>18</sup> Other copycats also hurried to mimic JUUL’s potent nicotine formulation and youth-oriented design—building on the illicit youth e-cigarette market JLI created.

8. By September 2018, youth vaping rates were spiraling out of control, and the FDA sent warning letters to Defendants JLI<sup>19</sup> and Altria Client Services<sup>20</sup> regarding the alarmingly high rates of youth using their products. In October 2018, the FDA raided JLI’s headquarters and seized more than one thousand documents relating to JLI’s sales and marketing practices.<sup>21</sup> By the end of 2019, the FDA, the Federal Trade Commission, and the U.S. House of

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<sup>17</sup> *Id.*

<sup>18</sup> Letter from Ann Simoneau, J.D., Director FDA Center for Tobacco Products’ Office of Compliance and Enforcement, to Kelly L. Zeller, General Manager, Eonsmoke, LLC (“Eonsmoke, LLC Warning Letter”) (Oct. 24, 2019), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/eonsmoke-llc-592097-10242019>.

<sup>19</sup> Letter from Scott Gottlieb, M.D., FDA Commissioner, to Kevin Burns, JUUL Labs, Inc. (Sept. 12, 2018), <https://www.fda.gov/media/119669/download>.

<sup>20</sup> Letter from Scott Gottlieb, M.D., FDA Commissioner, to Howard A. Willard III, Altria Group, Inc. (Sept. 12, 2018), <https://www.fda.gov/media/119666/download>.

<sup>21</sup> Laurie McGinley, *FDA seizes Juul e-cigarette documents in surprise inspection of headquarters*, Wash. Post (Oct. 2, 2018), <https://www.washingtonpost.com/health/2018/10/02/fda-seizes-juul-e-cigarette-documents-surprise-inspection-headquarters/>.



Representatives Committee on Oversight and Reform had all commenced investigations into JLI's role in the youth vaping epidemic and whether JLI's marketing practices purposefully targeted youth. Multiple state attorneys general have now also opened investigations into or filed suit against JLI.

9. As the pressure on JLI intensified, Altria<sup>22</sup>—maker of Marlboro cigarettes, parent company of Philip Morris USA, and one of the largest tobacco companies in the world—stepped in to publicly support JLI. While Altria first began having “confidential discussions” beginning in the spring of 2017,<sup>23</sup> Altria did not make its relationship with JLI public until December 20, 2018, when Altria announced a \$12.8 billion equity investment in JLI, giving it a 35% stake in JLI. Just several weeks prior to this announcement, Altria had seemingly criticized JLI's marketing practices in a letter to the FDA and declared that “pod-based products significantly contribute to the rise in youth use of e-vapor products.” Altria removed its own pod-based products, the MarkTen Elite and Apex by MarkTen, from the market—only to commit its substantial resources, regulatory knowledge, and lobbying muscle to protecting and expanding JUUL's market share, which, as Altria and JLI both know, relies heavily on youth.

10. Attempting to revise history and cover-up JLI's misconduct, JLI and Altria are now describing their collaboration as a “harm reduction opportunity,” and insist JLI never marketed to youth. These assertions fall flat against the facts, as detailed below. Altria has

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<sup>22</sup> Altria Group, Inc. and its subsidiaries Altria Client Services LLC, Altria Group Distribution Company, and Nu Mark, LLC, and Nu Mark Innovations, Ltd (collectively, “Altria” or “Altria Defendants”).

<sup>23</sup> Letter from Howard A. Willard III, Altria Group, Inc. to Senator Richard J. Durbin at 3 (Oct. 14, 2019), <https://www.altria.com/-/media/Project/Altria/Altria/about-altria/federal-regulation-of-tobacco/regulatory-filings/documents/Altria-Response-to-October-1-2019-Senate-Letter.pdf>.

described the JUUL e-cigarette as “compelling” and “a terrific product.” In fact, Defendant JLI’s JUUL e-cigarette has compelled a generation of youth, who were never cigarette smokers, into nicotine addiction and forced local governments to spend significant amounts of time and resources combatting the youth vaping crisis sweeping their communities. JLI and Altria are now working together and denying that JLI’s products are marketed to and designed for youth and nonsmokers while maintaining JUUL’s market dominance—which would not be possible if the customer base were in fact only adult smokers seeking to quit.

11. Plaintiff the City and County of Denver brings this action against Defendants JUUL Labs, Inc.; Eonsmoke, LLC; Altria Group, Inc. and its subsidiaries Altria Client Services LLC, Altria Group Distribution Company, and Nu Mark, LLC, and Nu Mark Innovations, Ltd (collectively, “Altria” or “Altria Defendants”), for damages and injunctive relief, including abatement of the public health crisis caused by Defendants’ wrongful conduct.

## **II. JURISDICTION AND VENUE**

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Plaintiff’s racketeering claim arises under the laws of the United States, 18 U.S.C. § 1961 *et seq.*, and pursuant to 28 U.S.C. § 1332(a) because: (i) the amount in controversy exceeds \$75,000, exclusive of interests and costs, and (ii) the plaintiff and defendants are citizens of different states. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

13. The Court has personal jurisdiction over Defendants because they do business in the District of Colorado and have sufficient minimum contacts with this District. Defendants intentionally avail themselves of the markets in this State through the promotion, marketing, and

sale of the products at issue in this lawsuit in Colorado, and by retaining the profits and proceeds from these activities, to render the exercise of jurisdiction by this Court permissible under Colorado law and the U.S. Constitution.

14. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391 (b)(2) and (3) because a substantial part of the events or omissions giving rise to the claims at issue in this Complaint arose in this District and Defendants are subject to the Court’s personal jurisdiction with respect to this action.

### **III. PARTIES**

#### **Plaintiff**

15. Plaintiff the City and County of Denver (“Plaintiff” or “City and County of Denver” or “Denver”) is a home-rule municipality and a municipal corporation of the State of Colorado under the Colorado Constitution, Article XX.

#### **JUUL Labs, Inc.**

16. Defendant JUUL Labs, Inc. (“JLI”) is a Delaware corporation, having its principal place of business in San Francisco, California. JLI was incorporated in Delaware on March 12, 2007 (file no. 4315504) under the name Ploom, Inc. (“Ploom”). In February 2015, Ploom changed its name to PAX Labs, Inc. In April 2017, PAX Labs, Inc. formed a new corporation under the name PAX Labs (Deux), Inc., incorporated in Delaware on April 21, 2017 (file no. 6387684). On June 30, 2017, PAX Labs, Inc. was renamed JUUL Labs, Inc., and PAX Labs (Deux), Inc. was given the name PAX Labs, Inc.

17. JLI manufactures, designs, sells, markets, promotes and distributes JUUL e-cigarettes, JUULpods and accessories (collectively, “JUUL products”). From JUUL’s launch

in 2015 until June 2017, JLI manufactured, designed, sold, marketed, promoted, and distributed JUUL products under the name PAX Labs, Inc.

18. JUUL Labs, Inc., formerly known as PAX Labs, Inc., formerly known as Ploom, Inc., is referred to herein as “JLI.”

### **Eonsmoke**

19. Defendant Eonsmoke, LLC (“Eonsmoke”) is a New Jersey limited liability company with its principal place of business in Clifton, New Jersey. Eonsmoke markets and sells “Juul Compatible” Eonsmoke and Eonsmoke v2.0 electronic vapor devices and flavor pods, as well as 4X pods and disposable vape products such as Eon St!Ks.

### **Altria Defendants**

20. Defendant Altria Group, Inc. is a Virginia corporation, having its principal place of business in Richmond, Virginia. Altria is one of the world’s largest producers and marketers of tobacco products. On December 20, 2018, Altria purchased a 35% stake in JLI.

21. Defendant Altria Client Services LLC (“Altria Client Services”) is a New York corporation and wholly owned subsidiary of Altria Group, Inc. with its principal place of business in Henrico County, Virginia. Altria Client Services provides Altria Group, Inc. and its companies with services in many areas including digital marketing, packaging design & innovation, product development, and safety, health, and environmental affairs. Pursuant to Altria’s Relationship Agreement with JLI, Altria Client Services assists JLI in the sale, marketing, promotion and distribution of JUUL products.<sup>24</sup> Such services include database

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<sup>24</sup> Altria Group, Inc., *Relationship Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises LLC* (“Relationship Agreement”) (Form 8-K), Ex. 2.2 (Dec. 20,

support, direct marketing support, and premarket product application support.<sup>25</sup> On September 25, 2019, the former senior vice president and chief growth officer of Altria Client Services, K.C. Crosthwaite, became the new chief executive officer of JLI.

22. Defendant Altria Group Distribution Company is a Virginia corporation and wholly owned subsidiary of Altria Group, Inc. with its principal place of business in Henrico County, Virginia. Altria Group Distribution Company provides sales, distribution and consumer engagement services to Altria’s tobacco companies. Altria Group Distribution Company

[REDACTED]

[REDACTED]

Altria Group Distribution Company [REDACTED]

[REDACTED]

[REDACTED]

23. Defendant Nu Mark LLC is a Virginia corporation and wholly owned subsidiary of Altria Group, Inc., with its principal place of business in Richmond, Virginia. Nu Mark LLC was engaged in the manufacture and sale of Altria’s electronic vapor products. Shortly before Altria purchased a 35% stake in JLI in December 2018, Altria Group, Inc. announced that Nu Mark would be discontinuing the production and sale of all e-vapor products.

24. Defendant Nu Mark Innovations, Ltd. is a subsidiary of Nu Mark LLC located in Beit Shemesh, Israel. Nu Mark Innovations, Ltd. provides digital marketing and customer care

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2018),

<https://www.sec.gov/Archives/edgar/data/764180/000119312518353970/d660871dex22.htm>.

<sup>25</sup> *Id.*

services for Nu Mark LLC and Altria’s e-vapor brands, as well as product and technology development services.

25. Collectively, Altria Group, Inc. and its subsidiaries named above will be referred to herein as “Altria” or “Altria Defendants.”

#### IV. ALLEGATIONS OF FACT

##### A. JUUL: Runaway Commercial Success and Public Health Disaster

###### 1. Redesigning “the most successful consumer product of all time”

26. JLI was founded by Defendants Adam Bowen and James Monsees. JLI’s beginnings can be traced to the pair’s collaboration on a product design master’s thesis when they were graduate students at Stanford University in 2004—Monsees completing a Master of Fine Arts in Product Design, and Bowen a Master of Science in Mechanical Engineering in Product Design.<sup>26</sup> Their proposed product? A better cigarette.



Adam Bowen and James Monsees Source: Juul

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<sup>26</sup> Allison Keeley, *Vice Made Nice?*, Stan. Mag. (Aug. 2012), <https://stanfordmag.org/contents/vice-made-nice>.

27. Monsees has described the cigarette as “the most successful consumer product of all time . . . an amazing product.”<sup>27</sup> But years of anti-smoking campaigns, including work by local government public health departments and school-based anti-tobacco programs, have successfully de-normalized cigarette smoking. As part of their thesis research, Monsees and Bowen interviewed smokers who talked about feeling self-conscious of the signs of smoking, for example, coming back into a room after a smoke break and smelling like smoke, or having their hands smell like cigarettes even after washing them multiple times.<sup>28</sup> When Monsees and Bowen presented their thesis and product design to their classmates, they included a clip from a South Park episode showing the characters assembled at the Museum of Tolerance and shaming a smoker.<sup>29</sup> Their goal was to design a cigarette without the stigma and self-consciousness smokers experienced—as Monsees described it, to “deliver[] solutions that refresh the magic and luxury of the tobacco category” and recreate the lost “ritual and elegance that smoking once exemplified.”<sup>30</sup>

28. Essentially, Monsees and Bowen saw a market opportunity in a generation of consumers brought up on anti-smoking norms. In Monsees’ words, they wanted to redesign the cigarette “to meet the needs of people who want to enjoy tobacco but don’t self-identify with—

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<sup>27</sup> Gabriel Montoya, *Pax Labs: Origins with James Monsees*, Soc. Underground (Jan. 2015), <https://socialunderground.com/2015/01/pax-ploom-origins-future-james-monsees/>.

<sup>28</sup> Jordan Crook, *This is the Stanford thesis presentation that launched Juul*, Tech Crunch (Feb. 27, 2019), <https://techcrunch.com/2019/02/27/this-is-the-stanford-thesis-presentation-that-launched-juul/>.

<sup>29</sup> *Id.*; *Adam and James’ Thesis Presentation* at 4:04, JUUL (Feb. 27, 2019), [https://www.youtube.com/watch?v=ZBDLqWCjsMM&has\\_verified=1](https://www.youtube.com/watch?v=ZBDLqWCjsMM&has_verified=1).

<sup>30</sup> *Start Your Own Revolution: An Interview with James Monsees*, onboardly (Apr. 30, 2014), <https://web.archive.org/web/20161108110231/http://onboardly.com/entrepreneur-interviews/an-interview-with-james-monsees/> (last visited Mar. 27, 2020).

or don't necessarily want to be associated with—cigarettes.”<sup>31</sup> Monsees saw “a huge opportunity for products that speak directly to those consumers who aren't perfectly aligned with traditional tobacco products.”<sup>32</sup>

29. At one point during their thesis presentation, Monsees states, “The cigarette is actually a carefully engineered product for nicotine delivery and addiction.”<sup>33</sup> This description applies just as well to the product he and Bowen would launch a decade later—JUUL.

30. The outcome of Monsees and Bowen's thesis project was a “heat-not-burn” e-cigarette, which uses loose-leaf tobacco. The device heated tobacco contained in pods to a constant temperature, vaporizing nicotine and flavor without burning the materials or producing smoke.

31. After graduation, Bowen and Monsees worked on bringing their thesis project to the market, incorporating under the name Ploom in 2007. In those early years, they spent a lot of time talking about what Bowen called “the kind of typical thoughts of evil Big Tobacco companies like coming down and squashing you.”<sup>34</sup> But ultimately, that “was not really an issue.”<sup>35</sup> In fact, not only did Big Tobacco not squash them, but the opposite occurred. Although Bowen and Monsees characterized their products as aimed toward consumers not aligned with traditional tobacco products, they themselves have aligned with Big Tobacco on at least two occasions: first, with Japan Tobacco International (“JTI”) and then with Altria.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See* Crook, *supra* note 28.

<sup>34</sup> Keeley, *supra* note 26.

<sup>35</sup> *Id.*



32. In 2010, JLI (then called Ploom) launched its e-cigarette as the ModelOne, using pods of loose-leaf tobacco heated by butane. It did not catch on. JLI only sold a few thousand of them. By then a company with a dozen employees, JLI was faltering, in need of money, technological expertise, and marketing savvy.<sup>36</sup>

33. Help came from JTI, a division of Japan Tobacco Inc., the fourth-largest tobacco company in the world. In December 2011, JTI and JLI entered into a strategic agreement, which gave JTI a minority stake in JLI and made it a strategic partner. According to internal documents,

[REDACTED]

[REDACTED]<sup>37</sup> In a statement regarding the agreement, Monsees said, “We are very pleased to partner with JTI as their deep expertise, global distribution networks and capital resources will enable us to enter our next phase of growth and capitalize on global expansion opportunities.”<sup>38</sup>

As Bowen explained in an interview, “We were still doing a lot of our own internal product development, but now we had access to floors of scientists at JTI.”<sup>39</sup>

34. In 2012, JLI (still known as Ploom) unveiled the PAX, a loose-leaf vaporizer that did not use pods, but which was much more successful. The following year, JLI combined elements of the PAX with the pod system as the ModelTwo. Although consumers were enthusiastic about both the PAX and the ModelTwo, the products were limited to a small,

<sup>36</sup> David H. Freedman, *How Do You Sell a Product When You Can't Really Say What It Does?*, Inc.com (May 2014), <https://www.inc.com/magazine/201405/david-freedman/james-monsees-ploom-ecigarette-company-marketing-dilemma.html>.

<sup>37</sup> INREJUUL\_00371423 (Feb. 2015, [REDACTED]).

<sup>38</sup> *Innovative Partnership for Ploom and Japan Tobacco International JTI to Take Minority Share in Ploom*, Japan Tobacco Int'l (Dec. 8, 2011), <https://www.jti.com/sites/default/files/press-releases/documents/2011/innovative-partnership-for-ploom-and-japan-tobacco-international.pdf>.

<sup>39</sup> D. Freedman, *supra* note 36.

high-end market. The PAX, for example, retailed for \$250 when it was first marketed. But, as one of JLI's investors remarked in 2014, "The company is going to invade the bigger, lower-end market now dominated by e-cigarettes."<sup>40</sup> He explained that JLI had "lots of products in the works" and that "[w]e know we need something cheaper than Pax to go after the mass market. There are still huge opportunities out there."<sup>41</sup>

35. In February 2015, JLI and JTI ended their relationship, with JLI buying back JTI's minority stake in the business. JTI acquired the ModelTwo and pods product line, as well as the Ploom name, while JLI kept its open-system PAX vaporizer and changed its name to PAX Labs Inc. Monsees characterized the partnership as having "afforded both parties many mutual benefits," but said that the new arrangement would "fuel continued growth" and that JLI intended "rapid rollouts of new products."<sup>42</sup>

36. JLI made good on its promise of new products and invading the bigger, lower-end market in e-cigarettes. As discussed further below, JLI launched JUUL products in June 2015 with a well-publicized launch party in New York City and a viral social media marketing campaign.

37. In 2017, as JUUL became more and more popular, JLI changed its name from PAX to JUUL Labs, Inc.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *JTI to Acquire Ploom Product Line*, Convenience Store News (Feb. 16, 2015), <https://csnews.com/jti-acquire-ploom-product-line#close-olyticsmodal>.

38. By the close of 2017, according to Nielsen data, JLI had surpassed its competitors in capturing 32.9% of the e-cigarette market, with British American Tobacco at 27.4% and Altria at 15.2%.<sup>43</sup> The total e-cigarette market expanded 40% to \$1.16 billion.<sup>44</sup>

39. In 2018, JLI's gross profit margins were 70%<sup>45</sup> and it represented 76.1% of the national e-cigarette market.<sup>46</sup> In a complaint it filed in November 2018 against 24 vape companies for alleged patent infringement, JLI asserted that it was "now responsible for over 95% of the growth in the ENDS pod refill market in the United States" and included the following chart:<sup>47</sup>

**Appendix 5: U.S. ENDS Pod Market Retail Unit Sales Growth 2018**

4-Week Unit Sales by End Date

	Nielsen			IRI		
	Apr 21	Sep 8	Share of Growth	Apr 22	Sep 9	Share of Growth
Total Market	36,002,645	55,773,039	100%	29,546,883	50,793,955	100%
Juul	22,618,886	41,501,172	95.5%	14,964,158	35,166,120	95.1%
Vuse	6,385,922	6,172,595	-1.1%	7,204,900	7,409,312	1.0%
MarkTen	3,677,300	4,240,285	2.8%	2,904,168	3,230,237	1.5%
Logic	1,785,167	2,018,023	1.2%	1,928,841	1,876,006	-0.2%
Blu	1,062,360	1,461,127	2.0%	1,305,209	1,937,225	3.0%
Other	473,010	379,837	-0.5%	1,239,607	1,175,055	-0.3%

<sup>43</sup> Ari Levy, *E-cigarette maker Juul is raising \$150 million after spinning out of vaping company*, CNBC (Dec. 20, 2017), <https://www.cnbc.com/2017/12/19/juul-labs-raising-150-million-in-debt-after-spinning-out-of-pax.html>.

<sup>44</sup> *Id.*

<sup>45</sup> Dan Primack, *Scoop: The Numbers Behind Juul's Investor Appeal*, Axios (July 2, 2018), <https://www.axios.com/numbers-juul-investor-appeal-vaping-22c0a2f9-beb1-4a48-acee-5da64e3e2f82.html>.

<sup>46</sup> Robert K. Jackler et al., *JUUL Advertising Over Its First Three Years on the Market at 2*, Stan. Res. into the Impact of Tobacco Advert. (2019), [http://tobacco.stanford.edu/tobacco\\_main/publications/JUUL\\_Marketing\\_Stanford.pdf](http://tobacco.stanford.edu/tobacco_main/publications/JUUL_Marketing_Stanford.pdf).

<sup>47</sup> Verified Complaint Under Section 337 of the Tariff Act of 1930 at 6, *In the Matter of Certain Cartridges for Elec. Nicotine Delivery Sys. & Components Thereof*, Investigation No. 337-TA-1141 (USITC Nov. 19, 2018).

40. JLI shattered previous records for reaching decacorn status, reaching valuation of over \$10 billion in a matter of months—four times faster than Facebook.<sup>48</sup> This all came just three years after its product launch.

## **2. Following Big Tobacco’s footsteps: Nicotine Salts**

41. JLI’s staggering commercial success did not come from a blank slate. Under the Master Settlement Agreement between Big Tobacco and the States, the public has access to hundreds of thousands of Big Tobacco’s internal documents. In creating JUUL, Monsees and Bowen carefully studied the marketing strategies, advertisements, and product design of Big Tobacco. As Monsees candidly acknowledged, the internal tobacco documents “became a very intriguing space for us to investigate because we had so much information that you wouldn’t normally be able to get in most industries. And we were able to catch-up, right, to a huge, huge industry in no time. And then we started building prototypes.”<sup>49</sup> JLI researched how Big Tobacco companies engineered their products and chemically manipulated nicotine to maximize delivery: “We started looking at patent literature. We are pretty fluent in ‘Patentese.’ And we were able to deduce what had happened historically in the tobacco industry.”<sup>50</sup>

42. JLI built on Big Tobacco’s research to formulate its nicotine solution in a manner that would be appealing to youth and nonsmokers. JLI was well aware from the historical cigarette industry documents that the future of any nicotine-delivery business depends on ensnaring customers before they age beyond the window of opportunity. Big Tobacco designed

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<sup>48</sup> Zack Guzman, *Juul Surpasses Facebook As Fastest Startup to Reach Decacorn Status*, Yahoo! Fin. (Oct. 9, 2018), <https://finance.yahoo.com/news/juul-surpasses-facebook-fastest-startup-reach-decacorn-status-153728892.html>.

<sup>49</sup> Montoya, *supra* note 27.

<sup>50</sup> Crook, *supra* note 28.

products specifically to make it easier for teens to initiate smoking. In a 1973 internal memo Dr. Claude Teague of R.J. Reynolds Tobacco Company (“R.J. Reynolds”) observed, “Realistically, if our Company is to survive and prosper, over the long term, we must get our share of the youth market. In my opinion this will require new brands tailored to the youth market.”<sup>51</sup> Dr. Teague noted that “‘learning’ smokers” have a low tolerance for throat irritation so the smoke should be “as bland as possible,” i.e., not harsh; and he specifically recommended an acidic smoke “by holding pH down, probably below 6.”<sup>52</sup> As described below, JLI heeded Dr. Teague’s advice.

43. Monsees, Bowen, and JLI’s employees reviewed documents in the Big Tobacco archive that included information on how to manipulate nicotine pH to maximize nicotine delivery in a vapor while minimizing the throat irritation or “throat hit” that may potentially deter new smokers. Chenyue Xing, a chemist who worked for JLI (then called PAX Labs) and helped patent its liquid-nicotine formula, told Reuters that she recalled reviewing tobacco company records and research. “We had consultants who were veterans of the big tobacco companies,” she said, “We learned all the history.”<sup>53</sup>

44. As Monsees noted in 2015 during an interview with *WIRED* magazine, “The people who understood the science and were listed on previous patents from tobacco companies

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<sup>51</sup> Claude E. Teague, Jr., *Research Planning Memorandum on Some Thoughts About New Brands of Cigarettes for the Youth Market* at 1, U.C.S.F. Truth Tobacco Indus. Documents (Feb. 2, 1973), <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=lhvl0146>.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> Chris Kirkham, *Juul disregarded early evidence it was hooking teens*, Reuters (Nov. 5, 2019), <https://www.reuters.com/investigates/special-report/juul-ecigarette/>.

aren't at those companies anymore. If you go to Altria's R&D facility, it's empty."<sup>54</sup> Instead, some of those people were advising JLI and helping to develop JUUL.

45. As Dr. Teague's memo described, the solution that R.J. Reynolds scientists devised in the 1970s for reducing nicotine's harshness to make it easier for "learning smokers" to start and continue smoking was to combine the high-pH nicotine with a low-pH acid. The result was a neutralized compound referred to as nicotine salt. In a 1973 R.J. Reynolds memorandum, R.J. Reynolds highlighted that this chemical manipulation of the nicotine content was expected to give its cigarettes an "additional nicotine 'kick'" that would be more appealing and addictive.<sup>55</sup> A young R.J. Reynolds chemist, Thomas Perfetti, synthesized thirty different nicotine salt combinations, tested the salts' ability to dissolve into a liquid, and heated them in pursuit of the "maximum release of nicotine."<sup>56</sup> Perfetti published his results in a 1979 memo stamped "CONFIDENTIAL," which was found among the documents that the FDA obtained from JLI in 2018. Relying on cigarette industry research like this, [REDACTED], JLI developed a cartridge-based e-cigarette using nicotine salts. As described herein, JLI's use of nicotine salts, pioneered by major combustible Big Tobacco companies, was a critical tool for addicting non-smokers, including youth.

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<sup>54</sup> David Pierce, *This Might Just Be the First Great E-Cig*, WIRED (Apr. 21, 2015), [www.wired.com/2015/04/pax-juul-ecig/](http://www.wired.com/2015/04/pax-juul-ecig/).

<sup>55</sup> Frank G. Colby, *Cigarette Concept to Assure RJR a Larger Segment of the Youth Market* at 1, U.C.S.F. Truth Tobacco Industry Indus. Documents (Dec. 4, 1973), <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=mzfx0091>.

<sup>56</sup> Thomas A. Perfetti, *Smoking Satisfaction and Tar/Nicotine Control* (Dec. 7, 1978), <https://ca-times.brightspotcdn.com/3a/12/a5ec27874843a56e26b4ecdfd221/nicotine-salts-investigation.pdf>.

46. The “nicotine salt” formulation that JLI popularized follows this same approach. JLI added benzoic acid to its nicotine liquid, creating a nicotine salt called nicotine benzoate. This both reduced the nicotine’s harshness and delivered it more directly to the user’s lungs and brain.<sup>57</sup> The freebase nicotine in earlier e-cigarettes was partly absorbed in the user’s mouth and throat, resulting in a much slower absorption by the body.

47. JLI’s use of nicotine benzoate affects the palatability of nicotine inhalation by reducing the “throat hit” that users experience when vaping. According to Ari Atkins, one of the inventors of JUUL, “[i]n the tobacco plant, there are these organic acids that naturally occur. And they help stabilize the nicotine in such a way that makes it . . . I’ve got to choose my words carefully here: Appropriate for inhalation.”<sup>58</sup>

48. Because cigarette smokers are already accustomed to a certain level of harshness and throat hit, developing a product with reduced harshness and minimal “throat hit” is only a critical concern if the goal is to appeal to first-time smokers. The tobacco industry has long recognized this; a published study of industry documents concluded that “product design changes which make cigarettes more palatable, easier to smoke, or more addictive are also likely to encourage greater uptake of smoking.”<sup>59</sup> In the vaping context, reducing the harshness of nicotine also allows more frequent vaping, for longer periods of time, and masks the amount of nicotine being delivered.

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<sup>57</sup> Kirkham, *supra* note 53.

<sup>58</sup> Pierce, *supra* note 54.

<sup>59</sup> David A. Kessler, *Juul Says It Doesn’t Target Kids, But Its E-Cigarettes Pull Them In*, N.Y. Times (July 31, 2019), <https://www.nytimes.com/2019/07/31/opinion/juul-kids.html>.

49. Building on Big Tobacco’s research, JLI intentionally designed its product to minimize “throat hit” and maximize “buzz.” [REDACTED]

[REDACTED]

50. [REDACTED]

[REDACTED]

[REDACTED]<sup>60</sup> [REDACTED]  
“Employees tested new liquid-nicotine formulations on themselves or on strangers taking smoke breaks on the street. Sometimes, the mix packed too much punch – enough nicotine to make some testers’ hands shake or send them to the bathroom to vomit . . . .”<sup>61</sup>

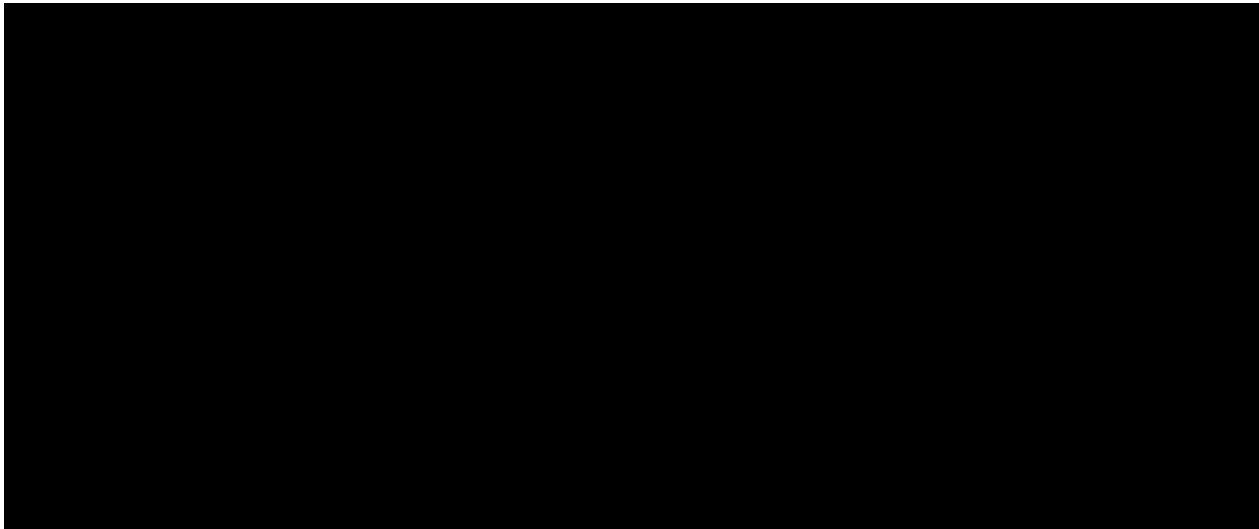
51. [REDACTED]

[REDACTED]

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<sup>60</sup> INREJUUL\_00002903.  
<sup>61</sup> Kirkham, *supra* note 53.  
<sup>62</sup> INREJUUL\_00002903.





52. [REDACTED]



53. A later study by Anna K. Duell et al., explains why JUUL delivered a strong “buzz” but so little throat hit. The Duell Study determined that the fraction of free-base nicotine in JLI’s “Fruit Medley” flavor was 0.05 and was 0.07 in the “Crème Brulee” flavor.<sup>63</sup> For comparison, “Zen” brand e-liquid has a free-base fraction of 0.84.<sup>64</sup> The Duell Study’s authors found that the low free-base fraction in JUUL aerosols resulted in a “decrease in the perceived harshness of the aerosol to the user and thus a greater abuse liability.”<sup>65</sup>

54. Dramatically reducing the throat hit is not necessary for a product that is aimed at smokers, who are accustomed to the harshness of cigarette smoke, but it very effectively appeals

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<sup>63</sup> 87 U.S. Patent No. 9,215, 895; Anna K. Duell et al., *Free-Base Nicotine Determination in Electronic Cigarette Liquids by H NMR Spectroscopy* (“Duell Study”), 31 Chem. Res. Toxicol. 431, 432 (Fig. 3) (May 18, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6008736/pdf/tx8b00097.pdf>.

<sup>64</sup> *Id.* at 432.

<sup>65</sup> *Id.* at 431–34.

to nonsmokers, especially youth. The Duell Study concluded that JLI's use of nicotine salts "may well contribute to the current use prevalence of JUUL products among youth."<sup>66</sup>

55. Reducing the harshness of nicotine also allows more frequent use of e-cigarettes, for longer periods of time, and masks the amount of nicotine being delivered. By removing the physiological drawbacks of inhaling traditional free-base nicotine, JLI's technology removes the principal barrier to nicotine consumption and addiction. The Duell Study further concluded that JLI's creation of a non-irritating vapor that delivers unprecedented amounts of nicotine is "particularly problematic for public health."<sup>67</sup>

56. JLI contemplated features that would automatically disable the device after nicotine delivery exceeded a certain threshold; according to Xing, one idea was to disable the device for thirty minutes or more following a certain number of puffs.<sup>68</sup> But in the end JLI launched its product without any such features.

### **3. JLI designed JUUL products to contain and deliver as much nicotine as possible**

57. JLI claims that each JUULpod is the equivalent of a pack of cigarettes and contains up to fifty-nine mg per ml of nicotine—an alarming amount that is roughly three times the concentration of nicotine that can be sold to consumers in the European Union. Compared to the average e-cigarette, JUULpods deliver roughly twice as much nicotine at nearly three times

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<sup>66</sup> *Id.* at 433 (citing J.G. Willett et al., *Recognition, use and perceptions of JUUL among youth and young adults*, 28 *Tobacco Control* 115-16 (2018)).

<sup>67</sup> *Id.* at 431.

<sup>68</sup> Kirkham, *supra* note 53.

the speed.<sup>69</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>70</sup> And, while only approximately 10% of the nicotine in a cigarette is delivered to the user,<sup>71</sup> JUUL e-cigarettes, on the other hand, have been found to deliver at least 82% of the nicotine contained in a JUULpod to the user.<sup>72</sup> [REDACTED]

[REDACTED]<sup>73</sup>

58. JLI knew that it had designed a highly addictive product that would appeal to youth much more than adult smokers. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>74</sup> [REDACTED]

<sup>69</sup> *How Much Nicotine is In Juul?*, Truth Initiative (Feb. 26, 2019), <https://truthinitiative.org/research-resources/emerging-tobacco-products/how-much-nicotine-juul>.

<sup>70</sup> INREJUUL\_00279931 (emphasis added).

<sup>71</sup> Lynn T. Kozlowski & Janine L. Pilliteri, *Compensation for Nicotine by Smokers of Lower Yield Cigarettes*, 7 *Smoking and Tobacco Control Monograph* 161, 164 (1983), [https://cancercontrol.cancer.gov/brp/tcrb/monographs/7/m7\\_12.pdf](https://cancercontrol.cancer.gov/brp/tcrb/monographs/7/m7_12.pdf).

<sup>72</sup> Samantha M. Reilly et al., *Free Radical, Carbonyl, and Nicotine Levels Produced by JUUL Electronic Cigarettes*, 21 *Nicotine Tobacco Research* 1274 (Aug. 19, 2019), <https://www.ncbi.nlm.nih.gov/pubmed/30346584> (about 82%, for averages of 164 µg per puff).

<sup>73</sup> *See, e.g.*, INREJUUL\_00023597 ([REDACTED]).

<sup>74</sup> JLI00365905.

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>75</sup>

59. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>76</sup>

60. [REDACTED]

[REDACTED]<sup>77</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>78</sup> [REDACTED]

[REDACTED]<sup>79</sup>

61. [REDACTED]

[REDACTED]<sup>80</sup> [REDACTED]

[REDACTED]<sup>81</sup>

62. [REDACTED]

[REDACTED]

[REDACTED]

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<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> JLI00365709.

<sup>77</sup> JLI00365176.

<sup>78</sup> INREJUUL\_00058345.

<sup>79</sup> *Id.*

<sup>80</sup> JLI00364678.

<sup>81</sup> JLI00364487.

[REDACTED]

[REDACTED] <sup>82</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>83</sup>

63. [REDACTED]

[REDACTED] JLI took no steps to offer U.S. consumers its products in a lower nicotine formulation until August 2018, when it began marketing certain flavors in 3% nicotine strength. (JLI markets 1.7% nicotine JUULpods in countries such as the UK and Israel.) Instead, JLI’s sales force emphasized the addictiveness of its formulation to persuade retailers to give the new product shelf space. Vincent Latronica, head of East Coast sales and distribution for JLI (then called PAX Labs) from 2014 until early 2016, told Reuters that he used a chart showing JUUL’s rapid delivery of nicotine to the bloodstream as a way to convince store owners that they would have repeat business and not be left with unsold inventory, and this became a central selling point for the new JLI product.<sup>84</sup> JLI’s sales team was, in Latronica’s words, “relentless.”<sup>85</sup>

64. [REDACTED] For

example, [REDACTED]

[REDACTED] He wrote:

<sup>82</sup> INREJUUL\_00260068.

<sup>83</sup> INREJUUL\_00260065.

<sup>84</sup> Kirkham, *supra* note 53.

<sup>85</sup> *Id.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>86</sup>

65. Another example came just days later. On [REDACTED]

[REDACTED]

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<sup>86</sup> INREJUUL\_00264888-890.

[REDACTED]

[REDACTED]<sup>87</sup>

66. Instead of taking steps to reduce the addictive nature of its products and to stop its advertising to youth, JLI doubled down. [REDACTED]

[REDACTED]

[REDACTED]<sup>88</sup>

**B. Following Big Tobacco’s Playbook, JLI Launched JUUL with a Blatantly Youth-Oriented Campaign**

**1. JLI learned from Big Tobacco the importance of hooking kids.**

67. JLI also looked to Big Tobacco for other marketing strategies, including advertisements designed to lure non-smoking youth.

68. [REDACTED]

[REDACTED]

[REDACTED]<sup>89</sup> In addition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>90</sup>

69. As discussed above, Monsees and Bowen were also able to take advantage of an extensive online tobacco advertising research database maintained by the Stanford Research into the Impact of Tobacco Advertising (“SRITA”), an inter-disciplinary research group devoted to

<sup>87</sup> INREJUUL\_00230416.

<sup>88</sup> INREJUUL\_00228928-930.

<sup>89</sup> INREJUUL\_00371447.

<sup>90</sup> INREJUUL\_00371458-459.

researching the promotional activities of the tobacco industry. SRITA's database contains approximately 50,000 original tobacco advertisements. According to Monsees, JLI's advertising was informed by traditional tobacco advertisements, and SRITA in particular had been very useful to JLI.<sup>91</sup>

70. It is no secret that a good portion of the Big Tobacco playbook involved targeting youth. Beginning in the 1950s, Philip Morris—now JLI's corporate affiliate—intentionally marketed cigarettes to young people under the age of twenty-one to recruit “replacement smokers” to ensure the economic future of the tobacco industry.<sup>92</sup> Philip Morris knew that youth smoking was essential to the tobacco industry's success and longevity, as one of its internal documents makes clear: “It is important to know as much as possible about teenage smoking patterns and attitudes. Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens.”<sup>93</sup> In August 1953, Elmo Roper & Associates on Philip Morris' behalf, conducted a study that examined the smoking habits of a “cross section of men and women 15 years of age and over.”<sup>94</sup> The study noted that Philip Morris had “very great strength among young people-particularly under 20.”<sup>95</sup> In 1975, Philip Morris recognized that “Marlboro's phenomenal growth rate in the past has been attributable in large part to our high market penetration among young smokers . . . 15 to 19 years old . . . my own data, which includes younger teenagers, shows even higher Marlboro market

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<sup>91</sup> Jackler et al., *supra* note 46 at 27.

<sup>92</sup> *U.S. v. Philip Morris USA, Inc.* (“*Philip Morris*”), 449 F. Supp. 2d 1, 618-622 (D.D.C. 2006).

<sup>93</sup> *Tobacco Company Quotes on Marketing to Kids*, Campaign for Tobacco-Free Kids (May 14, 2001), <https://www.tobaccofreekids.org/assets/factsheets/0114.pdf>.

<sup>94</sup> *Philip Morris*, 449 F. Supp. 2d at 580 (citing Burns W. Roper, *A Study of People's Cigarette Smoking Habits and Attitudes*, N.Y. Roper (1953)).

<sup>95</sup> *Id.*



penetration among 15-17-year-olds.”<sup>96</sup> Similarly, an internal Philip Morris document reported that “[t]he success of Marlboro Red during its most rapid growth period was because it became the brand of choice among teenagers who then stuck with it as they grew older.”<sup>97</sup> This was no accident. Philip Morris designed its marketing campaigns to appeal to youth because they recognized that “[t]oday’s teenager is tomorrow’s potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens.”<sup>98</sup> This marketing worked, and Marlboro cigarettes became the most popular brand with youth. In 2016, 48.7% of high school current cigarette smokers and 38.3% of middle school current cigarette smokers reported using Marlboro cigarettes.<sup>99</sup>

71. Tobacco companies have focused on the fourteen to twenty-four-year-old age group because young smokers have been the critical factor in the growth of their business. As the Vice-President of Marketing at R.J. Reynolds explained in 1974, the “young adult . . . market . . . represent[s] tomorrow’s cigarette business. As this 14-24 age group matures, they will account for a key share of the total cigarette volume—for at least the next 25 years.”<sup>100</sup> In 1978,

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<sup>96</sup> *Philip Morris and Targeting Kids*, Campaign for Tobacco-Free Kids (Oct. 8, 1999), [https://www.tobaccofreekids.org/assets/content/what\\_we\\_do/industry\\_watch/doubletalk/philip\\_morris.pdf](https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/doubletalk/philip_morris.pdf).

<sup>97</sup> *Id.*

<sup>98</sup> *Tobacco Company Quotes on Marketing to Kids*, *supra* note 93.

<sup>99</sup> Siobhan N. Perks *et al.*, *Cigarette Brand Preference and Pro-Tobacco Advertising Among Middle and High School Students—United States, 2012- 2016*, CDC Morbidity & Mortality Wkly. Rep. [MMWR] (Feb. 2, 2018), [https://www.cdc.gov/mmwr/volumes/67/wr/mm6704a3.htm?s\\_cid=mm6704a3\\_w](https://www.cdc.gov/mmwr/volumes/67/wr/mm6704a3.htm?s_cid=mm6704a3_w).

<sup>100</sup> C.A. Tucker, *Marketing Plans Presentation to RJRI B of D* at 2, U.C.S.F. Truth Tobacco Indus. Documents (Sept. 30, 1974), <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=ypmw0091>.

Lorillard’s Director of Sales in the Midwest told the president of the company that “the base of our business is the high school student.”<sup>101</sup>

72. According to the Surgeon General, “[n]early 9 out of 10 smokers start smoking by age 18, and more than 80% of underage smokers choose brands from among the top three most heavily advertised.”<sup>102</sup> The overwhelming consensus from public health authorities, independent studies, and credible expert witnesses is that “marketing is a substantial contributing factor to youth smoking initiation.”<sup>103</sup>

73. For decades, cigarette companies spun smoking as signifier of adulthood. This turned smoking into a way for teenagers to project independence and enhance their image among their peers.<sup>104</sup> R.J. Reynolds’s now-infamous Joe Camel “ambassador of Cool” advertising campaign, which ran from 1988 through 1997, exemplifies the importance the tobacco industry placed on hooking young smokers early.<sup>105</sup>

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<sup>101</sup> *Tobacco Company Quotes on Marketing to Kids*, *supra* note 93; *see also Philip Morris*, 449 F. Supp. 2d at 596.

<sup>102</sup> *Preventing Tobacco Use Among Youths, Surgeon General Fact Sheet*, U.S. Dep’t Health & Human Servs. (June 6, 2017), <https://www.hhs.gov/surgeongeneral/reports-and-publications/tobacco/preventing-youth-tobacco-use-factsheet/index.html>.

<sup>103</sup> *Philip Morris*, 449 F. Supp. 2d at 570.

<sup>104</sup> *Id.* at 576 (“the ubiquity of Defendants’ marketing increases young peoples’ perceptions of the prevalence of smoking (‘everyone is doing it’), normalizes smoking, and connects positive imagery (sex appeal, popularity, peer approval, success, and independence) with smoking, all of which work together to encourage youth smoking initiation and continued consumption”); *see also id.* at 617-19.

<sup>105</sup> *Joe Camel: Character of the Year Advertisement*, Stan. U. Res. into the Impact of Tobacco Advert. (1990), [http://tobacco.stanford.edu/tobacco\\_main/images.php?token2=fm\\_st138.php&token1=fm\\_img4072.php&theme\\_file=fm\\_mt015.php&theme\\_name=Targeting%20Teens&subtheme\\_name=Joe%20Camel](http://tobacco.stanford.edu/tobacco_main/images.php?token2=fm_st138.php&token1=fm_img4072.php&theme_file=fm_mt015.php&theme_name=Targeting%20Teens&subtheme_name=Joe%20Camel).



74. Big Tobacco, of course, is now prohibited from employing youth-oriented marketing strategies to sell traditional cigarettes by virtue of the Master Settlement Agreement and subsequent regulations. For example, combustible cigarette companies may not:

- A. use outdoor advertising such as billboards;
- B. sponsor events;
- C. give free samples;
- D. pay any person to “use, display, make reference to or use as a prop any Tobacco Product, Tobacco Product package . . . in any “Media;”
- E. pay any third party to conduct any activity which the tobacco manufacturer is prohibited from doing; or
- F. sell “flavored” cigarettes.

75. All of these above activities were prohibited precisely because of their effectiveness at appealing to youth. But nothing prevented JLI from using these same strategies to market e-cigarettes.

76. As described below, all of these activities figured prominently in the marketing campaign for JUUL products.

**2. JLI’s advertising strategy was [REDACTED] to capture young nonsmokers, not adult smokers.**

77. Contrary to JLI’s and Altria’s recent statements that JUUL was only ever marketed to adult smokers, JLI’s internal documents show that, from the outset, JLI’s target demographic was nonsmoking [REDACTED]

78. Consistent with Monsees’ position that he has no “qualms” with marketing to people that were not yet addicted to nicotine,<sup>106</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>107</sup> In [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>108</sup>

[REDACTED]

<sup>106</sup> D. Freedman, *supra* note 36.

<sup>107</sup> INREJUUL\_00441209.

<sup>108</sup> INREJUUL\_00057291 *et seq.* (emphasis added).

79. JLI’s strategy to cultivate an aura of “cool” around its nicotine-delivery device is, of course, not new. Decades before, Dr. Teague from R.J. Reynolds observed that “pre-smokers” face “psychological pressure” to smoke if their peers are doing so, “a new brand aimed at a young smoker must somehow be the ‘in’ brand and its promotion should emphasize togetherness, belonging and group acceptance, while at the same time emphasizing ‘doing one’s own thing.’”<sup>109</sup> Struggling to define their own identities, teenagers are particularly vulnerable to image-heavy advertisements that psychologically cue them on the “right” way to look and behave amongst peers.<sup>110</sup> Advertisements that map onto adolescent aspirations and vulnerabilities drive adolescent tobacco product initiation.<sup>111</sup>

80. JLI followed this playbook to the letter. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>112</sup> [REDACTED]

<sup>113</sup> [REDACTED]

[REDACTED]” fairly describes most adolescents—but has little relevance to existing smokers wishing to quit their cigarette habit.

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<sup>109</sup> Teague, *supra* note 51.

<sup>110</sup> *Philip Morris*, 449 F. Supp. 2d at 578.

<sup>111</sup> *Id.* at 570, 590.

<sup>112</sup> INREJUUL\_00057298-487.

<sup>113</sup> *Id.*

81. [REDACTED]

[REDACTED]<sup>114</sup> [REDACTED]

[REDACTED]<sup>115</sup>

82. Other internal documents emphasize the theme of making JUUL trendy and cool.

[REDACTED]

[REDACTED]

[REDACTED]<sup>116</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>117</sup> [REDACTED]

[REDACTED]<sup>118</sup> For example, [REDACTED]

[REDACTED]

[REDACTED]<sup>119</sup> [REDACTED]

[REDACTED]<sup>120</sup> [REDACTED]

[REDACTED]<sup>121</sup>

83. This focus on [REDACTED] continued up to and after launch. [REDACTED]

[REDACTED]

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<sup>114</sup> *Id.*

<sup>115</sup> INREJUUL\_00277080-104.

<sup>116</sup> INREJUUL\_00057289.

<sup>117</sup> INREJUUL\_00057293.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> INREJUUL 00441325-326.

[REDACTED]

[REDACTED] <sup>122</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>123</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>124</sup> [REDACTED]

[REDACTED] <sup>125</sup> [REDACTED] <sup>126</sup> [REDACTED]

[REDACTED]

84. In addition, JLI identified [REDACTED]

[REDACTED]

[REDACTED] <sup>127</sup>

**3. JLI’s “Vaporized” campaign was intentionally youth-focused.**

85. As noted above, JLI’s first major marketing hire was Cult Collective. JLI engaged the Calgary-based advertising agency in 2014 to complete a “diagnostic” evaluation of the JLI brand and to make recommendations regarding the best advertising strategy to market the JUUL e-cigarette.

86. Cult Collective recommended that JLI position its e-cigarette technology as the focus of its advertisements, emphasizing JUUL as an alternative option for existing smokers.

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<sup>122</sup> JLI00218598.  
<sup>123</sup> JLI00206206.  
<sup>124</sup> JLI00222528.  
<sup>125</sup> JLI00461564.  
<sup>126</sup> JLI00235965.  
<sup>127</sup> INREJUUL\_00161703-715.

Cult Collective presented JLI with exemplar advertisements that used images of a boom box and a joy stick, juxtaposed against the JUUL e-cigarette, with the tag line: “Everything changes, eventually. JUUL | The evolution of smoking | *Finally, a truly satisfying alternative.*”<sup>128</sup>



87. This campaign expressly invokes combustible cigarettes and positions JUUL as a technological upgrade for the modern smoker.

88. But JLI rejected Cult Collective’s suggestion, instead choosing to run a campaign that experts would later describe as “patently youth oriented.”<sup>129</sup>

<sup>128</sup> Complaint ¶ 41, *Commonwealth of Massachusetts v. JUUL Labs, Inc.*, No. 2084CV00402 (Mass. Super. Ct. Feb. 12, 2020), <https://www.mass.gov/doc/juul-complaint/download> (emphasis added).

<sup>129</sup> Robert K. Jackler, *The Role of the Company in the Juul Teen Epidemic, Testimony of Robert Jackler before the House Subcommittee on Economic and Consumer Policy* (“Jackler Testimony”) at 2 (July 24, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019.07.24%20Jackler%20Testimony.pdf>.



89. JLI's 2015 ad campaign, called "Vaporized," was designed to create a "cult-like following" for JUUL products.<sup>130</sup> The Vaporized campaign's imagery featured a vivid color scheme and models in their twenties in poses that researchers noted are evocative of behaviors more characteristic of underage teens than mature adults.<sup>131</sup> Researchers from the SRITA found it "clear" that this imagery resonated with underage teens who aspire to emulate trendsetting young adults.<sup>132</sup>



<sup>130</sup> *Id.* at 4.

<sup>131</sup> Jackler et al., *supra* note 46 at 1.

<sup>132</sup> *Id.* at 7.



90. JLI recognized that the models in these advertisements looked young and were likely to appeal to youth, but it launched the campaign anyway. [REDACTED]

[REDACTED]

[REDACTED]<sup>133</sup> [REDACTED]

[REDACTED]<sup>134</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>135</sup> “Monsees,

who was CEO at the time, personally reviewed images from the billboard photo shoot while it was in session.”<sup>136</sup> A senior manager later told *The New York Times* that “he and others in the

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<sup>133</sup> INREJUUL\_00371285.

<sup>134</sup> INREJUUL\_00371314.

<sup>135</sup> INREJUUL\_00174387.

<sup>136</sup> Ainsley Harris, *How Juul, founded on a life-saving mission, became the most embattled startup of 2018: E-cigarette startup Juul Labs is valued at more than \$16 billion. It’s also hooking teens on nicotine and drawing scrutiny from the FDA. Can the company innovate its way out of a crisis it helped create?*, Fast Co. (Nov. 19, 2018), <https://www.fastcompany.com/90262821/how-juul-founded-on-a-life-saving-mission-became-the-most-embattled-startup-of-2018>.

company were well aware” that the marketing campaign “could appeal to” teenagers.<sup>137</sup>

91. JLI knew these images would be successful with a youth market because it intentionally crafted them to mimic specific ads that Big Tobacco had used to target teens. In fact, many JUUL ads were nearly identical to old cigarette ads that were designed to get teens to smoke.



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<sup>137</sup> Matt Richtel & Sheila Kaplan, *Did Juul Lure Teenagers and Get ‘Customers for Life’?*, N.Y. Times (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/science/juul-vaping-teen-marketing.html>.

<sup>138</sup> *Virginia Slims vs Juul Advertisement*, Stan. U. Res. into the Impact of Tobacco Advert. (2015), [http://tobacco.stanford.edu/tobacco\\_main/images-comp.php?token2=fm\\_tn\\_st328.php&token1=fm\\_tn\\_img10799.php&theme\\_file=fm\\_tn\\_mt035.php&theme\\_name=Cigs%20vs.%20eCigs&subtheme\\_name=Cigs%20vs%20eCigs%20JUUL](http://tobacco.stanford.edu/tobacco_main/images-comp.php?token2=fm_tn_st328.php&token1=fm_tn_img10799.php&theme_file=fm_tn_mt035.php&theme_name=Cigs%20vs.%20eCigs&subtheme_name=Cigs%20vs%20eCigs%20JUUL).

<sup>139</sup> Julia Belluz, *The Vape Company Juul Said It Doesn’t Target Teens. Its Early Ads Tell a Different Story*, Vox (Jan. 25, 2019), <https://www.vox.com/2019/1/25/18194953/vape-juul-e-cigarette-marketing>.

92. JLI's officers and directors were well aware that JLI's branding of JUUL products was oriented toward youth and duplicated earlier efforts by the cigarette industry to hook children on nicotine. JLI's officers and directors directed and approved JLI's branding of JUUL products to be oriented toward youth. JLI's officers and directors [REDACTED]

[REDACTED]

93. JLI's officers and directors [REDACTED]

[REDACTED]

[REDACTED]<sup>140</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>141</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>142</sup> [REDACTED]

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<sup>140</sup> Examining JLI's Role in the Youth Nicotine Epidemic: Part II: Hearing Before the Subcommittee on Economic and Consumer Policy of the Committee on Oversight and Reform, House of Representatives, 116<sup>th</sup> Cong. 70 (2019) (statement of Monsees, CPO, JLI).

<sup>141</sup> JLI00206239.

<sup>142</sup> JLI00214617.

<sup>143</sup> *Id.*

[REDACTED]

[REDACTED]

[REDACTED]<sup>144</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>145</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>146</sup>

94. This recognition notwithstanding, JLI’s officers and directors pressed on with JLI’s youth-oriented campaign. Some of JLI’s leaders, such as Board member Hoyoung Huh, opposed any actions to curb youth sales. Youth sales were a large potential source of revenue.<sup>147</sup> As one manager explained, perhaps “people internally had an issue” with sales of JUUL to teenagers, “[b]ut a lot of people had no problem with 500 percent year-over-year growth.”<sup>148</sup> And JLI’s leaders understood that the youth who were hooked on nicotine were the most likely to become lifelong customers and thus were the most profitable segment to target.<sup>149</sup>

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<sup>144</sup> *Id.*  
<sup>145</sup> *Id.*  
<sup>146</sup> *Id.* (emphasis added).  
<sup>147</sup> Kirkham, *supra* note 53.  
<sup>148</sup> *Id.*  
<sup>149</sup> *Id.*

95. So in June 2015, JLI launched the “Vaporized” advertising campaign,<sup>150</sup> with [REDACTED]  
[REDACTED]<sup>151</sup> JLI aggressively sought high-visibility spaces with youth appeal. For example, Vaporized ads occupied the front spread of the July 2015 issue of *VICE Magazine*, which bills itself as the “#1 youth media brand” in the world, and a twelve-unit billboard display in New York City’s Times Square.<sup>152</sup>



153

96. JLI’s advertisements were also placed on websites attractive to children, adolescents in middle school and high school, and underage college students. These advertisements, which included the images of models from the Vaporized campaign, began

<sup>150</sup> Declan Harty, *JUUL Hopes to Reinvent E-Cigarette Ads with ‘Vaporized Campaign’*, AdAge (June 23, 2015), <https://adage.com/article/cmo-strategy/juul-hopes-reinvent-e-cigarette-ads-campaign/299142>.

<sup>151</sup> INREJUUL\_00057291-295.

<sup>152</sup> Kathleen Chaykowski, *The Disturbing Focus of Juul’s Early Marketing Campaigns*, Forbes (Nov. 16, 2018), <https://www.forbes.com/sites/kathleenchaykowski/2018/11/16/the-disturbing-focus-of-juuls-early-marketing-campaigns/#3da1e11b14f9>; see also Harty, *supra* note 150.

<sup>153</sup> [http://tobacco.stanford.edu/tobacco\\_web/images/pod/juul/timesquare/large/times\\_17.gif](http://tobacco.stanford.edu/tobacco_web/images/pod/juul/timesquare/large/times_17.gif); see also Erin Brodwin, *Silicon Valley e-cig startup Juul ‘threw a really great party’ to launch its devices, which experts say deliberately targeted youth*, Bus. Insider (Sept. 4, 2018), <https://www.businessinsider.com/juul-e-cig-startup-marketing-appealed-to-teens-2018-7>.

appearing on websites as early as June 2015. The websites included: nickjr.com (the website for a children’s television network run by Nickelodeon Group); cartoonnetwork.com (Cartoon Network’s website); allfreetidscrafts.com; hellokids.com; and kidsgameheroes.com. In addition, JLI purchased banner advertisements on websites providing games targeted to younger girls,<sup>154</sup> educational websites for middle school and high school students,<sup>155</sup> and other teen-targeted websites.<sup>156</sup>

97. JLI knew these websites targeted children. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>157</sup> Nevertheless, JLI continued to push its campaign on websites with young demographics.

98. As discussed further below, JLI also promoted the Vaporized campaign on Facebook, Instagram, and Twitter. JLI could have employed age-gating on its social media accounts to prevent underage consumers from viewing its Vaporized advertisements, but chose not to do so.

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<sup>154</sup> The sites included dailydressupgames.com, didigames.com, forhergames.com, games2girls.com, girlgames.com, and girlsgogames.com.

<sup>155</sup> *E.g.*, coolmath-games.com. JLI also purchased advertisements on basic-mathematics.com, coolmath.com, math-aids.com, mathplayground.com, mathway.com, onlinemathlearning.com, and purplemath.com.

<sup>156</sup> *E.g.*, teen.com, seventeen.com, justjaredjr.com, and hireteen.com. JLI purchased advertisements on websites for high school students hoping to attend college such as collegeconfidential.com and collegeview.com.

<sup>157</sup> INREJUUL\_00082179-185 (emphasis added).

99. The Vaporized campaign included the largest e-cigarette smartphone campaign of 2015, which accounted for 74% of all such smartphone advertising that year.<sup>158</sup>

100. [REDACTED]

[REDACTED]<sup>159</sup>

**4. JLI hosted parties and pop-up “JUUL Lounges” to create a youthful brand and gave away free samples to get youth hooked.**

101. In addition to print media, JLI utilized events, promotional models, and free samples to market JUUL products. Over the first year after JLI launched its ad campaign in June 2015, it held a series of at least twenty-five highly stylized parties, typically with rock music entertainment, in cities across the United States.<sup>160</sup>



102. Photographs from these events confirm that they drew a youthful crowd.

<sup>158</sup> Jackler et al., *supra* note 46 at 19.

<sup>159</sup> INREJUUL\_00093933-934.

<sup>160</sup> Jackler et al., *supra* note 46 at 4.





103. At these launch parties, thousands of young people were given free JUUL devices and nicotine-filled JUULpods (appropriately named “JUUL starter kits”), and JLI posted photos of various young people enthusiastically puffing on JUULs across JLI’s social media channels.<sup>161</sup>

104. In addition, JLI gave away samples at music events without age restrictions, including Outside Lands in San Francisco’s Golden Gate Park, and other events aimed a youthful audience, such as the annual Cinespia “Movies All Night Slumber Party” in Los Angeles. These events, in addition to providing youthful crowds for handing out samples, were opportunities for JLI to cultivate its brand image as youthful, hip, and trendy—but had nothing to do with smoking cessation. For example, on August 7, 2015, JLI tweeted, “Need tix for @cinespia 8/15? We got you. Follow us and tweet #JUULallnight and our faves will get a pair of tix!”<sup>162</sup>

105. As part of the Vaporized campaign, JLI also emulated trendy pop-up restaurants and stores by using a shipping container “pop-up JUUL bar” at festivals and events in the Los Angeles and New York City metro areas. The firm BeCore designed and created the container

<sup>161</sup> Jackler et al., *supra* note 46 at 4; Chaykowski, *supra* note 152.

<sup>162</sup> JUUL Labs, Inc. (@JUULvapor), Twitter (Aug. 7, 2015), [http://tobacco.stanford.edu/tobacco\\_web/images/pod/juul/twitter/large/twitter\\_18.jpg](http://tobacco.stanford.edu/tobacco_web/images/pod/juul/twitter/large/twitter_18.jpg).

for JLI, and managed it as a mobile JUUL product sampling lounge. BeCore reported that, on average, it “exceeded the sampling goals set by JUUL for each location (average number of samples/event distributed equals 5,000+.”<sup>163</sup>



**Juul's container bar**

164

106. JLI also held sampling events of JUUL products in stores. [REDACTED]

[REDACTED]<sup>165</sup>

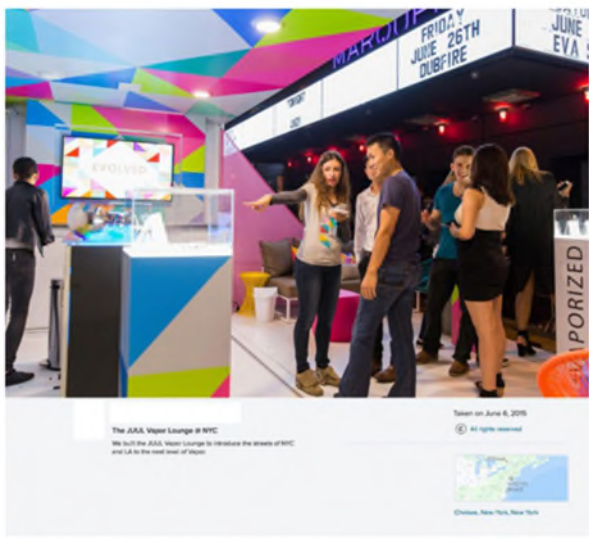
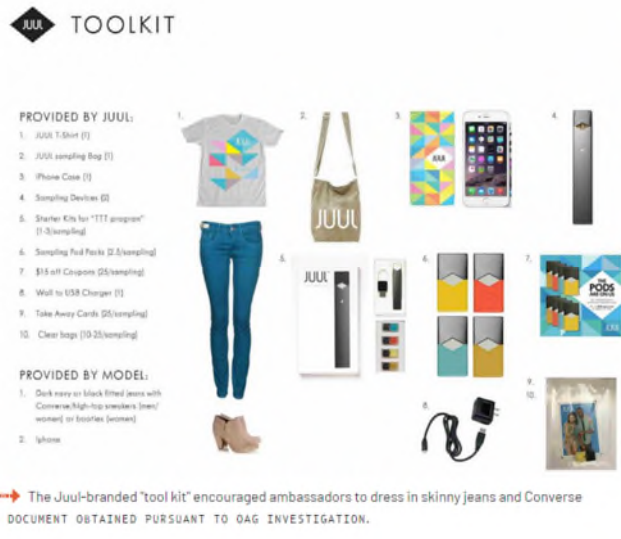
107. Documents obtained by the New York Attorney General show that JLI recruited young “brand ambassadors” to staff its events and required a dress code that included skinny jeans, high-top sneakers or booties, and an iPhone in a JUUL-branded case.<sup>166</sup>

<sup>163</sup> Jackler et al., *supra* note 46 at 9.

<sup>164</sup> Harty, *supra* note 150.

<sup>165</sup> INREJUUL\_00160394.

<sup>166</sup> Jake Offenhartz, *Juul Hooked Teens Through Sick Parties and Hip Ambassadors*, *NY AG Says*, *Gothamist* (Nov. 19, 2019), <https://gothamist.com/news/juul-hooked-teens-through-sick-parties-and-hip-ambassadors-ny-ag-says>; Chaykowski, *supra* note 152.



108. JLI engaged PUSH Agency, LLC (“PUSH”), a promotional model and event staffing agency, to provide models and brand ambassadors to hand out coupons in trendy areas of New York City popular with young people. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 167

109. Though JLI publicly acknowledged in October 2017 that it is unlawful to distribute free samples of its products at live events,<sup>168</sup> it continued to reach out to new users by offering samples, sometimes at \$1 “demo events.” Like so many of JLI’s initiatives, promotions of this kind are prohibited for cigarette companies by the Master Settlement Agreement.

<sup>167</sup> INREJUUL\_00158794-803.

<sup>168</sup> See Nik Davis (@bigbabynik), Twitter (Nov. 17, 2017 1:11 PM), <https://twitter.com/JLIVapor/status/931630885887266816>; see also Jackler Testimony, *supra* note 129.

110. The effect—and purpose—of JLI’s Vaporized giveaways was to flood major cities with JUUL products that would hook thousands of new users, and to generate buzz for the brand among urban trendsetters who would then spread JLI’s message to their friends via word of mouth and social media.

**5. By using viral advertising, JLI ensured that Its advertising campaigns would reach youth and outlast JLI’s own efforts.**

111. JLI not only used Big Tobacco’s advertising imagery and giveaways in a manner that reached youth, but also coupled traditional advertisements with an aggressive social media marketing campaign. Through the use of social media, JLI has been able to operate an even more pervasive, insidious, and successful viral marketing campaign than its predecessors in the tobacco industry. [REDACTED]

[REDACTED]<sup>169</sup>

[REDACTED]

112. JLI was particularly active on Instagram, which is the most popular social media site among teens.<sup>170</sup> JLI cultivated hashtags, allowing it to blend JUUL products’ ads in with a wide range of user content, increasing exposure while concealing the commercial nature of the

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<sup>169</sup> INREJUUL\_00349541.

<sup>170</sup> Jackler et al., *supra* note 46.

content.<sup>171</sup> JLI then used hashtags to reinforce the themes it crafted in the JUUL products’ design, like #style, #technology, #smart, and #gadget. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>172</sup>

113. JLI’s hashtags attracted an enormous community of youthful posts on a wide array of subjects. According to Dr. Jackler, #Juul contains literally thousands of juvenile postings, and numerous Instagram hashtags contain the JUUL brand name.<sup>173</sup>

114. A key feature of JLI’s viral marketing campaign was inviting user-generated content. This strategy revolves around prompting social media followers to provide their own JUUL-related content—posting selfies in their favorite places to use JUUL products, for example. The response provided by a user is then typically distributed by the social media platform employed into the user’s personal network. In this way, brands can infiltrate online communities with personalized content that promotes their products, such as a picture of a friend using a JUUL e-cigarette at the beach.

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<sup>171</sup> *Id.* at 23.

<sup>172</sup> INREJUUL\_00093294.

<sup>173</sup> Jackler Testimony, *supra* note 129 at 10.



115. Just as JLI intended, JUUL users began taking photos of themselves using JUUL devices and putting them on social media with the hashtag #juul. They were creating JLI content that looked and felt like real JLI ads: featuring young people having fun and using JUUL. JLI’s flavor-based hashtag campaigns #MangoMonday and #coolmint generated hundreds of thousands of user-generated posts. Within a few months of JLI’s commercial release of JUUL in June 2015, a former JLI executive reportedly told *The New York Times* that JLI “quickly realized that teenagers were, in fact, using [JUULs] because they posted images of themselves vaping JUULs on social media.”<sup>174</sup> Some JLI executives sought to take advantage of this to build the JUUL brand. For example, [REDACTED]

<sup>174</sup> Richtel & Kaplan, *supra* note 137.

[REDACTED]<sup>175</sup> [REDACTED]

[REDACTED]<sup>176</sup>

116. JLI also sought to work with high profile “influencers” that appeal to youth. JLI used these [REDACTED]

[REDACTED]

[REDACTED]<sup>177</sup> Influencers are prized sources of brand promotion on social media networks.

117. Documents obtained pursuant to a Congressional investigation show that in July 2015, JLI’s contract with Grit was for services that including “Influencer Relations,” in which Grit agreed to provide two “Social Buzzmakers” for six events within a four-week period, with each Social Buzzmaker having a minimum of 30,000 followers and be active on at least two social media channels, such as Instagram, Twitter, or Facebook. The contract provided that JLI would determine or approve the timing of the Buzzmakers’ posts. In addition, JLI engaged Grit to “develop influencer engagement efforts to establish a network of creatives to leverage as loyalists for Juul/Pax brand activations.”<sup>178</sup>

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<sup>175</sup> JLI00382271.

<sup>176</sup> JLI00382271.

<sup>177</sup> See INREJUUL 00091138 ([REDACTED]).

<sup>178</sup> Kenrick Cai, *Juul Funded High Schools, Recruited Social Media Influencers To Reach Youth, House Panel Charges*, Forbes (July 25, 2019), <https://www.forbes.com/sites/kenrickcai/2019/07/25/juul-high-schools-influencers-reach-youth-house-investigation/#57735a4a33e2>. See JLI-HOR-00042050.

118. Like its Vaporized campaign, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>179</sup> In keeping with this strategy, JLI targeted influencers that were young and popular with adolescents. One influencer JLI targeted was Tavi Gevinson, who was nineteen years old in the summer of 2015. The year before, *Rolling Stone* magazine described Gevinson as “possibly the most influential 18-year-old in America.”<sup>180</sup>

119. JLI contracted with Grit to enlist influencers by sending them free JUUL e-cigarettes. Grit provided free JUUL products to Luka Sabbat, known as the “the Internet’s Coolest Teenager,”<sup>181</sup> who was seventeen years old during the summer of 2015.

120. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]<sup>182</sup>

121. JLI paid these social media influencers to post photos of themselves with JUUL devices and to use the hashtags that it was cultivating.<sup>183</sup> One such influencer was Christina Zayas, whom JLI paid \$1,000 for just one blog post and one Instagram post in the fall of 2017.

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<sup>179</sup> INREJUUL\_00057293.

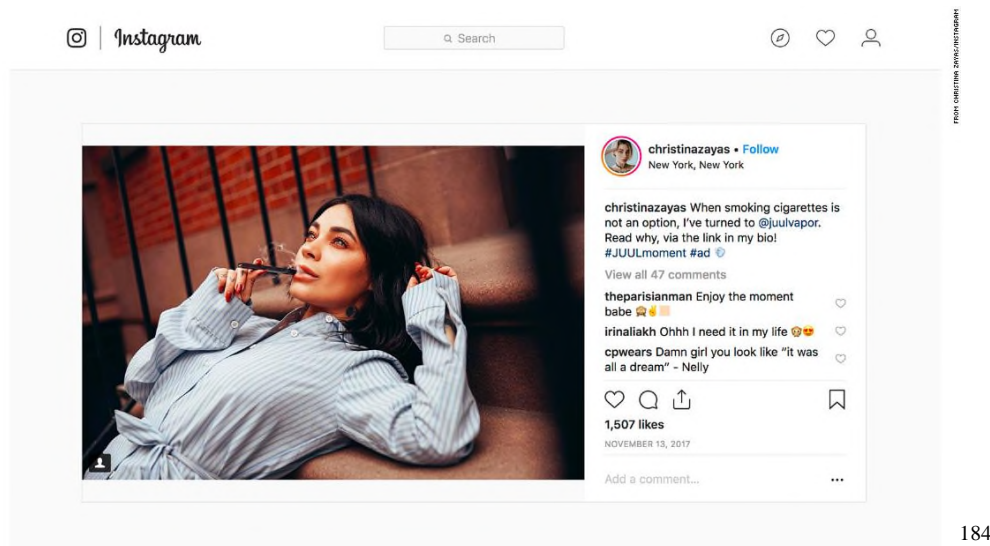
<sup>180</sup> Alex Morris, *Tavi Gevinson: A Power Teen’s New Direction*, *Rolling Stone* (Aug. 14, 2014), <https://www.rollingstone.com/culture/culture-features/tavi-gevinson-a-power-teens-new-direction-232286/>.

<sup>181</sup> Alexis Barnett, *Who Is Luka Sabbat? Meet the Internet’s Coolest Teenager*, *Complex* (Aug. 17, 2015), <https://www.complex.com/style/luka-sabbat-interview-on-youth-kanye-west-and-fashion>.

<sup>182</sup> See INREJUUL 00091141 ([REDACTED]).

<sup>183</sup> Jackler et al., *supra* note 46 at 19-21.





122. JLI encouraged its distributors, wholesalers, and other resellers—either explicitly or implicitly—to hire affiliates and influencers to promote JLI’s brand and JUUL products. Even if not paid directly by JLI, these influencers profited from the promotion of JUUL products either because they were paid by JUUL resellers, JUUL accessory sellers, or sellers of JUUL-compatible products.

123. For example, one YouTube user Donnysmokes (Donny Karle, age twenty-one) created a JUUL products promotional video in 2017 that garnered roughly 52,000 views, many of which were from users under the age of eighteen.<sup>185</sup> Since that time, Karle has made a series of videos, including videos: *How to hide your JUUL from your parents*; and *How to HIDE & HIT Your JUUL at SCHOOL WITHOUT Getting CAUGHT*.<sup>186</sup> Karle has admitted to earning

<sup>184</sup> Michael Nedelman et al., *#Juul: How social media hyped nicotine for a new generation*, CNN Health (Dec. 19, 2018), <https://www.cnn.com/2018/12/17/health/juul-social-media-influencers/index.html>.

<sup>185</sup> Jackler Testimony, *supra* note 129.

<sup>186</sup> *Id.*

approximately \$1,200 a month from unspecified sources simply from posting videos of himself consuming e-cigarettes, especially of JUUL products online.<sup>187</sup>



124. Karle also created a YouTube sensation called the “JUUL Challenge,” which is a play on the viral “Ice Bucket Challenge.” In the JUUL Challenge, the goal is to suck down as much nicotine as possible within a predetermined amount of time. The JUUL Challenge, which promotes nicotine abuse and adolescent use of JUUL products, went viral like the Ice Bucket Challenge it mimicked. Soon, youth across the country were posting their own JUUL Challenge videos, a practice that continues to this day on YouTube, Instagram, Snapchat and other social media platforms. In one recent JUUL Challenge on YouTube, which has received nearly 500,000 views, the two teenagers filming themselves discussing the hundreds of thousands of views their prior JUUL Challenge received and comment upon the “virality” of their JUUL Challenge content.<sup>188</sup>

<sup>187</sup> Allie Conti, *This 21-year-old is Making Thousands a Month Vaping on YouTube*, VICE (Feb. 5, 2018), [https://www.vice.com/en\\_us/article/8xvjmk/this-21-year-old-is-making-thousands-a-month-vaping-on-youtube](https://www.vice.com/en_us/article/8xvjmk/this-21-year-old-is-making-thousands-a-month-vaping-on-youtube).

<sup>188</sup> Nate420, JUUL Challenge (Apr. 22, 2018), [https://youtu.be/gnM8hqW\\_2oo](https://youtu.be/gnM8hqW_2oo) (last visited Mar. 30, 2020).

125. JLI was aware of Karle’s videos and his young followers. [REDACTED]

[REDACTED]<sup>189</sup> And [REDACTED] it did not attempt to remove his JUUL-related content until 2018, and by then JLI’s efforts were too little, too late. [REDACTED]

[REDACTED]<sup>190</sup> JLI knowingly sought and accepted the benefits of viral marketing and user-generated content. [REDACTED]

[REDACTED]

[REDACTED]<sup>191</sup>

126. JLI recruited “affiliates” to help its viral marketing campaign. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>192</sup> JLI’s affiliates promoted JUUL products on social media platforms including YouTube, Instagram, Facebook, Snapchat, and Twitter and routinely failed to disclose that they were being paid to promote JUUL products. JLI’s “affiliate program” recruited those who authored favorable reviews of its products by providing such reviewers with a 20% discount of purchases of JUUL products.<sup>193</sup> It even recruited JUUL users to act as part of their marketing team by asking users to “refer a friend and get a discount.”<sup>194</sup>

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<sup>189</sup> INREJUUL\_00199348 ([REDACTED]).

<sup>190</sup> INREJUUL\_00349541.

<sup>191</sup> Karle000009 (undated Twitter direct messages exchange).

<sup>192</sup> INREJUUL\_00113437-441.

<sup>193</sup> Jackler Testimony, *supra* note 129 at 9-10.

<sup>194</sup> *Id.* at 9.

127. Between 2015 and 2017, JUUL-related posts on Twitter increased quadratically, which is the exact result to be expected from an effective viral marketing campaign.<sup>195</sup> JLI's growth on Instagram was likely even more rapid.

128. A 2018 study of JLI's sales and presence on social media platforms found that JLI grew nearly 700%, yet spent "no recorded money" in the first half of 2017 on major advertising channels, and spent only \$20,000 on business-to-business advertising.<sup>196</sup> Despite JLI's apparently minimal advertising spend in 2017, the study found a significant increase in JUUL-related tweets in 2017.<sup>197</sup>

129. On Instagram, the study found seven JUUL-related accounts, including @doit4juul and @JUULgirls, which accounted for 4,230 total JUUL-related posts and had more than 270,000 followers.<sup>198</sup>

130. The lead author of the study concluded that JLI was "taking advantage" of the reach and accessibility of multiple social media platforms to "target the youth and young adults . . . because there are no restrictions," on social media advertising.<sup>199</sup>

131. A large number of JLI's social media posts reached youth. The Surgeon General found that JLI's Twitter account was being followed by adolescents, and that 25% of those re-

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<sup>195</sup>See Brittany Emelle et al., *Mobile Marketing of Electronic Cigarettes in the U.S.*, Truth Initiative (May 22, 2017), <https://www.slideshare.net/YTHorg/mobile-marketing-of-electronic-cigarettes>.

<sup>196</sup>Jidong Huang et al., *Vaping versus JUULing: how the extraordinary growth and marketing of JUUL transformed the US retail e-cigarette market*, 28 *Tobacco Control* 146-52 (May 31, 2018), <https://tobaccocontrol.bmj.com/content/tobaccocontrol/28/2/146.full.pdf>.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup>Laura Kelley, *JUUL Sales Among Young People Fueled by Social Media, Says Study*, *Wash. Times* (June 4, 2018), <https://www.washingtontimes.com/news/2018/jun/4/juul-sales-among-young-people-fueled-by-social-med/>.

tweeting official JLI tweets were under eighteen years old.<sup>200</sup> Another study found that as many as half of JLI's Twitter followers were thirteen to seventeen years old.<sup>201</sup>

132. A study characterizing JLI's JUUL-related Instagram posts between March and May 2018 found that among nearly 15,000 relevant posts from over 5,000 unique Instagram accounts, more than half were related to youth or youth lifestyle.<sup>202</sup>

133. By April 2018, searching "JUUL" on YouTube yielded 137,000 videos with forty-three videos having over 100,000 views.<sup>203</sup> Of these, a huge number were plainly related to underage use, including: 1,730 videos on "hiding JUUL in school," 789 on "JUUL in school bathroom," 992 on "hiding JUUL at home," and 241 on "hiding JUUL in Sharpie."<sup>204</sup>

134. In 2018, JLI was internally collecting hundreds of social media posts—directed at JLI—informing it of JUUL's wild popularity with young people and in many cases requesting that JLI do something to stop it.<sup>205</sup>

135. But even after JLI halted its own social media posts in November 2018, viral peer-to-peer promotion among teens insured continued corporate and product visibility among

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<sup>200</sup> Adams, *supra* note 2.

<sup>201</sup> Steven Reinberg, *Study: Half of Juul's Twitter followers are teens, young adults*, United Press Int'l (May 20, 2019), [https://www.upi.com/Health\\_News/2019/05/20/Study-Half-of-Juuls-Twitter-followers-are-teens-young-adults/1981558384957/](https://www.upi.com/Health_News/2019/05/20/Study-Half-of-Juuls-Twitter-followers-are-teens-young-adults/1981558384957/).

<sup>202</sup> Lauren Czaplicki et al., *Characterizing JUUL-related posts on Instagram*, Tobacco Control 054824 (Aug. 1, 2019), <https://tobaccocontrol.bmj.com/content/early/2019/07/30/tobaccocontrol-2018-054824>.

<sup>203</sup> Divya Ramamurthi et al., *JUUL and Other Stealth Vaporizers: Hiding the Habit from Parents and Teachers*, 28 Tobacco Control 610-16 (Sept. 15, 2018), <https://tobaccocontrol.bmj.com/content/tobaccocontrol/28/6/610.full.pdf>.

<sup>204</sup> *Id.*

<sup>205</sup> Complaint for Permanent Injunction, Abatement, Civil Penalties, and Other Equitable Relief, *People v. JUUL Labs, Inc.* ("CA AG JUUL Complaint"), No. RG19043543 (Super. Ct. of Cal. Nov. 18, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/91186258.pdf>.

youth.<sup>206</sup> In fact, community posts about JUUL products increased after JLI itself quit social media in the fall of 2018. Prior to November 2018, over a quarter of a million posts appeared. In the eight months *after* JLI halted its promotional postings, the rate of community postings increased significantly, resulting in the number of posts doubling to over half a million.<sup>207</sup>

136. If JLI was concerned that other social media accounts were using its trademark in posts directed to underage audiences, JLI could have stepped in and attempted to stop the use of the word “JUUL,” including the use of all the hashtags that contain the word “JUUL.” JLI could have sought to shut down infringing accounts such as @doit4juul and @JUULgirls. JLI did not act promptly to do so. Instead, JLI repeatedly thanked and encouraged the owner of the @JUULnation Instagram account for his posting of youth-oriented JUUL content on Instagram.

**C. JLI and Its Officers and Directors Knew JLI’s Aggressively Youth-Oriented Advertising Was Hooking Kids But Continued It Anyway**

137. JLI was well aware from the beginning that its products would appeal to youth.

[REDACTED]

[REDACTED] <sup>208</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

138. But JLI’s officers and directors at this point were taking actions that went beyond the regular and legitimate business operations of JLI in order to market JUUL products to youth.

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> INREJUUL\_00056077 [Confidential].

At the same time [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>209</sup>

139. Within weeks of JUUL’s launch, on June 23, 2015, an article in *AdAge* regarding the Vaporized campaign highlighted the concerns about the youth focus of the campaign: “John Schachter, director of state communications for Campaign for Tobacco-Free Kids, expressed concern about the Juul campaign because of the youth of the men and women depicted in the campaign, especially when adjoined with the design.”<sup>210</sup> Reacting to the article that evening, JLI Marketing Manager Sarah Richardson commented, [REDACTED]

<sup>211</sup>

140. A former JLI manager, who spoke to *The New York Times* on the condition that his name not be used, said that within months of JUUL’s 2015 introduction, it became evident that teenagers were either buying JUUL products online or finding other individuals who made the purchases for them. Some people bought more JUUL kits on JLI’s website than they could individually use—sometimes ten or more devices at a time. “First, they just knew it was being bought for resale,” said the former senior manager, who was briefed on JLI’s business strategy. “Then, when they saw the social media, in fall and winter of 2015, they suspected it was teens.”<sup>212</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> Harty, *supra* note 150.

<sup>211</sup> INREJUUL00278533 (emphasis added).

<sup>212</sup> Richtel & Kaplan, *supra* note 137.

141. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>213</sup>

142. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>214</sup> But JLI did not run this campaign then and in fact did not begin focusing its advertising on switching from combustible cigarettes until 2018.<sup>215</sup>

143. JLI's officers and directors, and in particular Huh, wanted to continue their fraudulent marketing, knowing that these ads were also targeted to youth, "argu[ing] that the company couldn't be blamed for youth nicotine addiction."<sup>216</sup>

144. JLI's officers and directors had the authority to direct the marketing to JLI and approved JLI's youth marketing strategy despite their knowledge that the marketing campaigns appealed to youth.

145. In October 2015, Monsees stepped down from his role as CEO of JLI (to become Chief Product Officer) and, in his stead, Pritzker, Huh, and Valani formed an Executive Committee of the JLI Board of Directors that would take charge of fraudulently marketing JUUL

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<sup>213</sup> INREJUUL\_00339938 (emphasis added).

<sup>214</sup> JLI00214617.

<sup>215</sup> Jackler, *supra* note 129.

<sup>216</sup> Kirkham, *supra* note 53.



products, including to youth. Prior to the installation of Tyler Goldman as JLI’s new CEO in August 2016, Pritzker, Huh, and Valani used their newly formed Executive Committee to expand the number of addicted e-cigarette users through fraudulent advertising and representations to the public. They cleaned house at JLI by “dismiss[ing] other senior leaders and effectively tak[ing] over the company.”

146. [REDACTED]<sup>217</sup> [REDACTED]

[REDACTED]<sup>218</sup> Also, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>219</sup> Additionally, [REDACTED]

[REDACTED]

[REDACTED]<sup>220</sup> [REDACTED]

[REDACTED]

147. [REDACTED]

[REDACTED]

[REDACTED]

<sup>217</sup> See INREJUUL\_00278406 *et seq.* ([REDACTED]); INREJUUL\_00278410 *et seq.* ([REDACTED]).

<sup>218</sup> See INREJUUL\_00278404 *et seq.* ([REDACTED]); INREJUUL\_00278402 *et seq.* ([REDACTED]).

<sup>219</sup> INREJUUL\_00278405 ([REDACTED]).

<sup>220</sup> *Id.*

[REDACTED] <sup>221</sup> [REDACTED]

[REDACTED] <sup>222</sup>

148. By March 2016, however, JLI employees internally recognized that JLI’s efforts to market to children were too obvious. [REDACTED]

[REDACTED]

[REDACTED] <sup>223</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>224</sup> [REDACTED]

[REDACTED] <sup>225</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>226</sup> [REDACTED]

[REDACTED]

[REDACTED] <sup>227</sup> Around this time, JLI reoriented its JUUL products advertising from the explicitly youth-oriented Vaporized campaign to a more subtle approach to appeal to youth. The advertising’s key themes continued to include

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<sup>221</sup> INREJUUL\_00061856.

<sup>222</sup> INREJUUL\_00278359.

<sup>223</sup> INREJUUL\_00178377.

<sup>224</sup> INREJUUL\_00061469.

<sup>225</sup> INREJUUL\_00178379.

<sup>226</sup> INREJUUL\_00178384.

<sup>227</sup> INREJUUL\_00061274.

pleasure/relaxation, socialization/romance, and flavors<sup>228</sup>—all of which still appeal to youth, as was made clear in the Big Tobacco litigation.

149. It is clear that JLI, like Philip Morris and other Big Tobacco companies before it, targeted youth as a key business demographic. Unsurprisingly, JLI's efforts to follow these pages of Big Tobacco's playbook has yielded results: a recent study found that 15 to 17-year-olds are *sixteen times* more likely to use JUUL products than 25 to 34-year-olds.<sup>229</sup>

**D. JLI's Early Labeling and Advertising for JUUL Products Omitted the Fact that JUUL Products Contain Nicotine.**

150. As part of its strategy to market to youth and nonsmokers, JLI also did not effectively inform users that JUUL products contain nicotine. Despite making numerous revisions to JUUL products' packaging since 2015, JLI did not add nicotine warnings until forced to do so in August 2018. The original JUUL product labels had a California Proposition 65 warning indicating that the product contains a substance known to cause cancer, and a warning to keep JUULpods away from children and pets, but contained no warnings specifically about the known effects, or unknown long-term effects, of nicotine or consuming e-cigarettes/inhaling nicotine salts.

151. Moreover, many of JUUL's advertisements, particularly prior to November 2017, also did not mention that JUUL contained nicotine. In the first year after its launch, not one of JLI's 171 promotional emails said anything about the nicotine content in JUUL products.<sup>230</sup> For

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<sup>228</sup> Jackler et al., *supra* note 46 at 9.

<sup>229</sup> D.M. Vallone et al., *Prevalence and correlates of Juul use among a national sample of youth and young adults*, 28 Tobacco Control 603-09 (Oct. 29, 2018), <http://dx.doi.org/10.1136/tobaccocontrol-2018-054693>.

<sup>230</sup> Jackler et al., *supra* note 46 at 25.

example, in a July 11, 2015 email, JLI advertised its promotional events with the text, “Music, Art, & JUUL. What could be better? Stop by and be gifted a free starter kit.”<sup>231</sup> This email did not mention that JUULpods contain nicotine, nor did it say that JUUL or the free starter kits were only for adults.

152. Compounding these omissions, JLI’s marketing strategy for JUUL products was so successful in embedding its products into pop culture that it entered the vernacular as a verb. The term “juuling” also erases the connection to terms like “smoking” or “e-cigarette,” which could alert users to the true nature of the activity.

153. As a result of these omissions, many youth were unaware that JUUL products contained nicotine at all, let alone a high dose of it. One recent survey of youth and young adults ages fifteen to twenty-four found that 63% of JUUL users did not know that JUULpods always contain nicotine.<sup>232</sup>

**E. In Another Page from Big Tobacco’s Playbook, JLI Used Flavors to Hook Kids**

154. JUULpods sold in fruity or sweet flavors made the product even more attractive to adolescents. Tobacco companies have known for decades that flavored products are key to nicotine adoption by youth. A 1972 Brown & Williamson memorandum: *Youth Cigarette – New Concepts*, specifically noted the “well known fact that teenagers like sweet products.”<sup>233</sup> A 1979 Lorillard memorandum concluded that younger customers would be “attracted to products with

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<sup>231</sup> *Check out our JUUL events this Summer*, JUUL (hello@juulvapor.com) (July 11, 2015), [http://tobacco.stanford.edu/tobacco\\_web/images/pod/juul/email/large/email\\_2.jpg](http://tobacco.stanford.edu/tobacco_web/images/pod/juul/email/large/email_2.jpg).

<sup>232</sup> Willett, *supra* note 66.

<sup>233</sup> Marketing Innovations, Inc., *Brown & Williamson Tobacco Corp. Project Report: Youth Cigarette—New Concepts*, U.C.S.F. Truth Tobacco Indus. Documents (Sept. 1972), <https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=hazpd0040>.

‘less tobacco taste,’ and even proposed borrowing data from the “Life Savers” candy company to determine which flavors enjoyed the widest appeal among youth.<sup>234</sup>

155. Altria’s subsidiary U.S. Smokeless Tobacco Company (formerly called United States Tobacco Company) described the initiation of new customers through flavored products as “the graduation theory”:

New users of smokeless tobacco—attracted to the product for a variety of reasons—are most likely to begin with products that are milder tasting, more flavored, and/or easier to control in the mouth. After a period of time, there is a natural progression of product switching to brands that are more full-bodied, less flavored, have more concentrated “tobacco taste” than the entry brand.<sup>235</sup>

156. A sales manager who worked at U.S. Tobacco in the 1980s told the Wall Street Journal that “They talked about graduation all the time—in sales meetings, memos and manuals for the college program. It was a mantra.”<sup>236</sup>

157. According to 2004 data, seventeen-year-old smokers were more than three times as likely as those over the age of twenty-five to smoke flavored cigarettes and viewed flavored cigarettes as safer.<sup>237</sup> For this reason, in 2009 the FDA banned flavored cigarettes pursuant to its new authority under the Family Smoking Prevention and Tobacco Control Act of 2009. In announcing the ban, former FDA Commissioner Dr. Margaret Hamburg declared that “flavored

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<sup>234</sup> *Flavored Tobacco FAQs*, Students Working Against Tobacco, <http://swatflorida.com/uploads/flightresource/Flavored%20Tobacco%20Industry%20Quotes%20and%20Facts.pdf> (citing Sedgfield Idea Sessions 790606-790607 (June 8, 1979), Bates No. 81513681/3691) (last visited Mar. 27, 2020).

<sup>235</sup> G.N. Connolly, *The marketing of nicotine addiction by one oral snuff manufacturer*, 4 Tobacco Control 73-79 (1995), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1759392/pdf/v004p00073.pdf>.

<sup>236</sup> Alix Freedman, *Juiced Up: How a Tobacco Giant Doctors Snuff Brands to Boost Their ‘Kick,’* Wall St. J. (Oct. 26, 1994).

<sup>237</sup> Gardiner Harris, *Flavors Banned From Cigarettes to Deter Youth*, N.Y. Times (Sept. 22, 2009), <https://www.nytimes.com/2009/09/23/health/policy/23fda.html>.

cigarettes are a gateway for many children and young adults to become regular smokers.’’<sup>238</sup> A 2017 study of the cigarette flavor ban found that the ban was effective in lowering both the number of smokers and the amount smoked by smokers, though it was associated with an increased use of menthol cigarettes (the only flavor still available).<sup>239</sup>

158. The use of flavors is just as problematic with e-cigarettes. According to the Surgeon General, 85% of adolescents who use e-cigarettes use flavored varieties.<sup>240</sup> Studies also show that flavors motivate e-cigarette initiation among youth,<sup>241</sup> and that youth are much more likely to use flavored tobacco products than adults are.<sup>242</sup> Flavored e-cigarettes play a large role in the youth vaping epidemic. As mentioned above, flavors motivate e-cigarette initiation among youth and youth are much more likely to use flavored tobacco products than adults.<sup>243</sup> According to the FDA, 96% of twelve to seventeen-year-olds who recently begun using e-cigarettes

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<sup>238</sup> *Id.*

<sup>239</sup> Charles J. Courtemanche et al., *Influence of the Flavored Cigarette Ban on Adolescent Tobacco Use*, *Am. J. of Preventive Med.* 52(5):e139 - e146 (May 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5401634/pdf/nihms842675.pdf>; M.B. Harrell et al., *Flavored e-cigarette use: Characterizing youth, young adult, and adult users*, 5 *Prev. Med Rep.* 33–40 (Nov. 11, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121224/pdf/main.pdf>.

<sup>240</sup> *E-Cigarette Use Among Youth and Young Adults*, U.S. Dep’t of Health & Human Servs. (2016), <https://www.ctclearinghouse.org/Content/www/topics/2444-E-Cigarette-Use-Among-Youth-And-Young-Adults.pdf> (last visited Mar. 27, 2020).

<sup>241</sup> Karl Paul, *Flavored Vapes Lure Teens Into Smoking and Nicotine Addiction, Study Shows*, *MarketWatch* (Feb. 26, 2019), <https://www.marketwatch.com/story/flavored-vapes-lure-teens-into-smoking-and-nicotine-addiction-study-shows-2019-02-25>.

<sup>242</sup> A.C. Villanti et al., *Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study*, 53 *Am. J. of Preventative Med.* 139 (2017), <https://www.ncbi.nlm.nih.gov/pubmed/28318902>.

<sup>243</sup> See *E-Cigarette Use Among Youth and Young Adults*, *supra* note 240; Paul, *supra* note 241; Villanti, *supra* note 242.

reported using a flavored e-cigarette the first time they tried the product.<sup>244</sup> Flavors work to attract youth. A survey of teenagers between the ages of thirteen to seventeen from 2014-2015 showed that this age group was six times more interested in trying e-cigarettes in fruity flavors than they were in trying e-cigarettes with only tobacco flavor.<sup>245</sup>

159. Research confirms that flavored products—no matter what the tobacco product—appeal to youth and young adults. According to the *2012 Surgeon General Report*, “Much of the growing popularity of small cigars and smokeless tobacco is among younger adult consumers (aged <30 years) and appears to be linked to the marketing of flavored tobacco products that, like cigarettes, might be expected to be attractive to youth.”<sup>246</sup> A study published in *JAMA* in 2015 found that approximately 80% of those between the ages of twelve and seventeen who had ever used a tobacco product initiated tobacco use with a flavored product, and that for each tobacco product, at least two-thirds of youth reported using these products “because they come in flavors I like.”<sup>247</sup> Research also shows that when youth see advertisements for flavored e-cigarettes, they

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<sup>244</sup> *Modifications to Compliance Policy for Certain Deemed Tobacco Products*, FDA (Mar. 2019), <https://www.fda.gov/media/121384/download>.

<sup>245</sup> J.K. Pepper et al., *Adolescents’ interest in trying flavored e-cigarettes*, 25 *Tobacco Control* ii62 (Sept. 15, 2016), [https://tobaccocontrol.bmj.com/content/25/Suppl\\_2/ii62](https://tobaccocontrol.bmj.com/content/25/Suppl_2/ii62).

<sup>246</sup> *Preventing Tobacco Use Among Youth and Adults, A Report of the Surgeon General* (“2012 Surgeon General Report”) at 539, U.S. Dep’t Health & Human Servs. (2012), [https://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf\\_NBK99237.pdf](https://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf_NBK99237.pdf).

<sup>247</sup> Bridget K. Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*, 314 *JAMA* 1871 at 1872, 1873 (2015), <https://jamanetwork.com/journals/jama/fullarticle/2464690>.

believe the advertisements and products are intended for them.<sup>248</sup> A significant majority of under-age users choose flavored e-cigarette products.<sup>249</sup>

160. Both mint and menthol flavors have been successfully used to make tobacco products more palatable to youth. Among youth smokeless tobacco users, for example, mint and menthol are the most popular flavors.<sup>250</sup> And a recent study found that among high school JUUL users, mint is the most popular flavor.<sup>251</sup>

161. The role of mint and menthol flavors in facilitating youth tobacco use is well documented, as Dr. Jonathan Winickoff, a professor of pediatrics at Harvard Medical School and the Director of Pediatric Research in the Tobacco Research and Treatment Center, testified before Congress:

[It is] completely false to suggest that mint is not an attractive flavor to children. From candy canes to toothpaste, children are introduced to mint flavor from a young age. Not only do children enjoy mint, but it has special properties that make it an especially dangerous flavor for tobacco. Menthol's anesthetic properties cool the throat, mask the harshness of nicotine, and make it easier for

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<sup>248</sup> D.C. Petrescu et al., *What is the Impact of E-Cigarette Adverts on Children's Perceptions of Tobacco Smoking? An Experimental Study*, 26 *Tobacco Control* 421 (2016); Julia C. Chen-Sankey et al., *Perceived Ease of Flavored E-Cigarette Use and E-Cigarette Use Progression Among Youth Never Tobacco Users*, 14 *PLOS ONE* 1 (2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0212353>.

<sup>249</sup> Karen A. Cullen et al., *E-cigarette Use Among Youth in the United States, 2019*, 322 *JAMA*, 2095 (2019), <https://tinyurl.com/y3g75gmg> (“Among current exclusive e-cigarette users, an estimated 72.2% . . . of high school students and 59.2% . . . of middle school students used flavored e-cigarettes[.]”).

<sup>250</sup> Shyanika W. Rose et al., *Flavour types used by youth and adult tobacco users in wave 2 of the Population Assessment of Tobacco and Health (PATH) Study 2014–2015*, *Tobacco Control* (Sept. 21, 2019).

<sup>251</sup> Adam M. Leventhal et al., *Flavors of e-Cigarettes Used by Youths in the United States*, 322 *JAMA* 2132-34 (2019).



children to start using and continue using tobacco products. The impact of mint and menthol flavors on increasing youth tobacco addiction is well documented.<sup>252</sup>

162. Robin Koval, CEO and president of Truth Initiative, echoed Dr. Winickoff's testimony, stating that mint and menthol are among the most popular flavors for youth and that "[w]e also know, as does the tobacco industry, that menthol has been and continues to be the starter flavor of choice for young cigarette users."<sup>253</sup> According to the FDA, "younger populations have the highest rate of smoking menthol cigarettes" and "menthol in cigarettes is likely associated with increased initiation and progression to regular [] cigarette smoking."<sup>254</sup> Menthol cigarettes are also more addictive than regular cigarettes.<sup>255</sup>

163. In June 2015, JUUL came to market in four flavors including Tabaac (later renamed Tobacco), Fruut (later renamed Fruit Medley), Bruulé (later renamed Crème Brulee), and Miint (later renamed Mint).

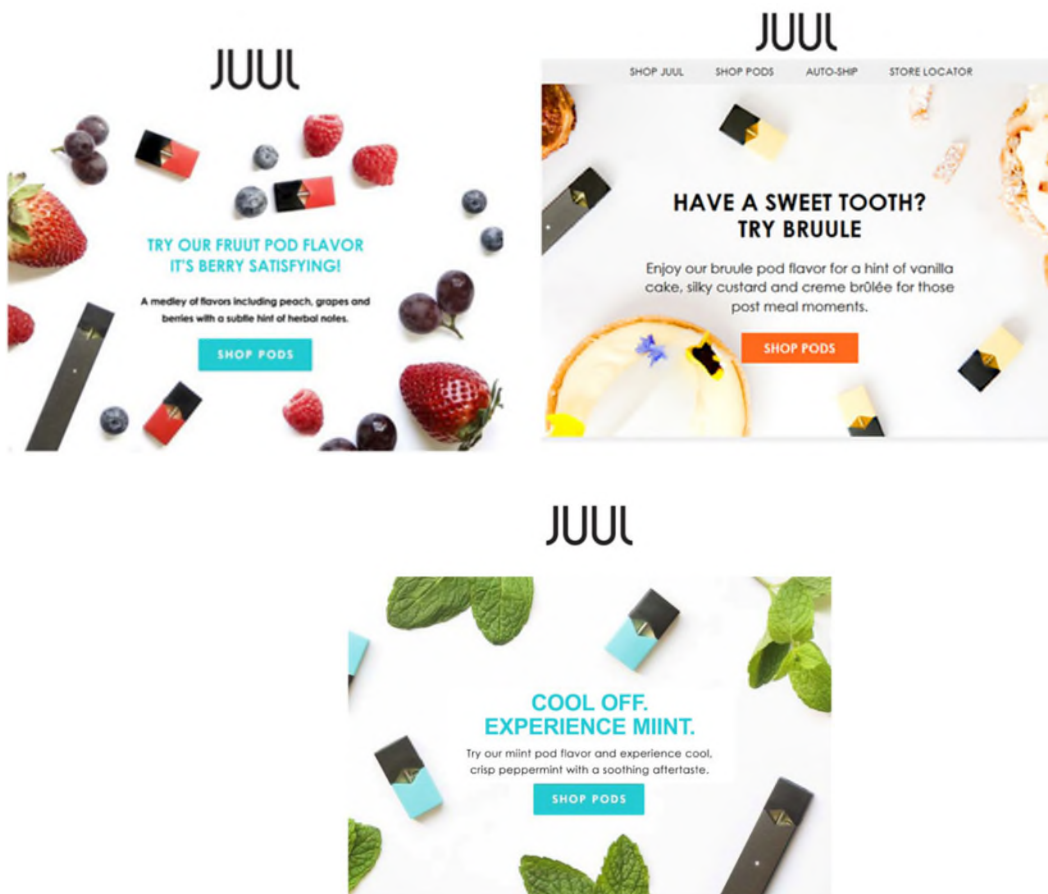
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<sup>252</sup> Jonathan Winickoff, *Testimony of Jonathan Winickoff before the U.S. House of Representatives Committee on Oversight and Reform Subcommittee on Economic and Consumer Policy* ("Winickoff Testimony") at 3, U.S. House Committee on Oversight & Reform (July 24, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019.07.24%20Winickoff%20AAP%20Testimony.pdf>.

<sup>253</sup> *Id.*

<sup>254</sup> *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes* at 5, FDA, <https://www.fda.gov/media/86497/download> (last visited Mar. 28, 2020).

<sup>255</sup> *Id.* at 6.



164. JUUL later offered other kid-friendly flavors, including Cool Cucumber and Mango.



165. JUUL also offered limited edition flavors, including Coco Miint, a mint chocolate flavor.



166. [REDACTED]

[REDACTED]<sup>256</sup> Instead of taking corrective action or withdrawing the kid-friendly flavors, JLI capitalized on their popularity with kids and continued to promote JUUL’s flavors. In a social media post from August 2017, for example, JLI tweeted “Beat The August Heat with Cool Mint” and “Crisp peppermint flavor with a pleasant aftertaste.”<sup>257</sup> In another August 2017 tweet, JLI compared JUUL to dessert: “Do you brulée? RT [re-tweet] if you enjoy dessert without the spoon with our Creme Brulee #JUULpods.”<sup>258</sup>

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<sup>256</sup> See INREJLI 00265068 ([REDACTED])

<sup>257</sup> JUUL Labs, Inc. (@JUULvapor), Twitter (Aug. 4, 2017), [http://tobacco.stanford.edu/tobacco\\_web/images/pod/juul/twitter/large/twitter\\_39.jpg](http://tobacco.stanford.edu/tobacco_web/images/pod/juul/twitter/large/twitter_39.jpg).

<sup>258</sup> Chaykowski, *supra* note 152.



167. The flavors pose dangers beyond luring young people into trying nicotine. Studies now show these sweet and fruity flavors present distinct additional health hazards. Researchers have found that some of the chemicals JLI uses for flavor and perfume—particularly in the Crème Brulee flavor—contain relatively high levels of acetals.<sup>259</sup> Acetals are airway-irritating chemicals that may cause lung damage.<sup>260</sup> Dr. Robert Jackler reported that test results have shown that JLI’s sweet and fruity flavors “contribute[] to the increasing body of evidence documenting toxicological effects of e-cig vapor.”<sup>261</sup>

168. JLI also engaged market research consultants to study youth flavor preferences, and this research provided additional confirmation that JLI’s flavors appealed to youth. ■

<sup>259</sup> Susie Neilson, *Irritating Compounds Can Show Up in ‘Vape Juice’*, NPR (July 30, 2019), <https://www.npr.org/sections/health-shots/2019/07/30/746238009/irritating-compounds-discovered-in-vape-juice>.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

[REDACTED]

[REDACTED]

[REDACTED] 262

169. Under the [REDACTED]

[REDACTED] 263 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 264 [REDACTED]

[REDACTED]

[REDACTED] 265

170. [REDACTED]

[REDACTED]

[REDACTED] 266 [REDACTED] 267

171. [REDACTED]

[REDACTED]

[REDACTED] 268

<sup>262</sup> INREJUUL\_00053206.

<sup>263</sup> INREJUUL\_00121627 ([REDACTED]); INREJUUL\_00124965 ([REDACTED]).

<sup>264</sup> *Id.*

<sup>265</sup> INREJUUL\_00035325.

<sup>266</sup> INREJUUL\_00124965.

<sup>267</sup> *Id.*

<sup>268</sup> INREJUUL\_00035325.

172. [REDACTED]

173. A 2018 survey of adolescents and young adults in California found that 74% of those surveyed indicated that their first use of a JUUL was of a flavored JUULpod.<sup>269</sup>

174. In January 2020, the FDA banned flavored e-cigarette pods, other than “Tobacco” and “Menthol” flavors, in response to “epidemic levels of youth use of e-cigarettes” because these products are “so appealing” to children.<sup>270</sup> But the damage to Plaintiff and Plaintiff’s community had already been done, and as discussed below, copycat companies exploited loopholes in the ban to continue supplying flavored nicotine products to youth.

**F. JLI also used JUUL’s Discreet and Tech-Inspired Design to Attract a New Generation of Youth to Nicotine**

175. The design of JUUL is also acutely attractive to youth. Unlike most of its predecessors, JUUL looks nothing like a cigarette. Instead of mimicking a cigarette, the product that adult smokers are used to using, JUUL is sleek and linear and seems like the latest tech invention. JLI co-founder Bowen drew on his experience as a design engineer at Apple Inc. (“Apple”) to make JUUL’s design mimic technology children were already familiar with, like Apple’s iPhone.<sup>271</sup> This made JUUL look “more like a cool gadget and less like a drug delivery

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<sup>269</sup> Karma McKelvey et al., *Adolescents and Young Adults Use in Perceptions of Pod-based Electronic Cigarettes*, 1 JAMA Network Open e183535 (2018), <https://doi.org/10.1001/jamanetworkopen.2018.3535>.

<sup>270</sup> *FDA News Release: FDA finalizes enforcement policy on unauthorized flavored cartridge-based e-cigarettes that appeal to children, including fruit and mint*, FDA (Jan. 2, 2020), <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children>.

<sup>271</sup> *How JUUL made nicotine go viral*, Vox – By Design (Aug. 10, 2018), <https://www.youtube.com/watch?v=AFOpokBUyok>.

device. This wasn't smoking or vaping, this was juuling."<sup>272</sup> The evocation of technology makes JUUL familiar and desirable to the younger tech-savvy generation, particularly teenagers. According to a nineteen-year-old interviewed for the Vox series *By Design*, "our grandmas have iPhones now, normal kids have JUULs now. Because it looks so modern, we kind of trust modern stuff a little bit more so we're like, we can use it, we're not going to have any trouble with it because you can trust it."<sup>273</sup> A sixteen-year-old agreed, explaining that "the tech aspect definitely helps people get introduced to it and then once they're introduced to it, they're staying, because they are conditioned to like all these different products. And then this is another product. And it's just another product. Until you're addicted to nicotine."<sup>274</sup>

176. JUUL is small and discrete. Fully assembled, the device is just over 9.5 cm in length and 1.5 cm wide. JUUL resembles a memory stick and can be charged in a computer's USB drive. This design allows the device to be concealed in plain sight, camouflaged as a thumb-drive, for use in public spaces, like schools and even charged in school computers. JLI has been so successful in emulating technology that its small, rectangular devices are often mistaken for—or passed off as—flash drives. According to one high school senior, "that's what people tell the teachers a lot, too, if you charge it in class, they'll just say it's my flash drive."<sup>275</sup> And unlike the distinct smell and odor emitted from combustible cigarettes, JUUL emits a reduced aerosol with a nearly undetectable scent. Unlike other e-cigarettes, JUUL does not produce large plumes of smoke. Instead, the vapor cloud is very small and dissipates very

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Juuling at School*, KOMO News (2019),

<https://komonews.com/news/healthworks/dangerous-teen-trend-juuling-at-school>.

quickly, allowing for concealed use. As a result, young users can, and do, use JUUL—in class or at home—without detection.



177. The ability to conceal a JUUL is part of the appeal for adolescents. The devices are small and slim, so they fit easily in a closed hand or a pocket. The ease and simplicity of use—there is nothing to light or unwrap, not even an on-off switch—also make it possible to covertly use a JUUL behind a turned back, which has become a trend in many schools. As a police officer told reporters, JUUL use is “incredibly prevalent in schools,” including both high schools and middle schools, and that it is hard to catch kids in the act of vaping because JUUL does not produce a big vapor cloud. As the officer explained, students will “just take a little hit or



puff off them and then can hold the vapor in their mouth for a little while . . . There’s minimal vapor. They’ll also just blow into their sleeve or into their hoodie.”<sup>276</sup> Finding new ways to hide the ever-concealable JUUL has spawned products designed just for that purpose, such as apparel that allows the wearer to use the device while it is concealed in the drawstring of a hoodie or the strap of a backpack.<sup>277</sup>

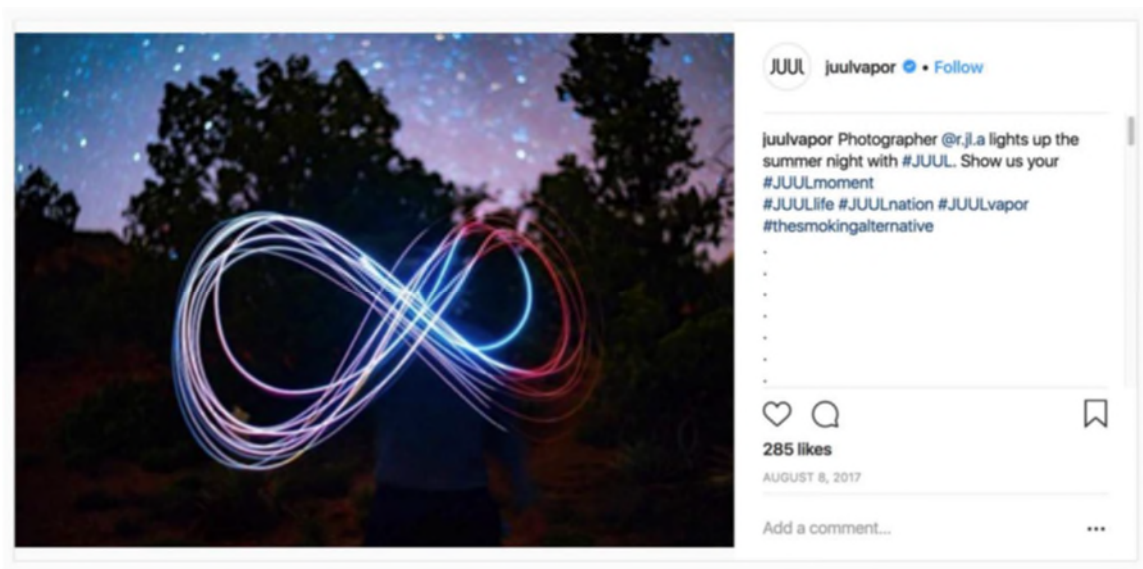
178. JLI also designed JUUL with features reminiscent of youth-oriented tech culture and gaming, like “secret” features users can unlock, such as making the indicator light flash rainbow colors in “party mode.” “Party mode” is activated by the user waving the JUUL device back and forth until the white LED light starts flashing multiple colors, so that the rainbow colors are visible while the person inhales from the JUUL device. “Party mode” can also be permanently activated by the user quickly and firmly slapping a JUUL against the palm of the hand, until the LED light starts flashing multiple colors permanently. JUUL party mode is described by users to be “like an Easter egg in a video game” and allows for “some cool tricks that are going to drive [] friends crazy.”<sup>278</sup> This feature made it even more appealing and “cool” to young users.

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<sup>276</sup> *Id.*

<sup>277</sup> Evie Blad, ‘*Juuling*’ and Teenagers: 3 Things Principals and Teachers Need to Know, *Educ. Wk.* (July 18, 2018), <https://www.edweek.org/ew/articles/2018/07/18/juuling-and-teenagers-3-things-principals-and.html>.

<sup>278</sup> Jon Hos, *Getting Your Juul Into Party Mode*, *Vape Drive* (July 12, 2018), <https://vapedrive.com/getting-your-juul-into-party-mode>.



179. According to Dr. David Kessler, a former Commissioner of the FDA and current Professor of pediatrics at the University of California, San Francisco, JUUL’s “fundamental design appears to ease young people into using these e-cigarettes and ultimately, addiction.”<sup>279</sup> Dr. Kessler emphasized the reduced harshness of JUUL’s nicotine salt formulation, the high nicotine content, discreet vapor cloud, and use of flavors as design features that appeal to youth.<sup>280</sup> On April 24, 2018, the FDA sent JLI a letter, based on the FDA’s concern “about the popularity of JUUL products among youth” and stated that this popularity may be related to “the product design.”<sup>281</sup> As a result, the FDA requested documents related to product design, including its “shape or form,” “nicotine salt formulation” and “nicotine concentration/content,”

<sup>279</sup> Kessler, *supra* note 59.

<sup>280</sup> *Id.*

<sup>281</sup> Letter from Matthew R. Holman, Director of the Office of Science at the Center for Tobacco Products, to Ziad Rouag, Vice President of Regulatory & Clinical Affairs, JUUL Labs, Inc. (Apr. 24, 2018), <https://www.fda.gov/media/112339/download>.

“flavors,” and “features such as: appearance, or lack thereof, or plume . . . [and] USB port rechargeability.”

**G. Eonsmoke, Riding on JLI’s Coattails, Promoted JUUL and Its Own “JUUL-Compatible” Products**

180. Defendant Eonsmoke took notice of JLI’s successful marketing to youth and saw it as an opportunity to profit, directly using the JUUL name to reach JLI’s young customers.

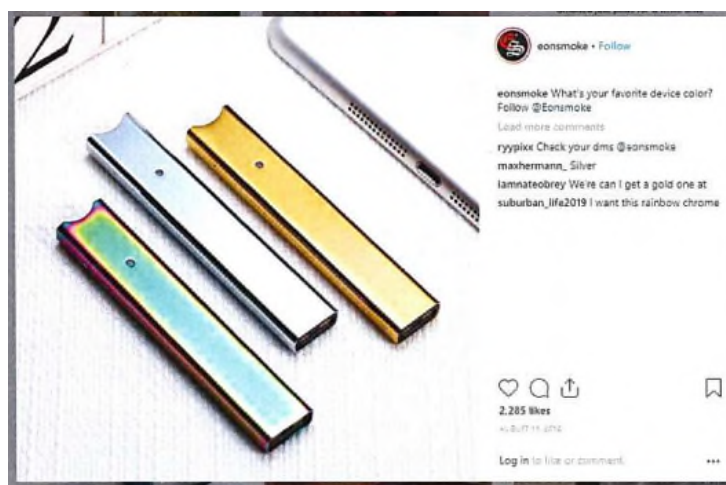
181. Eonsmoke designs, markets, and distributes e-cigarettes and accessories. Eonsmoke makes its own electronic vaping device that resembles JUUL. Eonsmoke also makes both closed-system pods, like those sold by JLI, and open-system pods that can be filled by the user. Both Eonsmoke’s device and its pods are advertised as JUUL-compatible, meaning that users can use Eonsmoke’s device to vape JUULpods and they can also use a JUUL to vape Eonsmoke’s pods.<sup>282</sup>

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<sup>282</sup> Eonsmoke Vapes, Tumblr (June 4, 2018), <https://eonsmoke.tumblr.com/post/174567212961/mango-pods-6-tastes-like-a-sweet-and-crisp> (showing Eonsmoke mango pods compatible with JUUL, captioned by Eonsmoke as “Mango Pods 6%. Tastes like a sweet and crisp Mango! Follow @Eonsmoke”); Eonsmoke Vapes, Tumblr (June 18th, 2018), <https://eonsmoke.tumblr.com/post/175012943246/blueberry-6-restocked-on-the-sites-grab-yours> (showing Eonsmoke blueberry pods compatible with JUUL; captioned by Eonsmoke as “Blueberry 6% restocked on the sites! Grab yours today while supplies last! Follow @Eonsmoke”).



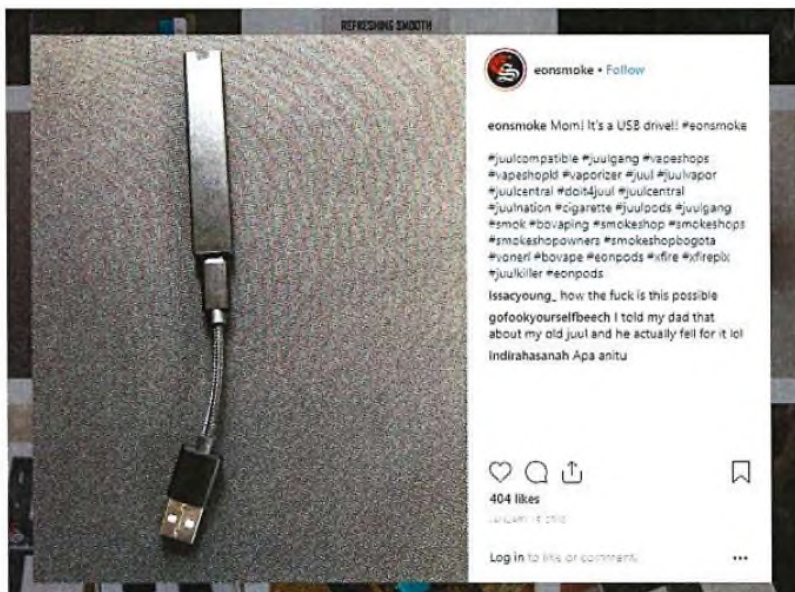
182. Below is an image of the Eonsmoke device:<sup>283</sup>



183. Eonsmoke’s devices, like JUUL, are designed to resemble flash drives. Eonsmoke explicitly capitalized on this confusing design by advertising that users of its products could lie to their parents and pretend the product was a flash drive. In the post pictured below, posted on Eonsmoke’s Instagram page, the company shared a photograph of its device with the caption

<sup>283</sup> Post by Instagram user “eonsmoke” on August 11, 2018.

“Mom! It’s a USB drive!! #eonsmoke.”<sup>284</sup> On this post, one user comments “I told my dad that about my old juul and he actually fell for it lol.”<sup>285</sup>



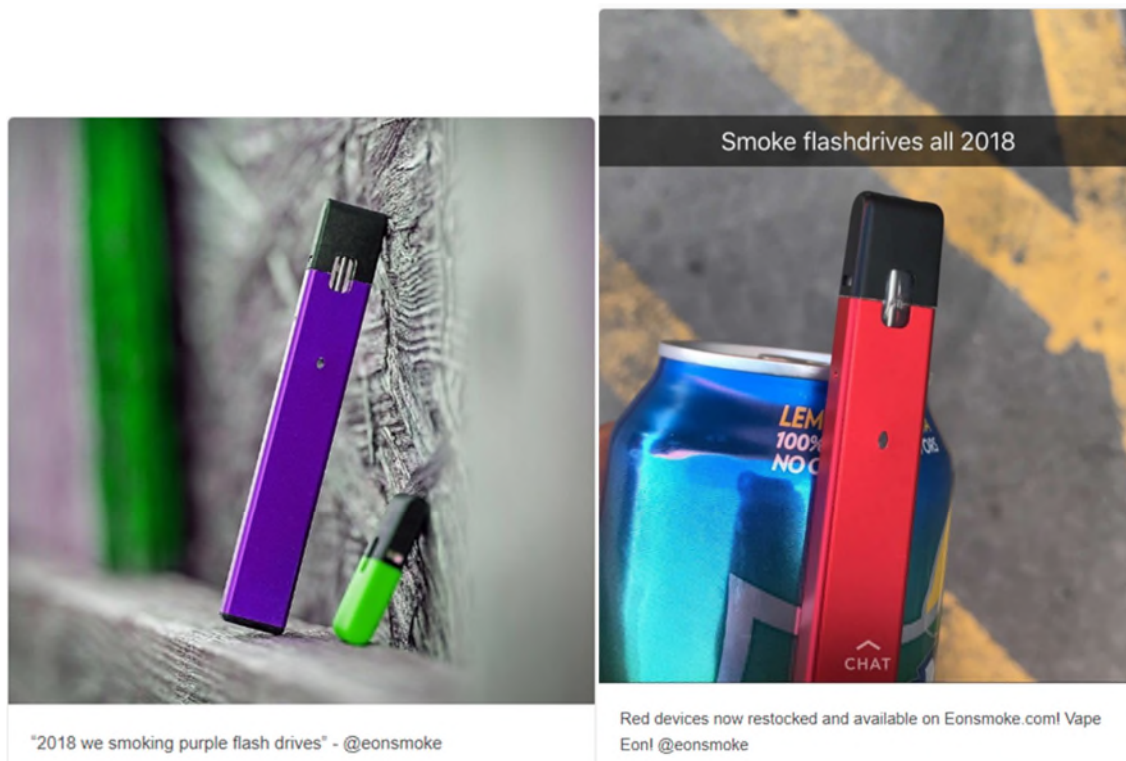
184. Although the official “eonsmoke” Instagram account is now deleted, on Tumblr, another social media platform, an account called “Eonsmoke Vapes” contains links and images of Instagram posts that appear to have been originally posted by Eonsmoke. Each linked Instagram post is now-deleted. This Tumblr user holds itself out as Eonsmoke’s official page.<sup>286</sup> These posts show Eonsmoke frequently used, as a marketing tool, the tendency to confuse its product with a flash drive:<sup>287</sup>

<sup>284</sup> Post by Instagram user “eonsmoke” on January 15, 2018.

<sup>285</sup> *Id.*

<sup>286</sup> The “Eonsmoke Vapes” Tumblr page uses Eonsmoke’s logo and the page’s bio says “Buy Eonsmoke e juices at an incredibly [sic] price. Also check out our Juul compatible e-cig pods in six flavors available now! Visit <https://www.eonsmoke.com>”. Eonsmoke Vapes, Tumblr, <https://eonsmoke.tumblr.com/> (last visited Mar. 29, 2020).

<sup>287</sup> Eonsmoke Vapes, Tumblr (June 26, 2018), <https://eonsmoke.tumblr.com/post/175286181941/2018-we-smoking-purple-flash-drives-eonsmoke> (showing purple vape; captioned by Eonsmoke as ““2018 we smoking purple flash



185. The resemblance between a vaping device and a flash drive would be meaningless if one was selling a smoking cessation device to chain smokers. But Eonsmoke was seeking to tap into the youth social media network JLI created by marketing to users of JUUL. Eonsmoke advertised its product as JUUL-compatible and used hashtags to connect itself to JUUL, including “#juulcompatible,” “#juulgang,” “#juul,” “#doit4juul,” and “#juulnation,” among others.<sup>288</sup> Similarly, in a post on the “Eonsmoke Vapes” Tumblr, Eonsmoke’s device and

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drives’ - @eonsmoke”); Eonsmoke Vapes, Tumblr (Apr. 16, 2018), <https://eonsmoke.tumblr.com/post/172997769276/red-devices-now-restocked-and-available-on> (showing red vape next to soda can with text “Smoke flashdrives all 2018”; captioned by Eonsmoke as “Red devices now restocked and available on Eonsmoke.com! Vape Eon! @eonsmoke”).

<sup>288</sup> Eonsmoke has been so aggressive in copying JUUL and targeting JUUL users that JLI sued Eonsmoke for patent infringement. *See* Verified Complaint, *JUUL Labs, Inc. v. Eonsmoke et al.*, No. 19- 08405 (D.N.J. Mar. 12, 2019).

blueberry pods are marketed as “sexy” and tagged with “#juul,” “#juulgang,” “#juulnation,” and “#doit4juul,” among other tags. Eonsmoke also told users to “[f]ollow” them for sales and giveaways as in the post shown here from 2018, even though the FDA made it clear in October 2017 that e-cigarette products are included in its ban on free samples of tobacco products:<sup>289</sup>

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<sup>289</sup> Eonsmoke Vapes, Tumblr (Feb. 13, 2018), <https://eonsmoke.tumblr.com/post/170841792591/so-sexy-what-do-you-guys-think-follow> (showing red vape and Eonsmoke blueberry pods, captioned by Eonsmoke “So sexy! What do you guys think? Follow @eonsmoke for sales and giveaways! #juul #juulgang #juulnation #juulcentral #doit4juul #doit4state #kangertech #kanger #aspirebreeze #aspirebreezekit #xfire #xfirevape #bovaping #bovape #bovapingus #smokeshop #vapeshop #vapor #vaporshop #smoktech #sourin #sourinair #sourindrop #bouldervape #mrsalte”); *see also* Eonsmoke Vapes, Tumblr (Feb. 10, 2018), <https://eonsmoke.tumblr.com/post/170724357236/we-are-doing-a-quick-weekend-juice-giveaway-of-our> (showing different flavor vape juice with text “Eonsmoke 60mg Juice Giveaway Tag a Friend Now!!!”, captioned by Eonsmoke “We are doing a quick weekend Juice giveaway of our made in USA 60mg salt nicotine vape juice!!! Giveaway ends Sunday 11:59 EST February 11<sup>th</sup>. The rules: 1. Follow @Eonsmoke 2. Tag a friend who vapes! More friends you tag the better your chances of winning!!! We will give away 4 bottles of 30ml juice!!!!!!!!!!!!!!!”); *see also* Eonsmoke Vapes, Tumblr (Feb. 10, 2018), <https://eonsmoke.tumblr.com/post/170725145496/you-probably-know-the-rules-by-now-we-are> (showing three vape devices with text “Gonna giveaway some devices too!!!!!!!!!! Follow @eonsmoke and tag a friend! Free devices giveaway!!!”, captioned by Eonsmoke “You probably know the rules by now.... we are feeling pretty generous! Hope you guys win something!!!! #eonsmoke #vapegiveaway #vapegiveaways #pods #podsgiveaways #vapegiveaways #vapegiveaway #podsgiveaways #eonsmoke #pods”).



186. Eonsmoke’s “Doit4juul” account on Instagram was the most-followed JUUL account on Instagram, with over 81,000 followers as of February 2018.<sup>290</sup> On YouTube, one of the “Doit4juul” videos had nearly 192,000 views as of March 2018.<sup>291</sup> The “Doit4juul” campaign called on followers to share pictures or videos of themselves using JUUL.

187. In addition to driving social media posts about JUUL and vaping, Eonsmoke targeted the youth market by selling its pods and nicotine salts in fruity and candy flavors such as

<sup>290</sup> Huang et al., *supra* note 196.

<sup>291</sup> *Id.*



“Sour Gummy Worms,” “Gummy Bear,” “Donut Cream,” “Pineapple Crush,” “Cotton Candy” and more:<sup>292</sup>



Salt Nicotine Sour Gummy Worms 60mg Or 30mg E Juice E Liquid 30ML



Gummy Bear 30ML 60mg Or 30mg Salt Nicotine E Juice E Liquid

188. When JLI was pressured to stop selling certain flavors in stores, Eonsmoke was more than happy to fill the role. In 2018, Eonsmoke generated an estimated \$5.3 million in revenue.<sup>293</sup> In 2019, after JLI stopped selling flavors like Mango in stores, Eonsmoke’s business

<sup>292</sup> Eonsmoke Vapes, Tumblr (June 12, 2018), <https://eonsmoke.tumblr.com/post/174824533561/sour-gummies-60mg-restocked-today-online-and> (showing Sour Gummy Worm salt nicotine vape juice, captioned by Eonsmoke “Sour Gummies 60mg restocked today online and through our vendors! Follow @Eonsmoke for more stock, vape developments, and new flavors”); *see also* Eonsmoke Vapes, Tumblr (July 1, 2018), <https://eonsmoke.tumblr.com/post/175446333176/cop-one-of-our-world-class-salt-nicotine-juices-in> (showing Gummy Bear salt nicotine vape juice, captioned by Eonsmoke “Cop one of our world class salt nicotine juices in 60mg. #eonsmoke @eonsmoke”); *see also* Eonsmoke Vapes, Tumblr (June 27, 2018), <https://eonsmoke.tumblr.com/post/175313662276/our-salt-nic-family-of-products-try-one-today-to> (showing salt nicotine vape juices, captioned by Eonsmoke “Our Salt Nic family of products! Try one today to see what all the hype is about. Follow @Eonsmoke”).

<sup>293</sup> Sheila Kaplan, *‘Juil-alikes’ Are Filling Shelves with Sweet, Teen-Friendly Nicotine Flavors*, N.Y. Times (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/health/juil-flavors-nicotine.html>.

soared, with an estimated \$43.6 million in tracked sales as of mid-July 2019.<sup>294</sup> According to a sixteen-year-old interviewed by *The New York Times*, Eonsmoke’s wide range of flavors is a big draw for minors: “A lot of my friends use the blueberry . . . People use the mango because it’s somewhat similar to the Juul mango.”<sup>295</sup>

189. Eonsmoke followed in JLI’s footsteps by advertising these flavors to youth using the apps and websites where minors often spend time, including Instagram, Tumblr, Snapchat, YouTube, and Reddit.<sup>296</sup>

190. For example, on the social media platform Reddit, user “Eonjuulcompatiblepod” holds itself out as a “Eonsmoke.com Juul Compatible Pods Official Representative” and claims that “Eonsmoke.com is the 2nd largest pod company in the USA and the top 5 in Salt Nicotine Bottled eLiquid. Our pods are Juul compatible so you don’t have to buy another device. 7 flavors including blueberry, watermelon and strawberry.”<sup>297</sup> Eonsmoke used Reddit to try to recruit JUUL users. For example, Eonsmoke commented that its products are not only compatible with JUUL but also cheap, a crucial factor for youth who often do not have much money: “Our pods are compatible with the juul device and our devices are compatible with juul pods and we just lowered the retail to 20\$ online after coupon.”<sup>298</sup> In addition, when Reddit users were discussing

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Eonsmoke Vapes, Instagram (Feb. 3, 2018) (captioned by Eonsmoke “The official vaping brand of Snapchat :) #snapchat #eonsmoke #eonpods #juul #juulgang #phix #phixvapor”).

<sup>297</sup> Eonsmoke (@Eonjuulcompatiblepod), Reddit, <https://www.reddit.com/user/Eonjuulcompatiblepod> (last visited Mar. 29, 2020).

<sup>298</sup> Eonsmoke (@Eonjuulcompatiblepod), Comment to @u/981ti, Reddit (May 21, 2018, 8:43 PM), [https://www.reddit.com/r/juul/comments/8k5wfa/are\\_there\\_any\\_other\\_devices\\_that\\_fit\\_juul\\_pods/dzeu9sj/?context=3](https://www.reddit.com/r/juul/comments/8k5wfa/are_there_any_other_devices_that_fit_juul_pods/dzeu9sj/?context=3).

additional JUUL flavors that they would like to try, including watermelon flavor, Eonsmoke was ready with its pitch: “We make watermelon. Step over to the dark side!”<sup>299</sup> In a comment on social media platform Reddit, Eonsmoke also advertised that compared to JUUL, “[o]ur throat hit is smoother, buzz is the same.” Eonsmoke also advertised its new “disposable pod system which is 1.3ml and 7% salt nic for 8\$ you get the battery plus one large pod that lasts like 2 juul pods.”<sup>300</sup>

191. Eonsmoke’s social media posts, like its products, are designed to appeal to youth. For example, Eonsmoke advertises its product as an accompaniment to candy and posts images popular with youth in the forms of “memes”:<sup>301</sup>

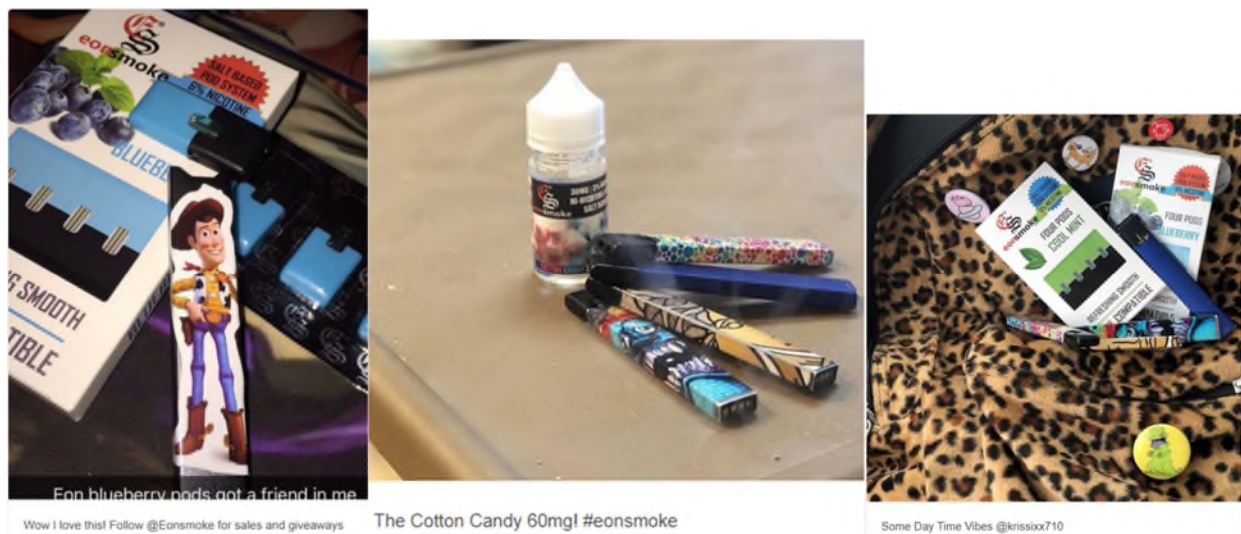


<sup>299</sup> Eonsmoke (@Eonjuulcompatiblepod), Comment to @u/12gwar18, Reddit (May 21, 2018, 8:26 PM), [https://www.reddit.com/r/juul/comments/8kpdun/what\\_flavors\\_do\\_you\\_guys\\_wanna\\_see\\_next\\_from\\_juul/](https://www.reddit.com/r/juul/comments/8kpdun/what_flavors_do_you_guys_wanna_see_next_from_juul/).

<sup>300</sup> Eonsmoke (@Eonjuulcompatiblepod), Comment to @u/richard\_bag\_DIK, Reddit (Oct. 23, 2018 3:40 PM), [https://www.reddit.com/r/juul/comments/9qrxxr/3rd\\_party\\_pods/e8bqkbb/?context=3](https://www.reddit.com/r/juul/comments/9qrxxr/3rd_party_pods/e8bqkbb/?context=3).

<sup>301</sup> Eonsmoke (@eonsmoke), Instagram (May 1, 2018) (showing an Eonsmoke device next to a bag of M&M candies and captioned by Eonsmoke “Can you name a better combo?”); *see also* Eonsmoke (@eonsmoke), Instagram (Feb. 25, 2018) (showing a meme featuring a character from the animated show “The Simpsons”).

192. Eonsmoke’s social media also explicitly encouraged users to associate their products with movies and toys popular with children, such as Toy Story, and with school supplies:<sup>302</sup>



193. Like JLI, Eonsmoke advertises that “[e]ach flavored cartridge is the equivalent of up to a pack of traditional cigarettes.”<sup>303</sup> But Eonsmoke emphasized that its products contain even more nicotine than JUUL. For example, EonSmoke sells its 4x Pods in “Blue Raspberry

<sup>302</sup> Eonsmoke Vapes, Tumblr (Mar. 19, 2018), <https://eonsmoke.tumblr.com/post/172051155991/wow-i-love-this-follow-eonsmoke-for-sales-and-giveaways> (showing Eonsmoke device with Woody from the animated film “Toy Story” and blueberry vape pods, captioned by Eonsmoke as “Wow I love this! Follow @Eonsmoke for sales and giveaways”); *see also* Eonsmoke Vapes, Tumblr (Feb. 16, 2018), <https://eonsmoke.tumblr.com/post/170965631311/the-cotton-candy-60mg-eonsmoke> (showing Eonsmoke devices and nicotine salt vape juice on a desk, captioned by Eonsmoke as “The Cotton Candy 60mg! #eonsmoke”); *see also* Eonsmoke Vapes, Tumblr (Feb. 4, 2018), <https://eonsmoke.tumblr.com/post/170502488296/some-day-time-vibes-krissixx710> (showing Eonsmoke devices and flavor pods on a leopard print backpack, captioned by Eonsmoke as “Some Day Time Vibes @krissixx710”).

<sup>303</sup> *Eonsmoke About Us*, EonSmoke, LLC (Oct. 9, 2019), <https://web.archive.org/web/20191009033001/https://www.eonsmoke.com/about-us/> (last visited Mar. 28, 2020).

Flavor JUUL Compatible 6.8% Salt Nic Pods.”<sup>304</sup> Eonsmoke also used social media and memes to highlight this “advantage” of their product over JUUL.

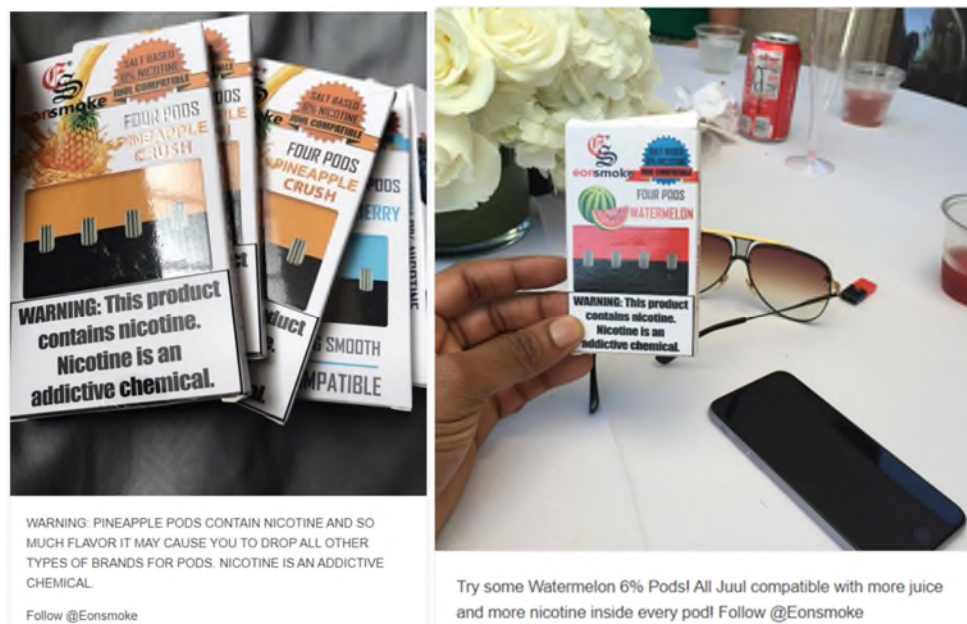
194. For example, on one post, Eonsmoke advertised that its “Watermelon 6% Pods” were “Juul compatible with more juice and more nicotine inside every pod!”<sup>305</sup> Eonsmoke highlighted this difference in several of its social media posts.<sup>306</sup>



<sup>304</sup> *Eonsmoke Product*, EonSmoke, LLC (Oct. 9, 2019), <https://web.archive.org/web/20191009085755/https://www.eonsmoke.com/product/4x-blue-raspberry-flavor-juul-compatible-6-8-salt-nic-pods/> (last visited Mar. 28, 2020) (“Flavor profile: Your favorite snack and ejuice flavor now in pod form. Both sweet and sour at the same time, makes sour gummy one of the fan favorites. Blue Raspberry 4x pods just hit that sweet spot of flavor.”).

<sup>305</sup> Eonsmoke Vapes, Tumblr (June 26, 2018), <https://eonsmoke.tumblr.com/post/175281868841/try-some-watermelon-6-pods-all-juul-compatible> (showing watermelon vape pods and sunglasses, captioned by Eonsmoke as “Try some Watermelon 6% Pods! All Juul compatible with more juice and more nicotine inside every pod! Follow @Eonsmoke”).

<sup>306</sup> Eonsmoke Vapes, Tumblr (Apr. 18, 2018), <https://eonsmoke.tumblr.com/post/173080730801/comment-eon-below-for-a-follow-back-follow> (showing person getting hit in the face with a book with text “When people say 6% nic is the same as 5% nic”, captioned by Eonsmoke as “Comment Eon below for a follow back! Follow @Eonsmoke”); *see also* Eonsmoke Vapes, Tumblr (May 20, 2018), <https://eonsmoke.tumblr.com/post/174088090966/warning-pineapple-pods-contain-nicotine-and-so> (showing pineapple crush vape pods, captioned by Eonsmoke as “WARNING: PINEAPPLE PODS CONTAIN NICOTINE AND SO MUCH FLAVOR IT MAY CAUSE YOU TO DROP ALL OTHER TYPES OF BRANDS FOR PODS. NICOTINE IS AN ADDICTIVE CHEMICAL. Follow @Eonsmoke”).



195. This tactic is clearly effective on the youth market. As one sixteen-year-old boy reported “Some of my friends use Eon pods because they have a higher nicotine percentage, because they want a bigger head rush.”<sup>307</sup>

196. But Eonsmoke also mimicked its references to nicotine while advertising on social media when it believed it was in its marketing interests to do so. Eonsmoke was more than happy to use nicotine as a youth-marketing gimmick, but it failed to warn its customers about the dangers of nicotine.

197. Like JLI, Eonsmoke also used “influencers” to advertise its products. Eonsmoke’s influencers include: Mia Khalifa, an Instagram influencer with 17.9 million followers who frequently posts suggestive or provocative photos and has a large youth audience; Stevie Emerson, who got 6.9 million views of his YouTube video titled, “Dude, Where’s my JUUL?” and frequently referred to vapor from e-cigarettes as “water vapor;” and Donny Karle who, as

<sup>307</sup> Kaplan, *Juul-alikes*, *supra* note 293.

discussed above, is better known to youth by his handle “DonnySmokes.” As a twenty-one-year-old, Karle was getting about three million views each month reviewing vapor products on YouTube, which began in 2017 when he posted a “unboxing” video of his newly purchased JUUL.<sup>308</sup> Karle’s videos were plainly aimed at youth; as mentioned above, one was titled, “*How to HIDE & HIT Your JUUL at SCHOOL WITHOUT Getting CAUGHT.*”<sup>309</sup> Eonsmoke’s CEO Michael Tolmach told *VICE* that the company paid Karle \$1,000 for each review of its products.<sup>310</sup>

198. As of the fall of 2019, Eonsmoke’s products were sold side by side with JUUL and the best-selling cigarette brand in the United States, Marlboro, a product of Philip Morris USA and its parent company, Defendant Altria.<sup>311</sup>

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<sup>308</sup> Conti, *supra* note 187.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Eonsmoke Vapes, Tumblr (July 14, 2018), <https://eonsmoke.tumblr.com/post/175887887396/this-is-how-the-top-shelf-of-the-cigarette-shelf> (showing Juuls being sold alongside cigarettes, captioned by Eonsmoke as “This is how the Top shelf of the cigarette shelf looks now! Switch from cigarettes to Eon 6% pods now! #eonsmoke #juul.”); *see also* Hannah Smothers, *JUUL’s ‘Banned’ Flavors Are Still Absolutely Available in New York City*, *VICE* (Nov. 4, 2019), [https://www.vice.com/en\\_us/article/xwepnj/juul-pod-banned-flavors-still-available-in-new-york-city](https://www.vice.com/en_us/article/xwepnj/juul-pod-banned-flavors-still-available-in-new-york-city) (showing JUUL products side by side with Eonsmoke products in stores in New York City in mid-October 2019).



199. Eonsmoke’s conduct did not go unnoticed. On October 24, 2019, the FDA issued a Warning Letter to Eonsmoke, stating that it was selling ninety-six e-cigarette products without a marketing authorization order.<sup>312</sup> The FDA also criticized Eonsmoke for omitting nicotine warnings in its influencer posts and for making unlawful affirmative statements minimizing the risks of vaping. Although Eonsmoke is not authorized to claim that its products are safer than cigarettes, its website boasted that “Eonsmoke electronic cigarettes provide you with a premium vaping experience without the thousands of harmful chemicals and additives often found in tobacco cigarettes.”<sup>313</sup>

200. Eonsmoke has been sued by multiple state Attorneys General, including from Arizona, Massachusetts, and North Carolina. On February 20, 2020, the Arizona Attorney General was granted a preliminary injunction prohibiting the advertising, marketing, distribution,

<sup>312</sup> Eonsmoke, LLC Warning Letter, *supra* note 18.

<sup>313</sup> *Id.*



and sale of all ninety-six Eonsmoke products that the FDA identified as being sold without authorization in its October 2019 Warning Letter.<sup>314</sup>

#### **H. The Proliferation of “JUULalikes” and Next-Generation Products Targeting Youth**

201. Eonsmoke was not the only company to follow JLI’s lead. As JUUL sales skyrocketed in 2017 and 2018, everyone from tobacco industry giants to vape start-ups launched their own products with the key elements of JUUL’s design: flavor pods, nicotine salts, and a tech-like appearance.

202. Imperial Brands and Reynolds American, both of which already marketed e-cigarettes, launched “JUULalike” versions of their products in 2018. As Alison Cooper, the CEO of Imperial Brands, put it, “The type of experience JUUL delivered was definitely a step forward.”<sup>315</sup> In February 2018, Imperial Brands launched a new pod-based device called “myblu,” noting in its press release that “[p]od-based devices are the fastest growing segment of the e-vapour category in the USA.”<sup>316</sup> Imperial Brands offered *myblu* pods in eleven flavors, including Polar Mint, Mango Apricot, and Green Apple.<sup>317</sup> In July 2018, Imperial Brands

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<sup>314</sup> *Attorney General Mark Brnovich Obtains Injection Against Vaping Company Eonsmoke*, Off. Att’y Gen. State of Ariz. (Feb. 20, 2020), <https://www.azag.gov/press-release/attorney-general-mark-brnovich-obtains-injunction-against-vaping-company-eonsmoke>.

<sup>315</sup> Steve Birr, *The Makers of Blu E-Cigarettes Are Taking On JUUL With A New Vape Device*, Daily Caller (July 5, 2018), <https://dailycaller.com/2018/07/05/blu-e-cigarette-juul-vape/>.

<sup>316</sup> *Imperial Brands launches new vaping product in USA*, Imperial Brands (Feb. 1, 2018), <https://www.imperialbrandspc.com/media/key-announcements/2018/imperial-brands-launches-new-vaping-product-in-usa.html>.

<sup>317</sup> *blu Launches myblu E-Vapor Device*, CStore Decisions (Feb. 21, 2018), <https://cstoredecisions.com/2018/02/21/blu-launches-myblu-e-vapor-device/>.

introduced a line of flavor pods called *myblu* INTENSE, using a nicotine salt formulation, with 4% nicotine strength.<sup>318</sup>

203. The launch of Imperial Brands’ *myblu* as a “JUULlike” product concerned Vince Willmore, Vice President of Communications for the Campaign for Tobacco-Free Kids. According to Willmore, “Juul is our biggest concern right as it is being widely used by kids across the country . . . [b]ut we are also concerned that the introduction of a growing number of Juul-like products could make the problem even worse.”<sup>319</sup> Willmore is not the only one worried. Then-FDA Commissioner Gottlieb expressed concern about products like *myblu*, stating that such products “closely resemble a USB flash drive, have high levels of nicotine and emissions that are hard to see. These characteristics may facilitate youth use, by making the products more attractive to children and teens.”<sup>320</sup>

204. According to British American Tobacco, parent company of Reynolds American, it had used nicotine salts in its Vuse e-liquid in the U.S. since 2012, “[s]o to be clear—not in

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<sup>318</sup> Rachel Becker, *Juul’s Nicotine Salts Are Dominating the Market – And Other Companies Want In*, The Verge (Nov. 21, 2018), <https://www.theverge.com/2018/11/21/18105969/juul-vaping-nicotine-salts-electronic-cigarettes-myblu-vuse-markten>; Angelica LaVito, *Juul’s momentum slips as NJOY woos customers with dollar e-cigarettes*, CNBC (Aug. 20, 2019), <https://www.cnbc.com/2019/08/20/juuls-momentum-slips-as-njoy-woos-customers-with-dollar-e-cigarettes.html>.

<sup>319</sup> Ben Tobin, *FDA targets e-cigarettes like Juul as teachers fear ‘epidemic’ use by students*, USA Today (Aug. 16, 2018), <https://www.usatoday.com/story/money/2018/08/16/juul-labs-back-school-teachers-e-cigarettes/917531002/>.

<sup>320</sup> Scott Gottlieb, Statement from FDA Commissioner Scott Gottlieb, M.D., on new enforcement actions and a Youth Tobacco Prevention Plan to stop youth use of, and access to, JUUL and other e-cigarettes, FDA (Apr. 23, 2018), [https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-enforcement-actions-and-youth-tobacco-prevention?utm\\_campaign=04242018\\_Statement\\_Youth%20Tobacco%20Prevention&utm\\_medium=email&utm\\_source=Eloqua](https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-enforcement-actions-and-youth-tobacco-prevention?utm_campaign=04242018_Statement_Youth%20Tobacco%20Prevention&utm_medium=email&utm_source=Eloqua).

response to Juul,” according to a spokesperson. But in August 2018, R.J. Reynolds Vapor Co. launched the Vuse Alto, with pre-filled pods available in 5% nicotine strength, compared to the 3% nicotine in Vuse Vibe cartridges and 1.5% nicotine in the Vuse Ciro. “Juul has achieved tremendous progress over the last 18 months,” Reynolds American CEO Ricardo Oberlander told reporters, adding that he sees JUUL as “showing the great potential for growth” in the e-cigarette industry.<sup>321</sup> Seeking some of the social media marketing success that propelled JLI’s growth, Reynolds American began marketing Vuse e-cigarettes on Twitter and Instagram in May 2019.<sup>322</sup>

205. Also in 2018, as discussed further below, Altria launched its pod-based products, the MarkTen Elite and the Apex by Markten.

206. Researchers from SRITA called it “a nicotine arms race,” writing that “JUUL’s success in the e-cigarette marketplace has spurred a variety of new pod-based products with exceptionally high nicotine.”<sup>323</sup> “As of September 2018,” the researchers wrote, “there were at least 39 JUUL knock off devices on the market”—none of which were sold prior to the introduction of JUUL.<sup>324</sup> These new devices followed JLI’s example of high nicotine and discrete design:

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<sup>321</sup> Richard Craver, *Reynolds Vapor prepares national launch of new e-cig rival to JUUL*, Winston-Salem J. (July 17, 2018), [https://www.journalnow.com/business/reynolds-vapor-prepares-national-launch-of-new-e-cig-rival/article\\_7ba10442-d438-575e-af23-794173089a8a.html](https://www.journalnow.com/business/reynolds-vapor-prepares-national-launch-of-new-e-cig-rival/article_7ba10442-d438-575e-af23-794173089a8a.html).

<sup>322</sup> Jennifer Maloney, *Reynolds, With an Eye on Juul, Wades into Social Media*, Wall St. J. (May 15, 2019), <https://www.wsj.com/articles/reynolds-with-an-eye-on-juul-wades-into-social-media-11557921721>.

<sup>323</sup> Robert K. Jackler & Divya Ramamurthi, *Nicotine arms race: JUUL and the high-nicotine product market*. 28 Tobacco Control 623-28 (2019).

<sup>324</sup> *Id.*

The vast majority of these emulate, and sometimes exceed, JUUL’s exceptionally high nicotine levels. Like JUUL, they are also inconspicuous, small enough to easily fit in a pocket or purse, and their purpose as a nicotine delivery system may not be obvious to many casual observers, including parents and teachers.<sup>325</sup>

207. In addition to the thirty-nine “JUULalike” devices, the researchers identified fourteen brands marketing fifteen JUUL-compatible pods, and seventy-one American e-liquid brands selling nicotine salt e-liquids with 5% or greater nicotine strength.<sup>326</sup> All but one vendor of the JUUL-compatible pods offered mango flavor.<sup>327</sup>

208. The rapid proliferation of vape products in JUUL’s wake and the speed with which the vape market evolves make it difficult to enact effective legislative and regulatory measures. When the FDA finalized its policy restricting flavored pods and “cartridge-based products” in January 2020, vape products sprung up in the regulatory loopholes almost immediately.

209. The FDA’s enforcement policy took effect on February 6, 2020, and covered:

- Any flavored, cartridge-based ENDS [Electronic Nicotine Delivery System] product (other than a tobacco- or menthol-flavored ENDS product);
- All other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors’ access; [and]
- Any ENDS product that is targeted to minors or likely to promote use of ENDS by minors.<sup>328</sup>

210. In effect, this was a ban on flavored e-cigarette pods, other than tobacco and menthol flavors. But both flavored nicotine liquid designed for refillable vape devices and

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 2.

<sup>327</sup> *Id.*

<sup>328</sup> *FDA News Release*, *supra* note 270.

disposable vape products were allowed to remain on the market.<sup>329</sup>

211. In announcing the ban, the Secretary of HHS recognized, “The United States has never seen an epidemic of substance use arise as quickly as our current epidemic of youth use of e-cigarettes.”<sup>330</sup> FDA Commissioner Stephen Hahn, M.D. added, “As we work to combat the troubling epidemic of youth e-cigarette use, the enforcement policy we’re issuing today confirms our commitment to dramatically limit children’s access to certain flavored e-cigarette products we know are so appealing to them – so-called cartridge-based products that are both easy to use and easily concealable.”<sup>331</sup>

212. Enterprising companies recognized loopholes in a policy aimed only at cartridge-based products and the opportunity to fill the demand for fruit-flavored nicotine created by JLI. Disposable vape devices, not covered by the FDA’s ban, have become increasingly popular with youth, building on the public health crisis Defendant JLI helped create. The use of disposable vape devices is now “rampant” in schools.<sup>332</sup> These products are typically cheaper than JUULpods and are offered in increasingly more flavors.<sup>333</sup> One high school junior told *The New York Times* that she starting vaping mint and other flavored JUULs when she was in tenth grade.<sup>334</sup> She now vapes using disposable “Puff Bars” because “[t]hey have flavors like the Juul flavors. It’s basically like

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<sup>329</sup> Abby Goodnough et al., *With Partial Flavor Ban, Trump Splits the Difference on Vaping*, N.Y. Times (Jan. 2, 2020), <https://www.nytimes.com/2020/01/02/health/flavor-ban-e-cigarettes.html>; Sheila Kaplan, *Teens Find a Big Loophole in the New Flavored Vaping Ban*, N.Y. Times (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/health/vaping-flavors-disposable.html>.

<sup>330</sup> *FDA News Release*, *supra* note 270.

<sup>331</sup> *Id.*

<sup>332</sup> Kaplan, *Teens Find a Big Loophole*, *supra* note 329.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

smoking a Juul.”<sup>335</sup> Other high school students confirmed the popularity of Puff Bars, saying they “saw them everywhere” and “[t]hat’s what everyone was talking about.”<sup>336</sup>

213. Defendant Eonsmoke also sells disposable vape devices called Eon St!Ks, in a wide variety of youth-friendly flavors such as Blue Raspberry, Mango, Pink Lemonade, Lush Ice, and Berry Gelato.<sup>337</sup> Not only do Eonsmoke’s products come in kid-friendly flavors, they are sold in strengths of 6.8% nicotine, even stronger than JUUL’s advertised 5% nicotine.<sup>338</sup>



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<sup>335</sup> *Id.*

<sup>336</sup> Angeline Jane Bernabe et al., *Loophole in vaping ban has teens turning to disposable e-cigarettes*, Good Morning Am. (Mar. 4, 2020), <https://www.goodmorningamerica.com/wellness/story/loophole-vaping-ban-teens-turning-disposable-cigarettes-69376300>.

<sup>337</sup> *Id.* (listing Eonsmoke’s St!K disposable vape flavors as Blue Raspberry, Watermelon, Strawberry, Mango, Pineapple, Green Apple, Citrus, Cucumber, Peach, Pink Lemonade, Lush Ice, Strawberry Banana, Cubano, Kiwi Strawberry, Pomegranate, and Berry Gelato).

<sup>338</sup> *Id.*

<sup>339</sup> *St!K Disposables 6.8% Nicotine 3 Pack*, Eonsmoke.com, [https://www.eonsmoke.com/product/\\_\\_\\_trashed-3/](https://www.eonsmoke.com/product/___trashed-3/) (last visited Mar. 28, 2020).

214. Eonsmoke also provides the flavoring for another disposable vape device called *fruyt*.<sup>340</sup> Eonsmoke St!Ks and Puff Bars have been sold side by side in stores.<sup>341</sup>



215. As a Professor at Rutgers Center for Tobacco Studies stated, “[t]hese disposable, completely self-contained e-cigarettes like Puff Bar and others share all of the characteristics that made Juul a problem.”<sup>342</sup> In online discussions of these disposable vape products, including Eon St!K, users focused on “tasting similar to JUUL flavours, lasting longer than a JUUL pod and having a good ‘hit’ like a JUUL . . . [and] posted images highlight the similar physical dimensions to JUUL.”<sup>343</sup> Researchers evaluating the rise of these products noted that “these products are similar to JUUL—the brand driving high rates of youth vaping—in form and function.”<sup>344</sup> Disposable vape devices like Defendant Eonsmoke’s are “nearly identical in size” to JUUL and “also contain nicotine salts,” but also offer even more flavors, even higher nicotine

<sup>340</sup> Cristine Delnevo et al., *Rapid proliferation of illegal pod-mod disposable e-cigarettes*, Tobacco Control 055485 (Jan. 6, 2020), <https://tobaccocontrol.bmj.com/content/early/2020/01/30/tobaccocontrol-2019-055485.full>.

<sup>341</sup> Kaplan, *Teens Find a Big Loophole*, *supra* note 329.

<sup>342</sup> *Id.*

<sup>343</sup> Delnevo, *Rapid proliferation*, *supra* note 340.

<sup>344</sup> *Id.*

concentrations, colorful marketing, and low pricing.<sup>345</sup> Researchers also noted that “as a ‘single use product’, disposable [vape devices] further contribute to plastic waste and microplastic pollution, which is a growing health concern.”<sup>346</sup> This waste is a problem for Plaintiff as well as other municipalities, schools, and counties, as discussed below.

216. In response to increasing pressure, the founder and CEO of the company behind Puff Bar, Cool Clouds, announced that the company has “ceased all distribution” of Puff Bar products in the U.S. and stopped licensing to “prevent third parties from distributing in the U.S.”<sup>347</sup> Defendant Eonsmoke’s disposable vape devices, on the other hand, are still available. Moreover, for every company selling candy-flavored vape products that exits the market, more materialize to take its place, driven by the knowledge that there is a large market of nicotine-addicted youth eager for their products.

217. The rise in disposable products as a means to evade bans on flavored e-cigarettes demonstrates why partial regulatory measures—banning flavor pods but not all flavored tobacco products, for example—are not sufficient to halt the spread of youth vaping.<sup>348</sup>

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> Sophie Alexander & Angelica LaVito, *Upstart L.A. company pulls back Puff Bar single-use vaping product after outcry*, L.A. Times (Feb. 20, 2020), <https://www.latimes.com/business/story/2020-02-20/vaping-loophole>.

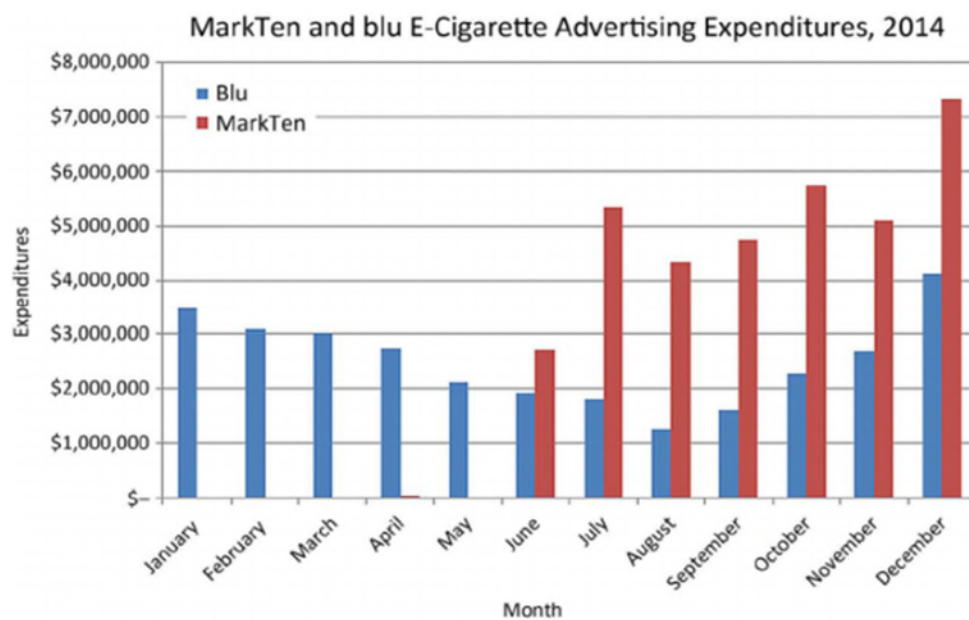
<sup>348</sup> *Press Release: Raising the Tobacco Age to 21 Won’t Stop the Youth E-Cigarette Epidemic and Is Not a Substitute for Eliminating the Flavored Products that Lure Kids*, Tobacco Free Kids (Dec. 16, 2019), [https://www.tobaccofreekids.org/press-releases/2019\\_12\\_16\\_tobacco21\\_flavor](https://www.tobaccofreekids.org/press-releases/2019_12_16_tobacco21_flavor).



## I. JLI and Altria Join Forces to Protect JUUL’s Market Domination

### 1. Before conspiring with JLI, Altria tried to corner the youth e-cigarette market

218. Altria’s first e-cigarette was a cigarette-lookalike, or “cigalike,” style of e-cigarette, sold under the brand MarkTen. Following a phased roll-out of MarkTen in Indiana and Arizona in late 2013, Altria launched the MarkTen nationwide in 2014 with an aggressive marketing campaign, eclipsing the advertising expenditures for the market leader at that time, blu e-cigarettes.<sup>349</sup>



219. E-cigarette advertising spending for 2014 totaled \$88.1 million, a 52% increase from 2013.<sup>350</sup> Of the \$88.1 million spent in 2014, nearly 40% of that was Altria’s MarkTen

<sup>349</sup> Jennifer Cantrell et al., *Rapid increase in e-cigarette advertising spending as Altria’s MarkTen enters the marketplace*, 25 *Tobacco Control* e16-18 (2015), <http://dx.doi.org/10.1136/tobaccocontrol-2015-052532>.

<sup>350</sup> *Id.*

campaign, at \$35 million.<sup>351</sup> More than eighteen million middle school and high school children were exposed to e-cigarette advertisements in 2014.<sup>352</sup> Approximately one in two middle school and high school age children saw advertisements for e-cigarettes in retail stores and almost two in five saw advertisements for e-cigarettes online.<sup>353</sup>



220. At the time, the president of the Campaign for Tobacco-Free Kids said that companies like Altria were using “exactly the same themes we saw work with kids in the U.S. for decades with cigarettes.”<sup>354</sup>

221. Although free samples of tobacco products are prohibited under the terms of the Tobacco Master Settlement Agreement, as well as FDA regulations issued in 2010, Altria

<sup>351</sup> *Id.*

<sup>352</sup> Carley Thompson, *How JUUL cornered the youth tobacco market and what you should know*, King Cty. Pub. Health Insider (Aug. 6, 2018), <https://publichealthinsider.com/2018/08/06/how-juul-cornered-the-youth-tobacco-market-and-what-you-should-know/>.

<sup>353</sup> *Id.*

<sup>354</sup> Matt Richtel, *A Bolder Effort by Big Tobacco on E-Cigarettes*, N.Y. Times (June 17, 2017), <https://www.nytimes.com/2014/06/17/business/a-bolder-effort-by-big-tobacco-on-e-cigarettes.html>.

exploited the grey area in the regulation of e-cigarettes and distributed coupons for free sample nicotine cartridges as part of its MarkTen launch. (The FDA has since issued finalized guidance clarifying the scope of the ban on distributing free samples or coupons to generally include e-cigarettes or components.<sup>355</sup>)

222. Altria utilized its extensive distribution network, reaching 60,000 stores in a month.<sup>356</sup> For instance, in Arizona, Altria’s distribution network allowed MarkTen to achieve a 48% e-cigarette market share in just seven weeks after launch, according to then-CEO Marty Barrington’s statements on an earnings call.<sup>357</sup> Altria was clear in its intent to dominate the e-cigarette market as it has the traditional cigarette one: “We are the market leader today and we will continue to be,” Barrington told investors at the time of MarkTen’s launch.<sup>358</sup>

223. Altria also began acquiring small companies in the vaping industry, starting in 2014 with Green Smoke, Inc., whose e-cigarettes were also the “cigalike” style, and were sold in flavors including “Vanilla Dreams” and “Smooth Chocolate.”<sup>359</sup> In 2016, Altria acquired a vape product called Cync, from Vape Forward.<sup>360</sup> Cync is a small vapor device that uses prefilled pods, similar to JUUL.

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<sup>355</sup> *The Prohibition of Distributing Free Samples of Tobacco Products: Guidance for Industry*, FDA (Oct. 2017), <https://www.fda.gov/media/119231/download>.

<sup>356</sup> Melissa Kress, *MarkTen National Rollout Hits 60,000 Stores*, Convenience Store News (July 22, 2014), <https://csnews.com/markten-national-rollout-hits-60000-stores>.

<sup>357</sup> Mike Esterl, *Altria To Launch MarkTen E-Cigarette Nationally*, Wall St. J. (Feb. 19, 2014), <https://www.wsj.com/articles/altria-to-launch-markten-e-cigarette-nationally-1392832378>.

<sup>358</sup> Kress, *supra* note 356.

<sup>359</sup> Esterl, *supra* note 357; Senator Richard J. Durbin et al., *Gateway to Addiction? A Survey of Popular Electronic Cigarette Manufacturers and Targeted Marketing to Youth* at 12 (Apr. 14, 2014), <https://www.durbin.senate.gov/imo/media/doc/Report%20-%20E-Cigarettes%20with%20Cover.pdf>.

<sup>360</sup> Remarks by Jody Begley, 2017 Altria Investor Day (Nov. 2, 2017), [http://media.corporate-ir.net/media\\_files/IROL/80/80855/2017InvestorDay/Remarks\\_and\\_Reconciliations.pdf](http://media.corporate-ir.net/media_files/IROL/80/80855/2017InvestorDay/Remarks_and_Reconciliations.pdf).

224. In 2016, Altria launched a pod-based, “closed-tank” e-cigarette like JUUL, which it branded as the MarkTen Elite: “a pod-based product with a premium, sleek battery design” and having the “convenience of prefilled, magnetic click pods.”<sup>361</sup> Altria told investors that the product “offers a variety of flavorful liquids in a modern, discrete device format.”<sup>362</sup> After its nationwide launch, former Altria CEO Barrington, boasted that the Elite’s pods held more than twice as much liquid as JUUL’s.<sup>363</sup>



225. Altria quickly followed with another pod-based product, the Apex by MarkTen.

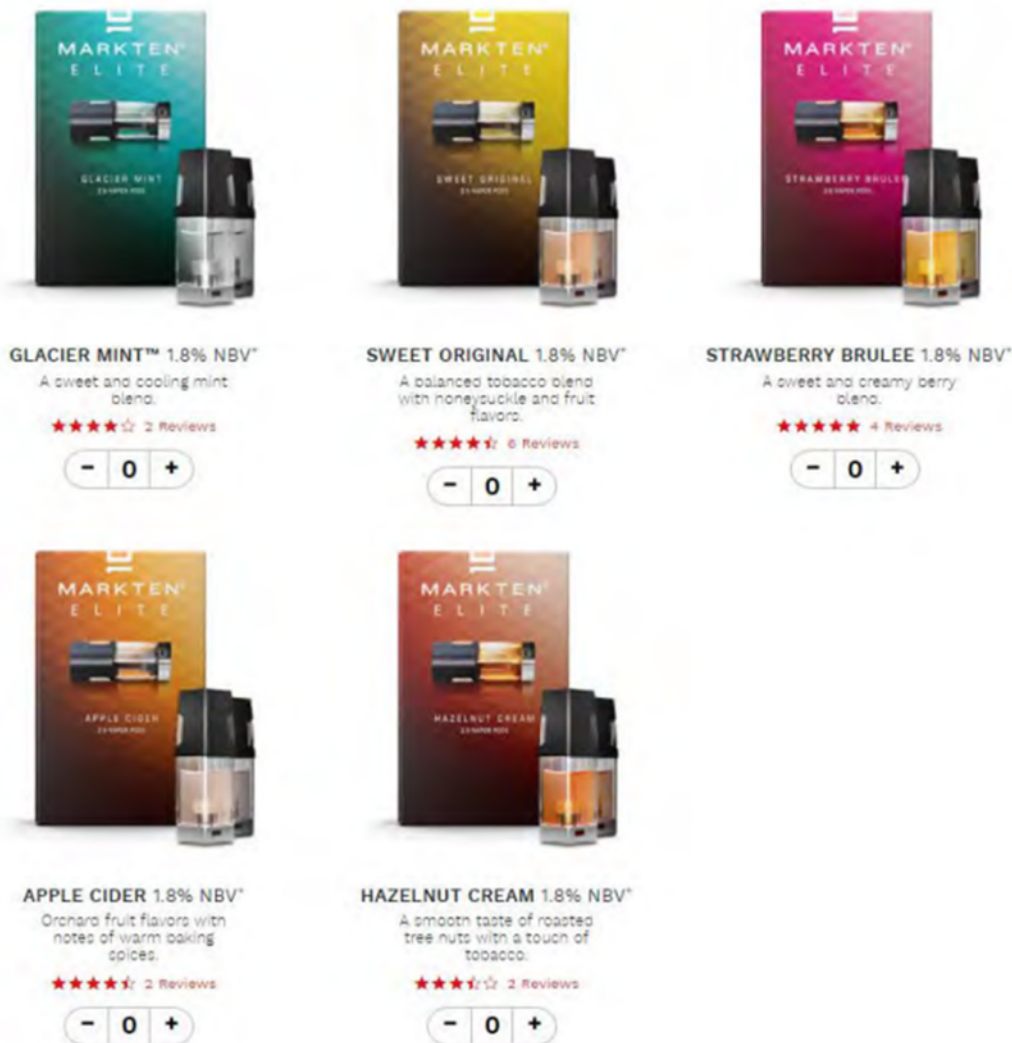


<sup>361</sup> Angel Abcede, *Altria Introducing Closed Vapor System*, CSP Daily News (Feb. 27, 2018), <https://www.cspdailynews.com/tobacco/altria-introducing-closed-vapor-system#page=0>.

<sup>362</sup> Remarks by Begley, *supra* note 360 at 18.

<sup>363</sup> Altria Group, Inc., Current Report (Form 8-K), Ex. 99.2 (Feb. 21, 2018), <https://www.sec.gov/Archives/edgar/data/764180/000076418018000020/exhibit992-2018cagnyremarks.htm> (remarks by Barrington and other members of Altria’s senior management team).

226. As mentioned above, Altria marketed its e-cigarettes in flavors that would appeal to youth. For example, the MarkTen Elite came in “Strawberry Brulee,” “Glacier Mint,” “Apple Cider,” and “Hazelnut Cream”:<sup>364</sup>



227. In February 2017, Altria told investors at the 2017 Consumer Analyst Group of New York (CAGNY) Conference that over the past year, “Nu Mark LLC (Nu Mark) made

<sup>364</sup> *Examples New Ecigs Post Juul* at 13, Campaign for Tobacco-Free Kids (July 18, 2018), [https://www.tobaccofreekids.org/assets/images/content/2018\\_07\\_18\\_New\\_Ecigs\\_Post\\_Juul.pdf](https://www.tobaccofreekids.org/assets/images/content/2018_07_18_New_Ecigs_Post_Juul.pdf).

excellent progress toward its long-term aspiration of becoming a leader in e-vapor.”<sup>365</sup> In his remarks, Willard said, “Nu Mark, our e-vapor company, had a very strong year. It made excellent progress toward establishing MarkTen as a leading brand in the category, continued to improve its supply chain, and took the necessary steps to comply with the deeming regulations.”<sup>366</sup> He noted, however, that the estimated “total 2016 e-vapor consumer spending was roughly flat compared to the prior year at approximately \$2.5 billion.”<sup>367</sup>

228. Despite its best efforts, in 2017, Altria’s MarkTen e-cigarettes had a market share of only 13.7%, well behind JLI’s growing market share of 40%.<sup>368</sup> Thus, despite its public statements to the contrary, Altria knew that it would not achieve its goal of dominating the e-cigarette market through its own products.

## **2. JLI and Altria Decide to Work Together to Expand JUUL’s Reach and Cover-Up JLI’s Youth Marketing**

229. As set forth above, Big Tobacco has long known the importance of targeting youth and addicting them to nicotine. Profitable growth requires a pipeline of “replacement smokers” or e-cigarette users. JLI was wildly successful at expanding that pipeline, hooking youth who had never smoked cigarettes—and who, having grown up in the decades of anti-

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<sup>365</sup> Altria Group, Inc., Current Report (Form 8-K), Ex. 99.2 at 1 (Feb. 22, 2017), <https://www.sec.gov/Archives/edgar/data/764180/000076418017000020/exhibit991-2017cagnyremarks.htm> (remarks by Barrington and other members of Altria’s senior management team).

<sup>366</sup> *Id.* at 9.

<sup>367</sup> *Id.* at 10.

<sup>368</sup> Richard Craver, *Vuse falls further behind Juul on e-cig sales*, Winston-Salem J. (Dec. 14, 2017), [https://www.journalnow.com/business/vuse-falls-further-behind-juul-on-e-cig-sales/article\\_ed14c6bc-5421-5806-9d32-bba0e8f86571.html](https://www.journalnow.com/business/vuse-falls-further-behind-juul-on-e-cig-sales/article_ed14c6bc-5421-5806-9d32-bba0e8f86571.html).

smoking efforts following the Tobacco Master Settlement Agreement, never intended to try cigarettes. JLI's customers largely represented the generation that Altria could not reach.

230. While still popular overseas, cigarette use has been declining in the United States in the last decade,<sup>369</sup> especially with youth. Altria estimates that the cigarette industry declined by 4% in 2017 and by 4.5% in 2018, and it predicted a continued 4% to 5% decline in the average annual U.S. cigarette industry volume for 2019 through 2023.<sup>370</sup> Altria later adjusted the estimated rate of decline to 4% to 6%, to reflect efforts to increase the legal age for cigarette smoking to twenty-one.<sup>371</sup>

231. As described above, Altria marketed its own e-cigarettes, testing different versions of the MarkTen e-cigarette and acquiring products such as the GreenSmoke cigalike and the Cync vape device. But JLI, a younger, tech-oriented, social-media-savvy company, was far better at targeting youth and making its product "cool" than Altria and other Big Tobacco companies were.

232. Both JLI and Altria knew that JUUL's meteoric growth came from young, nonsmoking customers. As described below, Altria told the FDA as much in an October 25, 2018 letter responding to the FDA's request for a plan of action to address youth e-cigarette use. Altria

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<sup>369</sup> *Current Cigarette Smoking Among Adults In the United States*, CDC, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/adult\\_data/cig\\_smoking/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm) (last visited Mar. 28, 2020); *Youth and Tobacco Use*, CDC, [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/youth\\_data/tobacco\\_use/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm) (last visited Mar. 28, 2020).

<sup>370</sup> *Altria's Fourth-Quarter 2018 Earnings Conference Call*, Altria (Jan. 31, 2019), <http://investor.altria.com/Cache/1001247877.PDF?O=PDF&T=&Y=&D=&FID=1001247877&iid=4087349>.

<sup>371</sup> *Altria Shares Slide As Cigarette Sales Continue to Decline*, Tobacco Bus. (July 31, 2019), <https://tobaccobusiness.com/altria-shares-slide-as-cigarette-sales-continue-to-decline/>.

informed the FDA that it was exiting the market for pod-based e-cigarettes, on the grounds that these products contributed to the youth vaping epidemic. Altria even displayed this letter to the public by posting it on its website, purporting to disclaim the very marketing and advertising tactics JLI relied on. But by this time, Altria and JLI had already been collaborating for approximately one year, and just seven weeks later, Altria would publicly announce its \$12.8 billion investment in JLI.

233. Altria wanted JUUL's profits and new customer base. JLI, facing a public outcry, needed Altria's help to navigate the storm that it created. The solution was a well-orchestrated cover-up with JLI dramatically changing its tune to promote itself as a company focused on "harm reduction," purportedly providing existing adult smokers with a way to "Make the Switch" from combustible cigarettes to JUUL.

234. For that reason and others, Defendants JLI and Altria formed an association-in-fact enterprise ("the Youth Marketing Cover-Up Enterprise") to protect and expand the market for JUUL through fraudulent means, including disseminating false statements denying JLI's efforts to target youth with nicotine products and characterizing JUUL as a cessation device that was never intended for, or marketed to, youth. All the while, JLI and Altria understood that maintaining and expanding JUUL's market share meant maintaining and expanding a customer base predominantly made of youth users.

235. Altria was prepared for this deception. Altria, and the rest of Big Tobacco, has a long history of targeting youth with nicotine products and then lying about it. In fact, this type of cover-up of youth marketing formed one of the bases for the U.S. Department of Justice's ("DOJ") 1999 RICO lawsuit alleging that Big Tobacco engaged in a conspiracy to deceive the



public about the health effects of smoking and about their marketing to youth. In 2006, in a 1,683-page opinion, Judge Kessler upheld the DOJ's RICO claim against Altria and the other Big Tobacco companies. Judge Kessler found that Big Tobacco, including Altria and its subsidiary Philip Morris USA, committed predicate racketeering acts by falsely claiming that "they do not market to youth, that their marketing is only aimed at adult smokers, and that their marketing has no impact on youth smoking."<sup>372</sup> For example, Philip Morris<sup>373</sup> and its co-conspirators caused to be transmitted a false claim that the cigarette industry "feel[s] very strongly that cigarette smoking is an adult custom that one should not even consider until they've reached the age of maturity," which it claimed was age twenty-one.<sup>374</sup> Similarly, the court found that Philip Morris's published marketing policies, claiming that "[a]ll of our brand advertising and promotions are intended for adults who choose to smoke" were false.<sup>375</sup> The court also found that Altria made false statements in support of the Enterprise at a 2000 Philip Morris shareholders meeting when the Altria Board of Directors denied that Philip Morris marketed to youth:<sup>376</sup>

[Philip Morris] has programs and policies in place, and are subject to legal restrictions, that help ensure that marketing and advertising activities be directed only to adults that choose to smoke . . . Philip Morris U.S.A. has a long-standing commitment to direct its advertising only at adults who choose to smoke [and] complies with an industry code and company policy that help ensure that its marketing efforts are directed only to adults who choose to smoke.

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<sup>372</sup> *Philip Morris*, 449 F. Supp. 2d at 862.

<sup>373</sup> *Id.* at 204 n.12 (Judge Kessler found that Altria "effectively and actively control[ed] the activities of all of its subsidiaries, including Defendant Philip Morris USA Inc.").

<sup>374</sup> *Id.* at 678-79.

<sup>375</sup> *Id.* at 683.

<sup>376</sup> *Id.* at 683.

Judge Kessler concluded that “[t]hese public statements are false and misleading and have been made to further the Enterprise’s overall objective of maximizing Defendants’ profits from the sale of cigarettes.”<sup>377</sup> As Judge Kessler explained, these “Defendants’ efforts to target youth [we]re based on a recognition that the youth market is critical to the growth of their industry; their denials of those efforts [we]re based on the recognition that the public considers pursuit of the youth market to be ethically unacceptable.”<sup>378</sup>

236. The Youth Marketing Cover-Up Enterprise’s attempted cover-up of JLI’s youth marketing is more of the same. As part of the fraudulent Enterprise, JLI and Altria made false statements to the public and to regulators about actions they were purportedly taking to address rampant youth vaping, including removing certain JUULpod flavors from the market while continuing to promote Mint JUULpods with the knowledge that Mint was a preferred flavor with youth, with the intent that parents, policymakers, and regulators would rely on such false statements in a way that would allow JLI to keep selling JUUL products.

237. The Youth Marketing Cover-Up Enterprise is an ongoing and continuing organization with a common purpose of covering up JLI’s youth focus and fraudulently maintaining and expanding JUUL’s massive and ill-gotten market share.

### **3. Following JLI’s Journey Closely: Formation of the Youth Marketing Cover-Up Enterprise**

238. Defendants Altria and JLI formed the Youth Marketing Cover-Up Enterprise by at least late 2017 or early 2018.

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<sup>377</sup> *Id.* at 862.

<sup>378</sup> *Id.* at 863.

239. From JLI's beginnings, Altria, a pioneer in addicting youth to nicotine, "followed Juul's journey rather closely."<sup>379</sup>

240. According to Altria's current CEO, Howard A. Willard III, Altria first contacted JLI about a commercial relationship in early 2017, with "confidential discussions" beginning in the spring of 2017.<sup>380</sup> JLI and Altria's "confidential discussions" occurred "over a period of approximately 18 months."<sup>381</sup>

241. In November 2017, Altria announced a minority investment in Avail Vapor, LLC ("Avail"), one of the largest vape store chains in the United States, which also produces and sells its own branded e-liquids for refillable "open-tank" devices.<sup>382</sup> Altria's comments to investors highlighted that the investment allowed Altria access to Avail's "extensive data around adult vaper purchasing patterns," and "full-service analytical science laboratory," located in Altria's hometown of Richmond, Virginia.<sup>383</sup>

242. On information and belief, the "confidential discussions" between JLI and Altria intensified in late 2017 and early 2018, and the companies began to lay the groundwork for

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<sup>379</sup> Altria Group, Inc., Current Report (Form 8-K), Ex. 99.1 at 4 (Feb. 20, 2019), <https://www.sec.gov/Archives/edgar/data/764180/000076418019000018/exhibit991-2019cagnyremarks.htm> (Remarks by Willard and other members Altria's senior management team).

<sup>380</sup> Willard, *Letter to Senator Durbin*, *supra* note 23 at 3.

<sup>381</sup> *Id.*

<sup>382</sup> Rich Duprey, *Is Altria Trying to Corner the E-Cig Market?*, Motley Fool (Jan. 7, 2018), <https://www.fool.com/investing/2018/01/07/is-altria-trying-to-corner-the-e-cig-market.aspx>; Lauren Thomas, *Altria shares plunge after FDA releases road map to curb tobacco-related deaths*, CNBC (July 28, 2017), <https://www.cnbc.com/2017/07/28/altria-shares-fall-after-fda-releases-roadmap-to-curb-tobacco-related-deaths-.html>.

<sup>383</sup> Altria Group, Inc., Current Report (Form 8-K), Ex. 99.1 at 19 (Nov. 2, 2017), <https://www.sec.gov/Archives/edgar/data/764180/000076418017000131/exhibit991-2017investorday.htm>.

Altria to support the Youth Marketing Cover-Up Enterprise. Altria has acknowledged that it was monitoring JUUL sales data “in late 2017 and early 2018.”<sup>384</sup> At that time, JUUL was dominating the e-cigarette market. By November 2017, JLI had sold one million units of its blockbuster product, with a 621% growth in year-to-year sales and capturing 32% of e-cigarette sales tracked by Nielsen.<sup>385</sup>

243. Altria recognized that JLI had, against the backdrop of steadily declining cigarette sales, created the perfect product to addict a new generation to nicotine. But to keep the product from disappearing off the shelves as quickly as it had arrived due to public outcry, JLI would need a more sophisticated approach to marketing and to navigating the storm of public opinion and regulatory and congressional scrutiny on the horizon. In short, JLI needed Altria’s experience, and Altria needed access to JLI’s best-selling e-cigarette and its youth market.

244. While following JLI’s journey closely and engaging in “confidential discussions,” Altria had tested variations on the MarkTen that shared features of JUUL, such as the MarkTen Bold, with a nicotine salt formulation and 4% nicotine by weight, and the MarkTen Elite, “a small pod-based product that offers a variety of flavorful liquids in a modern, discrete device format.”<sup>386</sup> But as noted above, sales of Altria’s own e-cigarettes trailed behind both JUUL and British American Tobacco’s Vuse.

245. Altria wanted JLI’s market dominance and young customer base. JLI, in the crosshairs of a public and regulatory outcry, needed Altria’s experience placating the public and its influence in Washington. Together, by lying about JLI’s efforts to addict youth to nicotine

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<sup>384</sup> Willard, *Letter to Senator Durbin*, *supra* note 23 at 6 (emphasis added).

<sup>385</sup> Robinson, *supra* note 14.

<sup>386</sup> Remarks by Begley, *supra* note 360.

and fraudulently misrepresenting the nature of JUUL, JLI and Altria could protect, maintain, and expand JLI's massive and ill-gotten youth market share.

**4. Late 2017–August 2018: Early Coordination of Altria with the Youth Marketing Cover-Up Enterprise**

246. As the sales of JUUL continued to mushroom, it was readily apparent, and widely reported, that the rapid growth in sales was due to the surging popularity of “juuling” among teenagers. By March 2018, multiple national news outlets including *National Public Radio*, *USA Today*, and *Business Insider* reported youth were using JUUL with alarming frequency, posting about “juuling” in school restrooms on social media, and bragging about being able to use the device in the classroom due to JUUL's discreet design.

247. One of the priorities for the Youth Marketing Cover-Up Enterprise was therefore to control the messaging and narrative around youth vaping. Faced with an urgent, growing public health crisis, national media attention, and the ire of the public, the FDA and members of Congress, the Youth Marketing Cover-Up Enterprise realized that given the increasing public and regulatory scrutiny of JLI's marketing tactics, a dis-information campaign was urgently needed to protect its bottom line, and it turned to a sophisticated and savvy third party for assistance. By at least April 2018, both JLI and Altria were working with the global public strategy firm Mercury LLC (“Mercury”), which is part of Omnicom Group, Inc. (“Omnicom”), one of the “Big Four” advertising holding companies dominating marketing and communications worldwide since the 1990s, second only to WPP plc.<sup>387</sup>

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<sup>387</sup> See *HISTORY's Moments in Media: The Birth of the Big 4 Holding Companies*, MediaVillage (Jan. 13, 2020), <https://www.mediavillage.com/article/historys-moments-in-media-the-birth-of-the-big-4-holding-companies/>; Nathalie Tadema & Joshua Jamerson, *Omnicom Posts Strong Sales Growth Advertising Giant's Second-Quarter Earnings Rise 12%*, Wall S. J. (July 22,

248. Mercury filed a lobbying registration on behalf of Defendant Altria Client Services LLC, effective April 1, 2018, identifying “tobacco product regulations” as the specific issue; two of Mercury’s managing directors, Stephen Aaron and Al Simpson, handle the Altria account.<sup>388</sup> Aaron, who was the federal liaison for the National Rifle Association for nearly a decade, describes his role as “help[ing] clients nuance complex issues to deliver effective messages amid intense national debates to move the public in support of client agendas.”<sup>389</sup> Big Tobacco spin tactics are familiar territory for Mercury: another Mercury client is the Foundation for a Smoke-Free World (“Foundation”), an organization established and solely funded by Philip Morris International that claims to be an independent scientific body.<sup>390</sup> The World Health Organization strongly rejected partnering with the Foundation and urged others to do the same,<sup>391</sup> while other global health organizations pointed out that “[w]hile PMI and its grantee claim a commitment to reducing harm; reports show that PMIs cigarettes continue to be heavily marketed in ways that attract children and undermine public health policy.”<sup>392</sup> Working with JLI

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2014), <https://www.wsj.com/articles/omnicom-sees-earnings-revenue-growth-top-expectations-1406028567>.

<sup>388</sup> Kevin McCauley, *Altria Taps Mercury for Tobacco Regulation Work*, O’Dwyer’s (June 4, 2018), <https://www.odwyerpr.com/story/public/10754/2018-06-04/altria-taps-mercury-for-tobacco-regulation-work.html>.

<sup>389</sup> Stephen Aaron, Managing Director, Mercury LLC, <http://www.mercuryllc.com/experts/stephen-aaron/> (last visited Mar. 28, 2020).

<sup>390</sup> Tess Legg et al., *The Philip Morris-funded Foundation for a Smoke-Free World: tax return sheds light on funding activities*, Vol. 393 *Lancet* No. 10190 at 2469-2562 (June 22, 2019), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)31347-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)31347-9/fulltext).

<sup>391</sup> *WHO Statement on Philip Morris funded Foundation for a Smoke-Free World*, WHO (Sept. 28, 2017), <https://www.who.int/news-room/detail/28-09-2017-who-statement-on-philip-morris-funded-foundation-for-a-smoke-free-world>.

<sup>392</sup> *Open Letter to Urge WHO Executive Board to Reject Foundation for a Smoke Free World (FSFW)*, GGTC (Jan. 28, 2019), <https://ggtc.world/2019/01/28/an-open-letter-to-urge-who-executive-board-to-reject-fsfw/>.

and Altria, Mercury has promoted a similar “harm reduction” message as a central feature of the Youth Marketing Cover-Up Enterprise’s dis-information campaign.

249. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>393</sup> [REDACTED]

[REDACTED]

[REDACTED]

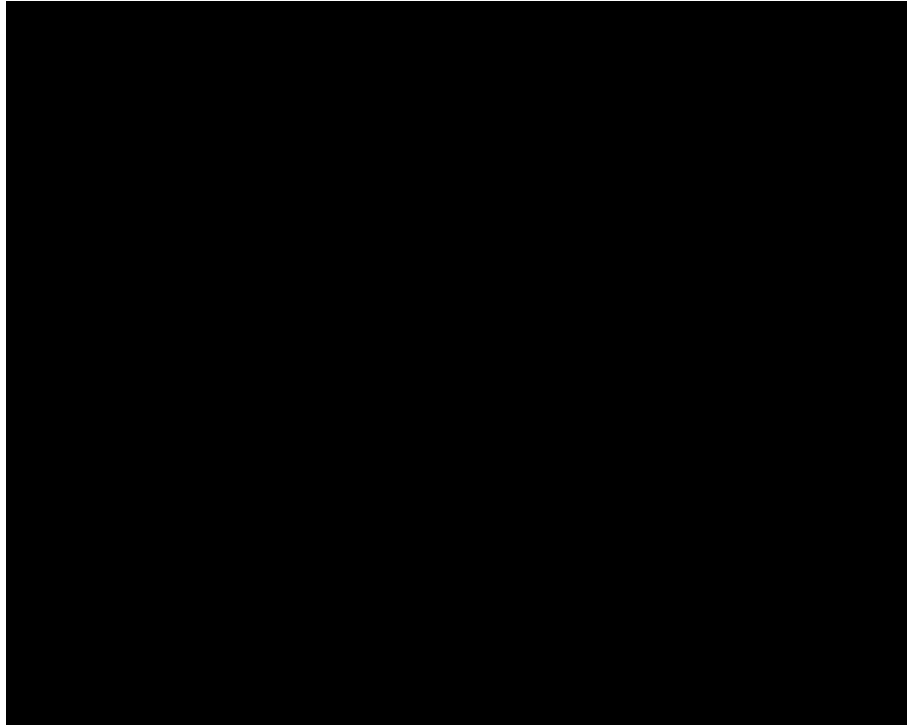
[REDACTED]

[REDACTED]<sup>394</sup>

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<sup>393</sup> INREJUUL\_00262168; *see also* Kate Zernike, ‘I Can’t Stop’: Schools Struggle With Vaping Explosion, N.Y. Times (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/health/vaping-ecigarettes-addiction-teen.html>.

<sup>394</sup> INREJUUL\_00262168.



250. [Redacted]

[Redacted]

[Redacted]

[Redacted]<sup>395</sup>

251. On April 18, 2018, a group of eleven United States Senators sent JLI a letter declaring that JUUL and JUULpods “are undermining our nation’s efforts to reduce tobacco use among youth and putting an entire new generation of children at risk of nicotine addiction and other health consequences.”<sup>396</sup>

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<sup>395</sup> INREJUUL\_00262226-227.

<sup>396</sup> Letter from Senator Richard J. Durbin et al. to Kevin Burns, JUUL Labs, Inc. (Apr. 18, 2018), <https://www.durbin.senate.gov/imo/media/doc/JUUL%20Letter%20-%20S%20IGNED.pdf>.



252. Less than a week later, on April 23, 2018, then-FDA Commissioner Gottlieb announced a crackdown on retailers to limit youth access to e-cigarettes and enforcement actions against JLI in particular.<sup>397</sup> On April 24, 2018, the FDA sent JLI a request for documents “relating to marketing practices and research on marketing, effects of product design, public health impact, and adverse experiences and complaints related to JUUL.”<sup>398</sup> The FDA stated clearly that it was requesting these documents because of evidence of widespread youth use, including media reporting about middle school and high school student use of JUUL on school property and social media evidence of youth use. “Widespread reports of youth use of JUUL products are of great public health concern,” the FDA warned.<sup>399</sup>

253. JLI, with the help of its “campaign manager” Mercury and Altria guiding its campaign, was ready with a response. The next day, on April 25, 2018, JLI issued a press release, pledging its support of efforts to raise the minimum age to purchase tobacco products to twenty-one and “an initial investment of \$30 million over the next three years dedicated to independent research, youth and parent education, and community engagement efforts.”<sup>400</sup>

254. As part of its “independent research,” in 2018, JLI, with the approval and knowledge of JLI’s officers and directors, engaged McKinsey & Company to survey teenagers regarding their e-cigarette flavor preferences, among other things, and engaged DB Research to conduct a focus group with teenagers in Maryland. As discussed above, this research confirmed

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<sup>397</sup> Gottlieb, Statement Apr. 23, 2018, *supra* note 320.

<sup>398</sup> Letter from Matthew Holman, M.D., FDA to Ziad Rouag, JUUL Labs, Inc. (Apr. 24, 2018), <https://www.fda.gov/media/112339/download>.

<sup>399</sup> *Id.*

<sup>400</sup> JUUL Labs, Inc., *JUUL Labs Announces Comprehensive Strategy to Combat Underage Use*, MarketWatch (Apr. 25, 2018), <https://www.marketwatch.com/press-release/juul-labs-announces-comprehensive-strategy-to-combat-underage-use-2018-04-25>.

the popularity of Mint JUULpods with teens. Similarly, the Altria Defendants knew from decades of experience selling a variety of tobacco products—and the development of its “graduation theory”—that both mint and menthol were popular with youth, as discussed above. Despite this knowledge, JLI and Altria kept Mint and Menthol JUULpods on the shelves even when ostensibly removing youth-friendly flavors from retail stores in November 2018, as discussed further below.

255. [REDACTED]

[REDACTED]

256. Instead, with that knowledge and with no genuine interest in youth prevention, and as detailed below, JLI, JLI’s officers and directors, and Altria committed to work to preserve Mint as a flavor for as long as possible. Indeed, to further this goal, Pritzker and Valani poured additional money into JLI a mere two months later as part of a \$600 million funding round, allowing the Youth Marketing Cover-Up Enterprise to continue the work of maintaining and expanding JUUL’s youth market-share while denying that JLI marketed to youth in order to avoid public outcry.<sup>401</sup>

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<sup>401</sup> *JUUL Raises \$650M Of Its \$1.25B Mega-Round*, crunchbase (July 10, 2018), <https://news.crunchbase.com/news/juul-raises-650m-of-its-1-25b-mega-round/>.

257.

[REDACTED]

<sup>402</sup>

[REDACTED]

<sup>403</sup>

258.

[REDACTED]

<sup>404</sup>

[REDACTED]<sup>405</sup> Put another way, JUUL’s continued market growth required Altria and JLI to convince the public and regulators that contrary to the facts, JLI had nothing to do with youth vaping.

259. On August 2, 2018, JLI met with the FDA to discuss a proposed youth-behavioral study on the prevalence of use, perceptions of use, and intentions to use JUUL and other tobacco products among adolescents aged thirteen and seventeen (the “Youth Prevalence study”).<sup>406</sup> As with other steps taken by the Youth Marketing Cover-Up Enterprise during this time, the Youth Prevalence study was a distraction and delay tactic, meant to give the public and regulators the

<sup>402</sup> INREJUUL\_00258827-828.

<sup>403</sup> *Id.*; see also *Start-up e-cigarette brand aims to “improve smokers’ lives”*, 362 BMJ k2930 (2018), <https://www.bmj.com/content/362/bmj.k2930>.

<sup>404</sup> INREJUUL\_00258827-828.

<sup>405</sup> *Id.*

<sup>406</sup> Letter from Joanna Engelke, JUUL Labs, Inc., to David Portnoy, Ph.D., M.P.H., FDA Center for Tobacco Products (Nov. 5, 2018).

impression that JLI was actively addressing the youth vaping epidemic. In fact, as discussed further below, the Youth Prevalence study was a sham, and JLI would provide “results” to the FDA in November 2018 that were directly contradicted by its own internal data.

260. [REDACTED]

<sup>407</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>408</sup> The brand campaign that Omnicom ultimately created for the Youth Marketing Cover-Up Enterprise was the “Make the Switch” campaign, which revolved around television ads featuring former smokers aged thirty-seven to fifty-four, each discussing “how JUUL helped them quit smoking.”<sup>409</sup>

261. A striking departure from JLI’s earlier advertising campaigns and launch parties, the “Make the Switch” campaign was the backdrop for the fraudulent statements disseminated by the Youth Marketing Cover-Up Enterprise in order to protect, maintain, and expand the tremendous market share gained by hooking kids on nicotine: that JUUL was only ever intended as an alternative to smoking for existing adult smokers and JLI’s marketing was never aimed at youth. According to JLI’s Vice President of Marketing, the “Make the Switch” campaign was

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<sup>407</sup> See INREJUUL\_00066530-539 ([REDACTED])

<sup>408</sup> INREJUUL\_00074841-844.

<sup>409</sup> Angelica LaVito, *Juul combats criticism with new TV ad campaign featuring adult smokers who quit after switching to e-cigarettes*, CNBC (Jan. 8, 2019), <https://www.cnbc.com/2019/01/07/juul-highlights-smokers-switching-to-e-cigarettes-in-ad-campaign.html>.

“an honest, straight down the middle of the fairway, very clear communication about what we’re trying to do as a company.”<sup>410</sup>

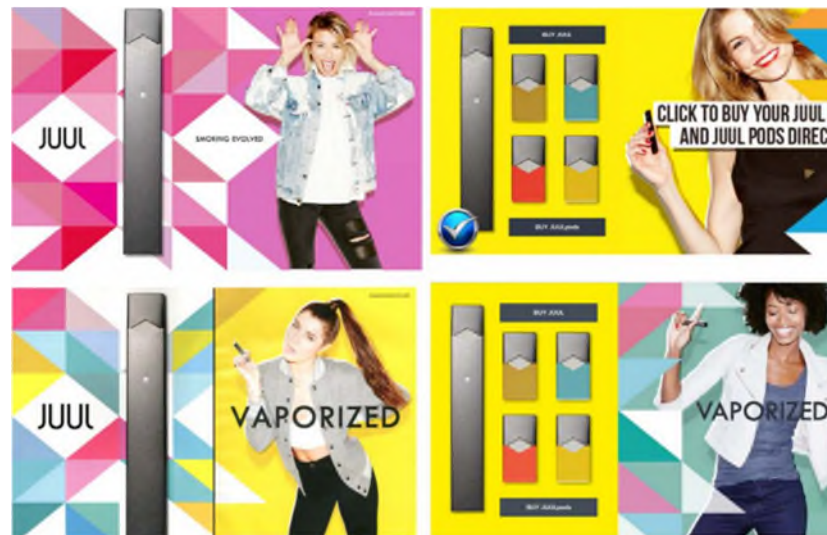
262. These statements, however, are belied by evidence of JLI’s early marketing campaigns and statements such as the admission by one of JLI’s engineers that “[w]e don’t think a lot about addiction here because we’re not trying to design a cessation product at all . . . anything about health is not on our mind.”<sup>411</sup> As described elsewhere herein, JLI and its officers and directors directly targeted underage nonsmokers. JLI and the Altria Defendants were well aware that such users made up a significant percentage of JLI’s customer base in 2018—in fact, they counted on this customer base to grow and preserve JUUL’s market share—and that the statements they disseminated regarding “Make the Switch” from smoking being JLI’s mission from the start were fraudulent.

263. The fraudulent nature of the “Make the Switch” campaign can literally be seen by comparing the campaign’s advertisements to JLI’s initial advertising, as demonstrated below. The fact that these advertisements are for the same product almost defies belief.

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<sup>410</sup> *Id.*

<sup>411</sup> Nitasha Tiku, *Startup Behind the Lambo of Vaporizers Just Launched an Intelligent e-Cigarette*, *The Verge* (Apr. 21, 2015), <https://www.theverge.com/2015/4/21/8458629/pax-labs-e-cigarette-juul>.



264. Indeed, JLI and Altria knew that the JUUL device was the *opposite* of a “tool[] to reduce or eliminate” nicotine consumption, given JUULpods’ high nicotine content, as well as the delivery of nicotine to the user. According to the National Institutes of Health, the “amount and speed of nicotine delivery . . . plays a critical role in the potential for abuse of tobacco products.”<sup>412</sup> JLI designed its product to provide the largest amount of nicotine in the fastest way

<sup>412</sup> CDC et al., *Nicotine Addiction: Past and Present, How Tobacco Smoke Causes Disease*, NCBI (2010), <https://www.ncbi.nlm.nih.gov/books/NBK53018/#ch4.s92>.

possible. As JLI itself advertises, JUUL delivers nicotine to the bloodstream as much as 2.7 times faster than other e-cigarettes. And, because of JLI's unique formula of nicotine salts and organic acids, as described above, vaping a JUUL delivers a vapor that is extremely potent in terms of nicotine content but also considerably smoother than cigarettes or even other e-cigarettes. At some point during the coordination between JLI and Altria, but no later than the due-diligence period for Altria's investment in JLI, JLI (through its employees) provided Altria with a copy of [REDACTED], described above.<sup>413</sup> Therefore, both JLI and Altria also knew [REDACTED] [REDACTED]. If "harm reduction" and switching from cigarettes were the true goals, there would be no need for the highly potent 5% nicotine formulation.

265. Far from being a product used by adults to quit smoking, JUUL has been an initiation product for nonsmokers, particularly and predominantly youth. Researchers found that in 2018, only 7.9% of American adults had ever used USB-shaped vape devices, like JUUL, and only 2% of adults currently used them.<sup>414</sup> And as mentioned above, youth were sixteen times more likely to use the USB-shaped JUUL than adults.<sup>415</sup>

266. Thus, JLI and Altria committed predicate acts of wire fraud when they caused the "Make the Switch" campaign to air on television with the fraudulent intent of deceiving the public, Congress, and regulators into believing that JLI is and had been focused solely on targeting adult smokers.

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<sup>413</sup> INREJUUL\_00244200.

<sup>414</sup> Kristy L Marynak et al., *Use and reasons for use of electronic vapour products shaped like USB flash drivers among a national sample of adults*, 28 Tobacco Control 685 (Nov. 2019), <https://tobaccocontrol.bmj.com/content/28/6/685>.

<sup>415</sup> Vallone et al., *supra* note 229.

267. Another key aspect of the Youth Marketing Cover-Up Enterprise’s early coordination was Altria’s acquisition of shelf space that it would later provide to JLI in order to sustain the exponential growth of underage users of JUUL products. By acquiring shelf space in furtherance of the Youth Marketing Cover-Up Enterprise, Altria took steps to ensure that JUUL products would receive prominent placement alongside a top-rated brand of combustible cigarettes, namely, Altria’s Marlboro brand—the best-selling cigarette overall and by far the most popular brand among youth, as described above.<sup>416</sup>

268. In 2018, Altria spent approximately \$100 million to secure shelf space at retailers for e-vapor products—purportedly for the MarkTen e-cigarette that it stopped manufacturing in 2018, although sales data suggests this was not the true reason for purchasing the shelf space: Altria’s short-lived 2018 launch of its pod-based MarkTen Elite put that product in only 25,000 stores,<sup>417</sup> whereas its 2014 launch of the original MarkTen saw the MarkTen reaching 60,000 stores in the first month in the western United States alone.<sup>418</sup> Altria’s payments for shelf space were a mixture of “cash and display fixtures in exchange for a commitment that its e-cigarettes would occupy prime shelf space for at least two years.”<sup>419</sup> But Altria had no need for two years of prominent shelf space while it was engaged in discussions with JLI, was actively scaling back sales of the original MarkTen, and had no true plans for a wide launch of the MarkTen Elite.

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<sup>416</sup> See 2012 Surgeon General Report, *supra* note 246 at 164; see also Perks, *supra* note 99.

<sup>417</sup> Sheila Kaplan, *Altria to Stop Selling Some E-Cigarette Brands That Appeal to Youths*, N.Y. Times (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/health/altria-vaping-ecigarettes.html>.

<sup>418</sup> Kress, *supra* note 356.

<sup>419</sup> Jennifer Maloney & John McKinnon, *Altria-Juul Deal Is Stuck in Antitrust Review*, Wall St. J. (Jan. 17, 2020), <https://www.wsj.com/articles/altria-juul-deal-is-stuck-in-antitrust-review-11579257002>.



Instead, when Altria later announced its \$12.8 billion investment in JLI, part of the agreement was that Altria would provide JLI with this premium shelf space.<sup>420</sup>

269. Altria’s purchase of shelf space in 2018 indicates that Altria and JLI were coordinating on the activities of the Youth Marketing Cover-Up Enterprise even before Altria announced its investment in JLI and demonstrates Altria’s commitment to maintaining and expanding JUUL’s market, including its youth market. The Youth Marketing Cover-Up Enterprise thus ensured that JUUL products are placed where kids are most likely to see them and buy them: in retail establishments, next to the most popular cigarette brand for underage users, Marlboro.<sup>421</sup>

#### **5. September–December 2018: Further Coordination of the Youth Marketing Cover-Up Enterprise**

270. Throughout 2018, as public and government scrutiny of JLI’s practices intensified, JUUL’s market share continued to climb. In the fall of 2018, with pressure mounting, JLI and Altria stepped up the fraudulent practices of the Enterprise in response. Altria and JLI’s responses to such scrutiny reflect a coordinated, successful effort to mislead the public, including Plaintiff, and regulators. In reliance on JLI and Altria’s fraudulent statements and actions, JUUL remained on the market without an overwhelming public outcry and enjoyed massive commercial success in Plaintiff’s community.

271. On September 25, 2018, then-FDA Commissioner Gottlieb called youth vaping an “epidemic” and sent letters to JLI and Altria demanding each company’s plan to reduce youth

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<sup>420</sup> *Id.*

<sup>421</sup> Laura Bach, *Where Do Youth Get Their E-Cigarettes?*, Campaign for Tobacco Free Kids (Dec. 3, 2019), <https://www.tobaccofreekids.org/assets/factsheets/0403.pdf>.

use, requesting a “detailed plan, including specific timeframes, to address and mitigate widespread use by minors.”<sup>422</sup>

272. On October 2, 2018, the FDA raided JLI’s headquarters and seized more than one thousand documents related to JLI’s sales and marketing practices.<sup>423</sup>

273. On October 16, 2018, JLI presented its “Action Plan” to the FDA in response to then-FDA Commissioner Gottlieb’s September 25, 2018 letter. [REDACTED]

[REDACTED]<sup>424</sup> [REDACTED]  
[REDACTED]<sup>425</sup> As discussed below, JLI also presented this Action Plan to the public a month later.

274. On October 25, 2018, Altria submitted a letter in response to the FDA’s call to combat the youth vaping epidemic, which it published to the public on its website.<sup>426</sup> Altria claimed to have “serious concerns” about youth access to e-vapor products and admitted that the use of e-cigarettes by youth had risen to “epidemic levels.”<sup>427</sup> Altria agreed to remove its pod-based e-cigarettes from the market and stop selling any flavored traditional e-cigarettes other than tobacco, menthol, and mint.<sup>428</sup> It acknowledged that “[b]ased on the publicly available

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<sup>422</sup> *Letters to Manufacturers Regarding Plans to Address Youth Access and Use*, FDA (Sept. 12, 2018), <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/ctp-letters-industry#youth-access> (Letters were also sent to Reynolds American, Fontem Ventures, and JTI).

<sup>423</sup> McGinley, *supra* note 21.

<sup>424</sup> *FDA Presentation at 2*, JUUL Labs, Inc. (Oct. 16, 2018); *see also* INREJUUL\_00182989.

<sup>425</sup> *Id.*

<sup>426</sup> Letter from Howard A. Willard III, Altria Group, Inc., to Scott Gottlieb, M.D., FDA Commissioner (Oct. 25, 2018), <https://www.altria.com/-/media/Project/Altria/Altria/about-altria/federal-regulation-of-tobacco/regulatory-filings/documents/Altria-Response-to-FDA-E-vapor-October-25-2018.pdf>.

<sup>427</sup> *Id.* at 1.

<sup>428</sup> *Id.* at 2.

information from FDA and others, we believe pod-based products significantly contribute to the rise in youth use of e-vapor products.”<sup>429</sup> “Although we do not believe we have a current issue with youth access to or use of our pod-based products, we do not want to risk contributing to the issue.”<sup>430</sup> Altria’s letter went on to disclaim a number of practices that it associated with marketing to youth—strategies that were key components of JLI’s marketing strategy. Altria specifically identified the use of flavors that go beyond traditional tobacco flavors, digitally advertising on websites with a large percentage of youth visitors, using social media to promote the brand, allowing online purchases and promotional sign-ups without age verification, advertising e-cigarettes on billboards, advertising with models who appear to be under twenty-five-years old, distributing branded merchandise, and paying celebrities or other third parties to market or use a particular brand’s e-cigarette. Altria also claimed to support “banning vaping in schools” in order to reduce “social access.”<sup>431</sup> Altria ended the letter by committing to “reverse the current use trend among youth.”<sup>432</sup>

275. On a public earnings conference call that same day, Altria repeated many of these statements, describing its decision to remove its pod-based products from the market as one intended to address the dramatic increase in youth e-cigarette use—while knowing that it was only weeks away from publicly announcing a \$12.8 billion investment in JLI, the company that ignited the youth vaping crisis:

In September, the FDA asked several companies, including Altria, to provide plans to address underage use of e-vapor products. We welcomed FDA’s action

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<sup>429</sup> *Id.* at 2.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 3.

<sup>432</sup> *Id.* at 5.

and *we agreed that the reported rise in underage use of e-vapor products is alarming and immediate action should be taken.*<sup>433</sup>

276. Throughout the call, Willard repeatedly emphasized that Altria’s withdrawal of its own pod-based products was intended to address youth use: “[W]e really feel like in light of this dramatic increase in youth usage, withdrawing those products until the PMTA is filed is one path forward.”<sup>434</sup> He later said, “And frankly, the actions we took were the actions that we thought we could take that would have the biggest impact on addressing the increased use of e-vapor products by youth . . . we wanted to make a significant contribution to addressing the issue.”<sup>435</sup>

277. Willard stated that Altria had concluded that “pod-based products and flavored products” were behind the increase in youth use of e-cigarettes:

[A]s we looked at the data that is available in some of the remarks from the FDA, I think we concluded that *the driver of the recent increase we think is pod-based products and flavored products* and so we thought that the two actions that we took addressed the drivers of the increased youth usage here in the short run.<sup>436</sup>

278. Without saying anything about the massive investment it was about to make in JLI’s pod-based products, Willard declared that Altria was removing its pod-based products from the market to address youth use, and it would discontinue its cig-a-like flavors other than mint, menthol, and tobacco:

First, Nu Mark will remove from the market MarkTen Elite and Apex by MarkTen pod-based products until these products receive a market order from the FDA or the youth issue is otherwise addressed. Second, for our remaining MarkTen and Green Smoke cig-a-like products, *Nu Mark will sell only tobacco, menthol and mint varieties*. Nu Mark will discontinue the sale of all other flavor

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<sup>433</sup> *Altria Group Inc. (MO) Q3 2018 Earnings Conference Call Transcript*, Motley Fool (Sept. 30, 2018), <https://www.fool.com/earnings/call-transcripts/2018/10/25/altria-group-inc-mo-q3-2018-earnings-conference-ca.aspx> (emphasis added) (Willard’s comments).

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.* (emphasis added).

variants of our cig-a-like products until these products receive a market order from the FDA or the youth issue is otherwise addressed. Although we don't believe we have a current issue with youth access or use of our e-vapor products, we are taking this action, because *we don't want to risk contributing to the issue.*<sup>437</sup>

279. Although Altria grouped mint and menthol flavors in the same category as tobacco flavor, it knew from decades of selling tobacco products with these flavors that mint and menthol are popular with youth, no matter what tobacco product, as discussed above.

280. On November 5, 2018, JLI transmitted the results of its Youth Prevalence study to the FDA.<sup>438</sup> Remarkably, JLI's study concluded that only 1.5% of youth had ever used JUUL, and that only 0.8% of youth had used JUUL in the last thirty days.<sup>439</sup> And [REDACTED] JLI's Youth Prevalence study suggested that Mango was four times as popular as Mint. Specifically, the Youth Prevalence study found that 47% of youth who reported vaping using JUUL in the last thirty days used Mango most often, with only about 12% reporting the same for Mint.<sup>440</sup>

281. On November 13, 2018, JLI presented its "Action Plan" to the public, largely identical to what JLI had presented to the FDA in October 2018.<sup>441</sup> JLI announced its intent to stop selling certain flavors in brick-and-mortar stores, restrict purchases of those flavors on the JUUL website to adults age twenty-one and over, and shut down its social media accounts.<sup>442</sup>

<sup>437</sup> *Id.* (emphasis added).

<sup>438</sup> Engelke, *Letter to David Portnoy*, *supra* note 406.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 3.

<sup>441</sup> *JUUL Labs Action Plan* ("JLI November Action Plan"), JUUL Labs, Inc. (Nov. 13, 2018), <https://newsroom.juul.com/juul-labs-action-plan/> (JLI did not include in its November Action Plan to the public a proposal for Bluetooth or WiFi equipped devices that was included in JLI's October 2018 Action Plan to the FDA.).

<sup>442</sup> *Id.*

The flavors that would be available only through JUUL.com were “Mango, Fruit, Creme, and Cucumber.”<sup>443</sup> Through both JLI’s October 2018 presentation to the FDA and JLI’s Action Plan shared with the public in November 2018, the Youth Marketing Cover-Up Enterprise fraudulently characterized Mint as a “tobacco and menthol-based product,” as opposed to a “flavored product,” suggesting that it was a product for adult smokers. JLI include a version of the below image in in both the public-facing Action Plan and JLI’s presentation to the FDA.<sup>444</sup>



282. But JLI and Altria knew that non-smoking youth liked Mint as much as any flavor. As JLI’s internal documents confirm, Mint’s success was [REDACTED] [REDACTED]<sup>445</sup> JLI knew there was [REDACTED]<sup>446</sup> and [REDACTED] [REDACTED]<sup>447</sup> As alleged in a

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

<sup>445</sup> INREJUUL\_00265069.

<sup>446</sup> INREJUUL\_00079307-409 at 395.

<sup>447</sup> *Id.*

whistleblower complaint, JLI's then-CEO told his employees that "You need to have an IQ of 5 to know that *when customers don't find mango they buy mint*."<sup>448</sup>

283. As predicted, JLI's sale of Mint pods rose from one third of its sales in September 2018 to approximately two thirds in February 2019. JLI's 2019 revenues were estimated to be between \$2.36 billion and \$3.4 billion, and Mint pods accounted for approximately 75% of JLI's total 2019 sales.

284. Seeing that the Youth Marketing and Cover-Up's scheme was successful, on December 7, 2018, Altria discontinued the production and distribution of all MarkTen and Green Smoke vapor products. "We remain committed to being the leader in providing adult smokers innovative alternative products that reduce risk, including e-vapor," Willard explained in a statement to the press.<sup>449</sup> "We do not see a path to leadership with these particular products and believe that now is the time to refocus our resources."<sup>450</sup>

## **6. Publicly Announcing the Ties Between the Youth Marketing Cover-Up Enterprise Defendants**

285. On December 20, 2018, Altria and JLI publicly announced the collaboration that had been taking place, on information and belief, since late 2017. In the largest equity investment

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<sup>448</sup> Angelica LaVito, *Former Juul executive sues over retaliation, claims company knowingly sold tainted nicotine pods*, CNBC (Oct. 30, 2019), <https://www.cnbc.com/2019/10/30/former-juul-executive-sues-over-retaliation-claims-company-knowingly-sold-tainted-pods.html>; Sheila Kaplan & Jan Hoffman, *Juul Knowingly Sold Tainted Nicotine Pods, Former Executive Says*, N.Y. Times (Nov. 20, 2019), <https://www.nytimes.com/2019/10/30/health/juul-pods-contaminated.html> (emphasis added).

<sup>449</sup> *Altria Shifts Gears on Innovative Products Platform*, Convenience Stores News (Dec. 7, 2018), <https://csnews.com/altria-shifts-gears-innovative-products-platform>.

<sup>450</sup> *Id.*

in United States history, Altria invested \$12.8 billion in JLI.<sup>451</sup> The announcement came less than two months after Altria told the FDA that it “believe[s] that pod-based products significantly contribute to the rise in youth use of e-vapor products” and that it accordingly would be removing its pod-based products from the market.<sup>452</sup>

286. In making this decision to place profits over public health, Altria considered that the e-cigarette industry would see significant year-over-year growth in the near term, and that “JUUL continu[es] to be a growth driver for the e-vapor category.”<sup>453</sup> And although Altria claimed its investment had an altruistic motive—“we believed the transaction would give Altria an unprecedented opportunity to share our experience in underage tobacco prevention with JUUL to help address youth usage”—in reality, Altria has provided *no* underage / youth prevention services to JLI.<sup>454</sup>

287. Altria admitted that minors were using JUUL products and that “underage use of e-cigarette product is a problem.”<sup>455</sup> But Altria would not have made such a sizable investment if it did not intend to grow JUUL’s already enormous market even more. In fact, Altria said as much when announcing its infusion of cash, explaining that its investment in JLI “enhances future growth prospects” and committing to applying “its logistics and distribution experience to help JUUL expand its reach and efficiency.”<sup>456</sup> According to Willard, Altria was “excited to

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<sup>451</sup> Altria Group, Inc., *Altria Makes \$12.8 Billion Minority Investment to Accelerate Harm Reduction and Drive Growth* (“Altria Minority Investment”) (Form 8-K), Ex. 99.1 (Dec. 20, 2018),

<https://www.sec.gov/Archives/edgar/data/764180/000119312518353970/d660871dex991.htm>.

<sup>452</sup> Willard, *Letter to Gottlieb*, *supra* note 426.

<sup>453</sup> Willard, *Letter Senator Durbin*, *supra* note 23 at 10-11.

<sup>454</sup> *Id.* at 5.

<sup>455</sup> *Id.*

<sup>456</sup> Altria Minority Investment, *supra* note 451.



support JUUL’s highly-talented team and offer [Altria’s] best-in-class services to build on their tremendous success.”<sup>457</sup>

288. This arrangement was profitable for both companies, as well as for Monsees, Bowen, Pritzker, Huh, and Valani. JLI’s employees received \$2 billion in bonuses, which, split among the JLI’s 1,500 employees, was approximately \$1.3 million per employee;<sup>458</sup> Altria received millions of loyal youth customers; and Monsees, Bowen, Pritzker, Huh, and Valani received untold sums of money and saw the value of their shares in JLI skyrocket, allowing them to cash out via a special dividend and bonus, as well as through stock sales that were not available to other JLI minority shareholders.<sup>459</sup> In deciding to make a huge investment in JLI, Altria took into account that the e-cigarette industry would see significant year-over-year growth in the near term, and that “JUUL continu[es] to be a growth driver for the e-vapor category.”<sup>460</sup>

289. Since the deal was inked in December 2018, Altria’s actions have clearly helped JUUL maintain, if not expand, its market share—a market share that, based on Altria’s own October 25, 2018 letter to the FDA, it believes was gained by employing marketing and advertising practices that contributed to youth vaping. Altria’s Second Quarter 2019 Earnings Call reported that JUUL continued to grow in the first half of 2019, from a 33% category share

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<sup>457</sup> *Id.*

<sup>458</sup> Olivia Zaleski, *Juul Employees to Get \$2 Billion Bonus in Altria Deal*, Bloomberg (Dec. 20, 2018), <https://www.bloomberg.com/news/articles/2018-12-20/juul-employees-said-to-get-2-billion-bonus-in-altria-deal>.

<sup>459</sup> Tiffany Kary, *JUUL Founders Sued for Self-Dealing Over Altria's \$12.8 Billion*, Bloomberg (Jan. 13, 2020), <https://www.bloomberg.com/news/articles/2020-01-13/juul-founders-sued-for-self-dealing-over-altria-s-12-8-billion>.

<sup>460</sup> Willard, *Letter to Senator Durbin*, *supra* note 23.

in 2018 to 48% by the second quarter 2019. JLI's expected revenue for 2019 was \$3.4 billion, nearly triple what it was in 2018.<sup>461</sup>

290. On a December 20, 2018 call, Altria emphasized the profit opportunity from its investment, while simultaneously characterizing it as an opportunity for harm reduction and reducing youth e-cigarette use. Willard made the following statements:

It's important to both Juul and us that they continue to operate with the entrepreneurial passion that has made them so successful;

Let's imagine the combination of Juul's leading market position, brand equity and deep innovation pipeline with our strong retail presence, our ability to connect directly with adult smokers on our company's databases while avoiding unintended audiences, our leading sales organization which covers approximately 230,000 stores, and our deep regulatory affairs expertise;

We believe the investment in Juul represents the fastest and most sustainable opportunity to generate the most significant income in the e-vapor category. The geo-economics today are attractive and we expect our strong distribution infrastructure to help accelerate their financial performance;

We have long said that providing adult smokers with superior, satisfying products with the potential to reduce harm is the best way to achieve tobacco harm reduction. Through Juul, we are making the biggest investment in our history toward that goal;

Altria and Juul are committed to preventing kids from using any tobacco products. As recent studies have made clear, youth vaping is a serious problem which both Altria and Juul are committed to solve; and

Together Juul and Altria will work to prevent youth usage through their announced initiatives, further technological developments, and increased advocacy for raising the minimum age of purchase for all tobacco products to 21.<sup>462</sup>

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<sup>461</sup> Olivia Zaleski & Ellen Huet, *Juul Expects Skyrocketing Sales of \$3.4 Billion, Despite Flavored Vape Restrictions*, Bloomberg (Feb. 22, 2019), <https://www.bloomberg.com/news/articles/2019-02-22/juul-expects-skyrocketing-sales-of-3-4-billion-despite-flavored-vape-ban>.

<sup>462</sup> Melissa Kress, *Altria Takes 'Significant Action' to Prepare for Its Future*, Convenience Store News (Dec. 21, 2018), <https://csnews.com/altria-takes-significant-action-prepare-its-future>.

291. Willard went so far as to characterize Altria's investment in JLI as the culmination of decades of pursuit of harm reduction for the sake of smokers' health and wellbeing:

Almost my entire career, we have believed that our business would be better in the long term if we could offer harm reduced products that would represent attractive alternatives to our adult cigarette smokers to switch. And we have invested billions of dollars in it and lots of effort. And ultimately until December this year, we really didn't have the product portfolio to fully achieve our harm reduction aspiration. And the opportunity to invest in JUUL, I think, really makes that harm reduction aspiration a reality.<sup>463</sup>

292. During Altria's January 31, 2019 Earnings Call, Altria explained its investment in JLI in more detail:

Through JUUL, we have found a unique opportunity to not only participate meaningfully in the e-vapor category but to also support and even accelerate transition to noncombustible alternative products by adult smokers. The JUUL investment provides Altria with a significant stake in the largest and fastest-growing e-vapor company with a highly talented management team, successful end-market products, a strong innovation pipeline and significant international opportunity. When you add to JUUL's already substantial capabilities, our underage tobacco prevention expertise and ability to directly connect with adult smokers, we see a compelling future with long-term benefits for both adult tobacco consumers and our shareholders. We are excited about JUUL's domestic growth and international prospects and their potential impact on our investment;

JUUL's 2018 growth was quite remarkable. JUUL had net revenues in excess of \$1 billion in 2018, up from approximately \$200 million in 2017. JUUL overwhelmingly reaccelerated the U.S. e-vapor category growth rate, growing JUUL's volume by nearly 600% to over 450 million refill kit pods;

We estimate JUUL represents over 30% of the overall e-vapor category across open and close systems and all trade classes. After e-vapor growth plateaued from 2015 to 2017, rapid growth was reignited in 2018, and we expect U.S. e-vapor volume to grow at a compounded annual rate of 15% to 20% through 2023. As a reminder, Altria's share of JUUL's international e-vapor income would be 100% incremental to Altria; and

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<sup>463</sup> *Id.*

We believe the global e-vapor and heat-not-burn segments, with estimated sales of roughly \$23 billion in 2018, have substantial room to grow. JUUL currently operates in eight countries with plans for additional expansion this year. We expect the JUUL product features that have driven JUUL’s success in switching adult smokers in the U.S. to strongly appeal to international adult cigarette smokers.<sup>464</sup>

293. But as the president of the Campaign for Tobacco-Free Kids observed upon announcement of the deal, “Altria has no interest in seriously reducing the number of people who smoke cigarettes.”<sup>465</sup>

294. Instead, Willard continued to emphasize that Altria expects to reap the benefits of JLI’s expansion to international markets: “Ultimately, we expect the international revenue and income opportunity to end up being as large as or larger than the U.S. opportunity. Our 35% investment was based on a deep strategic, operational and financial analysis of JUUL and the marketplace.”<sup>466</sup>

295. As Willard emphasized, Altria expected continued growth even in the U.S., with “a U.S. e-vapor category that grows volume between 15% to 20% annually” and “JUUL continuing to be the primary growth driver for the e-vapor category”—statements which are inconsistent with the idea of eliminating the underage and youth non-smoker sales that had driven JUUL to its position of dominance:

Clearly, we look at this opportunity over the long term, but for context, let us provide a view five years out. Some of our independently developed key assumptions over the next five years that informed that analysis include: *a U.S. e-*

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<sup>464</sup> *Altria Group (MO) Q4 2018 Earnings Conference Call Transcript*, Motley Fool (Dec. 31, 2018), <https://www.fool.com/earnings/call-transcripts/2019/02/01/altria-group-mo-q4-2018-earnings-conference-call-t.aspx>.

<sup>465</sup> Sheila Kaplan & Matt Richtel, *Juul Closes Deal with Tobacco Giant Altria*, N.Y. Times (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/health/juul-reaches-deal-with-tobacco-giant-altria.html>.

<sup>466</sup> *Altria Q4 2018 Earnings Call Transcript*, *supra* note 464.

*vapor category that grows volume between 15% to 20% annually; JUUL continuing to be the primary growth driver for the e-vapor category; attractive JUUL operating margins that achieve current cigarette-like margins due to the benefits of increasing scale and automation in the supply chain; international revenues that equal domestic revenues by 2023; and international margins that approach current international cigarette margins. Under our assumptions, our investment in JUUL would generate an after-tax return exceeding our weighted average cost of capital in 2023.*

Additionally, with five-year e-vapor category volume growth in the range of 15% to 20% annually, we would expect the U.S. cigarette category volume decline rate to be consistent with the decline rate estimate of 4% to 5%. *I'll remind you that in 2018 with e-vapor category volume growth of 35%, the cigarette category decline rate was 4.5%*, including half of a percent headwind from gas prices. Combined with the earnings and cash generation engine of our core tobacco business, we believe this investment in JUUL will support consistent returns over the long term by providing Altria with a significant stake in the fastest-growing -- in the fast-growing e-vapor category.

*And I think we agree with the other JUUL investors that its growth prospects are so strong that now is the time to invest in—and ultimately driving top-line growth.*<sup>467</sup>

Later in the call, Willard repeatedly referred to JUUL's growth as "dramatic":

I have to point out that JUUL's growth and success in the U.S. market last year was unique and first of its kind compared to other tobacco product successes both in the U.S. and overseas. *I mean, the growth rate was dramatic, it represented the entire growth of e-vapor for the year*, and it dramatically reaccelerated the growth of e-vapor.<sup>468</sup>

296. Such "dramatic" growth was, as Altria well knew, due to the product's viral popularity among teens. Willard briefly acknowledged the youth vaping crisis, stating, "Briefly touching on the regulatory environment, the FDA and many others are concerned about an epidemic of youth e-vapor usage. We share those concerns. This is an issue that we and others in the industry must continue to address aggressively and promptly."<sup>469</sup>

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<sup>467</sup> *Id.* (emphasis added).

<sup>468</sup> *Id.* (emphasis added).

<sup>469</sup> *Id.*

297. In response to questions from an analyst at Morgan Stanley, Willard said that even if there is “a slowdown in growth in the next year or two” due to regulatory actions aimed at reducing youth use, Altria expects overall growth in JUUL sales over the next five years:

I think with regard to the midterm forecast, one of the reasons why we selected a five-year period to estimate the growth rate of the e-vapor category and JUUL is a significant driver of that growth is, I think, there is a bit of uncertainty as to whether or not there’ll be a slowdown in growth in the next year or two as the industry works together with the FDA to drive down youth usage. And so I think that is to be determined. But I think even taking into account the fact that there could be some impact in the short run, I think we’re confident in the long-term growth rate that we forecasted.<sup>470</sup>

298. Two different analysts on the call quizzed Altria about the math behind its projections—how was it that Altria projected 15% to 20% growth in the United States e-vapor category, with JUUL as the primary driver of growth in the category, while the cigarette market decline was only predicted to be 4% to 5% annually, and JUUL’s supposed customer base was primarily smokers making the switch from cigarettes to vaping? Specifically, an analyst from Citi asked Altria about the slide shown below, representing JUUL’s growth relative to the growth of the e-vapor category as a whole:

So if I take what you’ve said about the impact basically with growth of JUUL—this is Slide 8, and equate that to cigarettes, it looks like the JUUL has grown about 0.4 billion units, which equates essentially to a 4% market share growth, and that’s true for the whole e-cigarettes or e-vapor category. And yet you’ve also said that the impact of the growth of e-vapor on cigarettes is about 1.3%, 1.4%. So is there a right way of thinking about it, where basically two-thirds of vapor growth is incremental? Is that how we should think about it? And, I guess, if that is the right way of thinking about it, **where is that increment coming from?** Do you think it’s mostly coming from people in their 20s or what?<sup>471</sup>

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<sup>470</sup> *Id.*

<sup>471</sup> *Id.* (emphasis added).



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299. Willard did not offer a full explanation but responded by saying the increase in the vapor growth category was coming in part from smokeless tobacco users and cigar smokers.<sup>473</sup> Given the forecasted dramatic growth in vaping and the relatively modest consumer base for smokeless tobacco and cigar smokers, this explanation is unconvincing at best.

300. While JLI and Altria remain distinct corporate entities, following its equity investment in JLI, Altria publicly acknowledged at least some of the systemic links between Altria and JLI, including contractual relationships, financial ties, and continuing coordination of activities. Altria provides services to JLI in furtherance of the Youth Marketing Cover-Up Enterprise, in the areas of “direct marketing; sales, distribution and fixture services; and

<sup>472</sup> *Altria’s Fourth-Quarter 2018 Earnings Conference Call*, Altria Client Services (Jan. 31, 2019), <http://investor.altria.com/Cache/IRCache/3ec9cf77-9d83-04fe-1ea2-1e2b8437afa5.PDF?O=PDF&T=&Y=&D=&FID=3ec9cf77-9d83-04fe-1ea2-1e2b8437afa5&iid=4087349>.

<sup>473</sup> *Altria Q4 2018 Earnings Call Transcript*, *supra* note 464.

regulatory affairs.”<sup>474</sup> These services included “[p]roviding regulatory affairs consulting and related services to Juul as it prepares its PMTA application.”<sup>475</sup>

301. [REDACTED]

[REDACTED].<sup>476</sup>

[REDACTED]

302. JLI and Altria also agreed to cross-market JUUL with Marlboro cigarettes. For example, Altria offered coupons for JUUL starter kits inside packs of Marlboro cigarettes.<sup>477</sup>

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<sup>474</sup> Willard, *Letter to Senator Durbin*, *supra* note 23 at 11

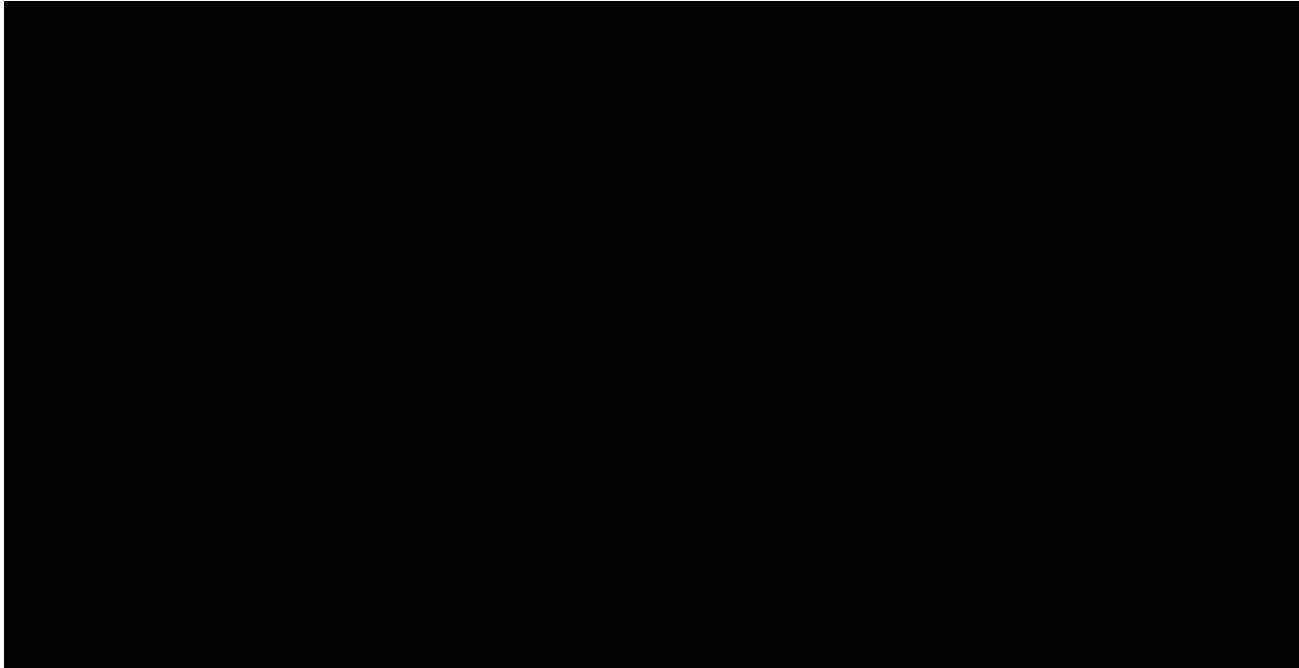
<sup>475</sup> *Id.* at 13.

<sup>476</sup> [REDACTED]

<sup>477</sup> [REDACTED];

Points for us!, Reddit (Sept. 16, 2019), [https://www.reddit.com/r/juul/comments/d50jku/points\\_for\\_us/](https://www.reddit.com/r/juul/comments/d50jku/points_for_us/) (depicting an image of a Marlboro carton with a JUUL starter kit coupon inside that a member of the public purchased).





303. These coupons, however, were more for show than anything else. In response to analyst questions about the JUUL coupons in Marlboro packs, Willard explained that Altria did not actually expect these coupons to cut into Marlboro sales, for two reasons. First, he said that cigarette smokers were already aware of JUUL:

So I think with regard to your question about putting JUUL inserts on our cigarette packs . . . *theoretically, I guess, it could result in a bit more volume*

*coming out of Marlboro. But I think that that is unlikely to be the case.* And I say that for really two reasons. I think there's already very high awareness among all cigarette -- adult cigarette smokers and, frankly, all Marlboro smokers about the availability of JUUL. So I think that a lot of that awareness has already been established. I wouldn't expect a big incremental uptick from those onsets.<sup>478</sup>

304. The second reason Willard gave is that JUUL is popular with younger customers, although he was careful to reference that group as twenty-one to twenty-nine-year-olds:

And then secondly, *I would point out that I think JUUL tends to get more of its growth from the 21- to 29-year-old cigarette smoker than it does from the 30-plus cigarette smoker.* And if you think about it, I think, as we've communicated in the past, Marlboro's share of those 21- to 29-year-old smokers is about equal to its overall share. But there are several other cigarette brands that are overdeveloped among 21- to 29-year olds, such as Newport, Camel or Natural American Spirit that, frankly, might actually give up more volume on a relative basis than Marlboro.<sup>479</sup>

305. By including JUUL coupons in Marlboro packs, the Enterprise creates the impression of marketing JUUL to existing smokers, to "Make the Switch." But neither Altria nor JLI expect a significant migration of Marlboro customers to JUUL. As Altria and JLI know, and as reflected by the analysts' inquiries about the growth of the e-vapor category compared to the decline in the cigarette category, JUUL sales depend on nonsmokers.

306. Altria also, through its provision of "services," actively sought to assist JLI in staving off regulation and keeping its products on the market and available to kids and the public at large and allow it to remain accessible in Plaintiff's community. Altria is and was working to actively help run the Youth Marketing Cover-Up Enterprise's operations and expand sales of JUUL products. Altria's investment brings legal and regulatory benefits to JLI, by helping to

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<sup>478</sup> *Altria Q4 2018 Earnings Call Transcript, supra* note 464 (emphasis added).

<sup>479</sup> *Id.* (emphasis added).

navigate the regulatory waters and FDA pressure while continuing to deceive the public about JLI's youth marketing.

307. From its decades of experience dealing with regulators, Altria knows the critical importance of influence in Washington. Altria “has a potent lobbying network in Washington [D.C.] and around the country,”<sup>480</sup> and a significant priority for the Enterprise is expanding JLI's connections to Washington insiders. In September 2018, for example, Andrew Perraut joined JLI as the Deputy Director of Public Policy; Perraut was previously a policy analyst for the White House Office of Information and Regulatory Affairs (“OIRA”) and the lead for all regulatory issues for tobacco for six years. In fact, Perraut participated in the redrafting of the FDA's proposed deeming regulations regarding e-cigarettes before the proposed rule was published in 2014. But by the time the tobacco industry was meeting with the agency in 2015, Perraut was on the other side of the table, representing an organization called Cigar Rights of America, along with others, to lobby against restrictions. As Perraut explained in an interview, this agency review period is not a well-publicized opportunity for influence: “The OIRA process is very intentionally a little bit under the radar. . . . Parties are generally fairly informed on how to submit their comments [to the FDA]; folks are much less informed about how to engage during the White House review.”<sup>481</sup>

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<sup>480</sup> Shelia Kaplan, *In Washington, Juul Vows to Curb Youth Vaping. Its Lobbying in States Runs Counter to That Pledge*, N.Y. Times (Apr. 28, 2019), <https://www.nytimes.com/2019/04/28/health/juul-lobbying-statesecigarettes.html>.

<sup>481</sup> Melissa Vonder Haar, *Deeming: Still Time to Comment, A Washington insider's view on e-vapor and the rulemaking process*, CSP Daily (May 20, 2015), <https://www.cspdailynews.com/tobacco/deeming-still-time-comment>.

308. Altria's lobbying prowess in the area of e-cigarettes was on display in the context of the FDA's deeming rule. First, notwithstanding Altria's professed concern about flavors attracting youth customers, Altria submitted comments in August 2014 in response to the proposed rule opposing the regulation of flavors. Altria asserted that restrictions could result in more illicit sales, and that adults also liked fruity and sweet e-cigarette flavors. Then, in April 2015, Altria distributed draft legislation on Capitol Hill that would eliminate the new requirement that most e-cigarettes already on sale in the United States be evaluated retroactively to determine if they are "appropriate for the protection of public health." Altria delivered its proposal, *F.D.A. Deeming Clarification Act of 2015*, to Representative Tom Cole of Oklahoma, who introduced the bill two weeks later *using Altria's draft verbatim. Seventy other representatives signed on to Altria's legislation.*

309. Altria brings this lobbying muscle to the Youth Marketing Cover-Up Enterprise. While an Altria spokesman has denied that there was any contractual services agreement for lobbying between JLI and Altria, he admitted that he did not know what informal advice and conversations Altria has had with JLI about lobbying and efforts. Vince Willmore, a spokesman for the Campaign for Tobacco-Free Kids, which has been involved in many state lobbying battles, said, "It's hard to say where Altria ends and Juul begins."<sup>482</sup> Since JLI and Altria joined forces, JLI's spending on lobbying has risen significantly. JLI spent \$4.28 million on lobbying in 2019, compared to \$1.64 million in 2018.<sup>483</sup> Successful lobbying efforts directly further Altria

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<sup>482</sup> Kaplan, *In Washington, Juul Vows to Curb Youth Vaping*, *supra* note 480.

<sup>483</sup> *Center for Responsive Politics, Client Profile: JUUL Labs*, <https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000070920> (last visited Mar. 28, 2020).

and JLI's goal of deceiving the public by preventing regulators from drawing public attention to JLI's prior youth marketing.

310. In addition, Altria's arrangement with JLI gives JLI greater access to retail opportunities. JUUL products have been in 90,000 retail outlets in the United States, while Altria reaches 230,000 outlets in the United States. Altria also brought its logistics and distribution experience (although, after increasing public scrutiny, Altria announced on January 30, 2020 that it would limit its support to regulatory efforts beginning in March 2020<sup>484</sup>). And importantly, as noted above, Altria gives JLI access to shelf space that it had obtained under fraudulent pretenses. This is not just any shelf space; it is space near Altria's products and retail displays. The arrangement allows JUUL to receive prominent placement alongside a top-rated brand of combustible cigarettes among youth.

311. Beyond the services Altria provides for the Youth Marketing Cover-Up Enterprise, Altria and JLI share leadership. Altria's investment allows it to appoint one-third of JLI's Board. In addition, in October 2019, JLI's CEO resigned to be replaced by another career Altria executive, K.C. Crosthwaite. Crosthwaite had most recently served as the vice president and chief growth officer of Altria Client Services, overseeing the company's work, including digital marketing, packaging design and innovation, product development, and safety, health, and environmental affairs. Crosthwaite knows Big Tobacco's playbook all too well, having previously served as the president and CEO of Phillip Morris USA, the vice president and general manager at Marlboro—the leading cigarette brand among youth. In addition, Joe

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<sup>484</sup> Nathan Bomey, *Marlboro maker Altria distances itself from vaping giant Juul amid legal scrutiny*, USA Today (Jan. 31, 2020), <https://www.usatoday.com/story/money/2020/01/31/juul-altria-distances-itself-e-cigarette-maker-amid-scrutiny/4618993002/>.

Murillo, who headed regulatory affairs for Altria and previously ran Altria's e-cigarette business, Nu Mark, is now JLI's Chief Regulatory Officer.<sup>485</sup>

312. The relationship between JLI and Altria did not go unnoticed. By February 2019, the FDA became aware that it had been deceived by JLI and Altria. On February 6, 2019, then-FDA commissioner Gottlieb wrote JLI and Altria demanding in-person meetings, excoriating Altria for its "newly announced plans with JUUL [that] *contradict the commitments you made to the FDA*" in a prior meeting and Willard's October 25, 2018 letter to the FDA.<sup>486</sup> Gottlieb's letter to JLI alleged that JLI's conduct was "inconsistent with its previous representations to the FDA."<sup>487</sup>

313. The FDA demanded Altria be prepared to explain itself regarding its "plans to stop marketing e-cigarettes and to address the crisis of youth use of e-cigarettes." Then-FDA Commissioner Gottlieb told Altria that "deeply concerning data" shows that "youth use of JUUL represents a significant proportion of overall use of e-cigarette products by children" and despite any alleged steps the companies had taken to address the issue he "ha[d] no reason to believe these youth patterns of use are abating in the near term, and they certainly do not appear to be reversing."

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<sup>485</sup> Jennifer Maloney, *Juul Hires Another Top Altria Executive*, Wall St. J. (Oct. 1, 2019), available at <https://www.wsj.com/articles/juul-hires-another-top-altriaexecutive-11569971306>.

<sup>486</sup> Letter from Scott Gottlieb, M.D., FDA Commissioner, to Howard A. Willard III, Altria Group, Inc. (Feb. 9, 2019), (emphasis added).

<sup>487</sup> Letter from Scott Gottlieb, M.D., FDA Commissioner, to Kevin Burns, JUUL Labs, Inc. (Feb. 9, 2019).

314. JLI and Altria met with Gottlieb in March 2019 in a meeting the then-FDA Commissioner described as “difficult.”<sup>488</sup> Gottlieb “did not come away with any evidence that public health concerns drove Altria’s decision to invest in JLI, and instead said it looked like a business decision. According to reporting by *The New York Times*, Gottlieb angrily criticized JLI’s lobbying of Congress and the White House, stating:

We have taken your meetings, returned your calls and I had personally met with you more times than I met with any other regulated company, and yet you still tried to go around us to the Hill and White House and undermine our public health efforts. I was trying to curb the illegal use by kids of your product and you are fighting me on it.”<sup>489</sup>

315. But just a week after the “difficult” meeting with JLI and Altria, Gottlieb posted a statement about the FDA’s new e-cigarette policy, proposing to ban all flavors *except* “tobacco-, mint- and menthol-flavored products.”<sup>490</sup> He cited the strong support of President Trump (whose administration JLI had aggressively lobbied<sup>491</sup>), and also cited “recent evidence indicat[ing] that mint- and menthol-flavored ENDS products are preferred more by adults than minors.”<sup>492</sup> JLI and Altria’s success in getting the FDA to adopt their fraudulent claim that Mint was a traditional

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<sup>488</sup> Kate Rooney & Angelica LaVito, *Altria Shares Fall After FDA’s Gottlieb Describes ‘Difficult’ Meeting on Juul*, CNBC (Mar. 19, 2019), <https://www.cnbc.com/2019/03/19/altria-shares-fall-after-fdas-gottlieb-describes-difficult-meeting-on-juul.html>.

<sup>489</sup> Julie Creswell & Sheila Kaplan, *How Juul Hooked a Generation on Nicotine*, N.Y. Times (Nov. 24, 2019), <https://www.nytimes.com/2019/11/23/health/juul-vaping-crisis.html>.

<sup>490</sup> Statement from FDA Commissioner Scott Gottlieb, M.D., on advancing new policies aimed at preventing youth access to, and appeal of, flavored tobacco products, including e-cigarettes and cigars, FDA (Mar. 13, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-advancing-new-policies-aimed-preventing-youth-access>.

<sup>491</sup> Evan Sully & Ben Brody, *JLI Spent Record \$1.2 Million Lobbying as Regulators Stepped Up*, Wash. Post (Oct. 22, 2019), [https://www.washingtonpost.com/business/on-small-business/juul-spent-record-12-million-lobbying-as-regulators-stepped-up/2019/10/22/2a0dbc52-f4de-11e9-b2d2-1f37c9d82dbb\\_story.html](https://www.washingtonpost.com/business/on-small-business/juul-spent-record-12-million-lobbying-as-regulators-stepped-up/2019/10/22/2a0dbc52-f4de-11e9-b2d2-1f37c9d82dbb_story.html).

<sup>492</sup> *Id.*

tobacco flavor was crucial to their mission to deceive the public into thinking that JLI does not market to youth despite JLI continuing to sell Mint JUULpods. Just a few weeks later, Gottlieb resigned from his position as FDA Commissioner.

316. The cover-up activities of the Enterprise are ongoing. The Youth Marketing Cover-Up Enterprise has recently taken another page out of Big Tobacco’s playbook, in working to manufacture a “grassroots” campaign of adult JUUL users—what some call an “Astroturf campaign.” In June 2019, the Enterprise retained Locust Street, another DC-based political and communications consultant, and what some have called a “political dark arts” firm. The Enterprise Defendants hired Locust Street to sway public opinion in New York in response to the state’s contemplated ban on flavored e-cigarettes. As part of this effort, Locust Street contacted adult JUUL customers by phone and/or email to encourage them to share their “switch story”:

My name is [redacted] and I am an Outreach Specialist with Locust Street Community Solutions. I’m reaching out to you on behalf of Juul Labs, who has contracted with Locust Street to support its services and collect success stories from New Yorkers who have made the switch to Juul from combustible cigarettes. We received your information as a Juul user from Juul Labs and we are only using this contact information to support our services on behalf of the company and to discuss your “switch story.”

I attempted to reach you by phone, but I’m emailing in case this is an easier way to get in touch. I hope that we can talk to discuss your experience with Juul products.

Please feel free to give me a call back at [redacted] or reply to this email if you’d like to share your story!<sup>493</sup>

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<sup>493</sup> Katie Notopoulos, *Juul Is Giving Its Customer Data To Its PR Firm*, BuzzFeed News (Sept. 5, 2019), <https://www.buzzfeednews.com/article/katienotopoulos/juul-user-privacy-publicity-new-york>.



317. This sort of fake “grassroots” campaign was a technique utilized by Big Tobacco in decades past to deceive the public. According to Sarah Milov, an assistant professor of history at the University of Virginia and the author of *The Cigarette: A Political History*, Big Tobacco companies “pioneered techniques of manufacturing popular outrage to proposed regulations on cigarettes because grassroots anti-smoking campaigns were beginning to gain traction in the 1970s.”<sup>494</sup>

318. JLI and Altria’s “Make the Switch” campaign was also fraudulent because, despite what it represented to the public, JLI does not have authority to claim that JUUL is healthier than cigarettes. On September 9, 2019, the FDA warned JLI that it had violated federal law by making unauthorized representations that JUUL products are safer than cigarettes.<sup>495</sup>

319. On October 17, 2019, JLI announced that it would suspend the sale of certain JUUL flavors online.<sup>496</sup> However, this likely had minimal impact given that JLI was continuing to sell the mint and menthol flavors, which both JLI and Altria knew to be popular flavors with youth, as discussed above. Recent research confirmed that 60% of high school e-cigarette users prefer mint and menthol flavors.<sup>497</sup> As former New York City Mayor Mike Bloomberg stated, “JUUL’s decision to keep mint- and menthol-flavored e-cigarettes on the shelves is a page right

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<sup>494</sup> Alex Norcia, *Get Ready for JUUL's Grassroots Rebrand*, VICE (Oct. 3, 2019), [https://www.vice.com/en\\_us/article/qvgwmp/get-ready-for-juuls-grassroots-rebrand](https://www.vice.com/en_us/article/qvgwmp/get-ready-for-juuls-grassroots-rebrand).

<sup>495</sup> *Juul Labs, Inc. Warning Letter*, FDA (Sept. 9, 2019), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/juul-labs-inc-590950-09092019>.

<sup>496</sup> Allison Aubrey, *Juul Suspends Sales of Flavored Vapes and Signs Settlement to Stop Marketing to Youth*, NPR (Oct. 17, 2019), <https://www.npr.org/sections/health-shots/2019/10/17/771098368/juul-suspends-sales-of-flavored-vapes-and-signs-settlement-to-stop-marketing-to->.

<sup>497</sup> Lindsey Tanner, *US teen vaping numbers climb, fueled by Juul & mint flavor*, Associated Press (Nov. 5, 2019), <https://apnews.com/8151770f69fd43c4b132854a335d0ef1>.

out of the tobacco industry’s playbook.”<sup>498</sup> Almost a month later, JLI announced that it would stop selling Mint, but it continues to sell its Menthol JUUL products.<sup>499</sup>

320. JLI’s purported attempts to limit the sale of flavored JUUL products have not been effective, thereby demonstrating that JLI’s so-called remedial measures have been about swaying public opinion and not about preventing youth access to JUUL. On November 4, 2019, *VICE Magazine* reported that when it visited more than twenty stores in New York City, all but two of the stores selling JUUL products had at least one of the banned flavors available in stores, including Mango.<sup>500</sup> Some of these stores were displaying these products even after JLI announced that it would suspend the sale of these flavors online. According to one bodega owner, the last time a JLI representative came into his store, flavored pods including Mango were on display, but the representative said nothing about them.<sup>501</sup> Photographs taken for that article showed both Mango-flavored JUUL pods and flavored Eonsmoke products still being sold side by side as recently as mid-October 2019.

#### **J. The Cost of JUUL’s Success**

321. JLI’s success in addicting a new generation to nicotine, and Altria’s support to insulate JLI from a public outcry that could have mitigated this harm, have come at a terrible cost to public health. On December 28, 2018, the University of Michigan’s National Adolescent Drug Trends for 2018 reported that increases in adolescent e-cigarette use from 2017 to 2018 were the

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<sup>498</sup> *Id.*

<sup>499</sup> Associated Press, *Juul Halts Sales of Mint, Its Top-Selling e-Cigarette Flavor*, N.Y. Times (Nov. 7, 2019), <https://www.nytimes.com/aponline/2019/11/07/health/bc-us-med-juul-flavor.html>.

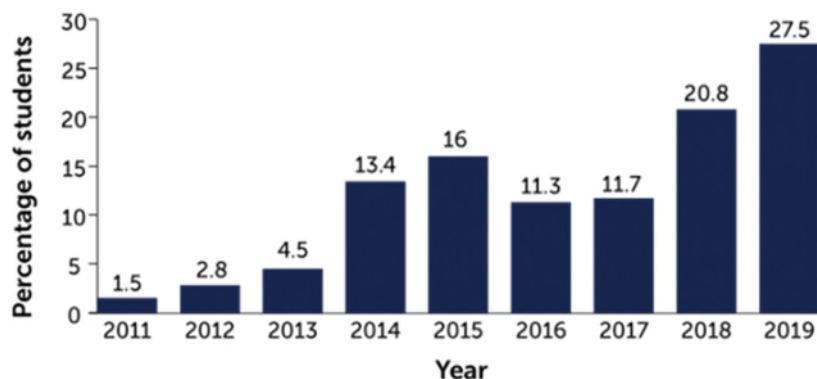
<sup>500</sup> Smothers, *supra* note 311.

<sup>501</sup> *Id.*

“largest ever recorded in the past 43 years for any adolescent substance use outcome in the U.S.”<sup>502</sup>

322. The percentage of twelfth grade students who reported consuming nicotine almost doubled between 2017 and 2018, rising from 11% to 20.9%.<sup>503</sup> This increase was “twice as large as the previous record for largest-ever increase among past 30-day outcomes in twelfth grade.”

323. By 2018 approximately 3.6 million middle and high school students were consuming e-cigarettes regularly,<sup>504</sup> and one in five twelfth graders reported using an e-cigarette containing nicotine in the last thirty days.<sup>505</sup> As of late 2019, five million students reported active use of e-cigarettes, with 27.5% of high school students and 10.5% of middle school students using them within the last thirty days and with most youth reporting JUUL as their usual brand.<sup>506</sup>



<sup>502</sup> *National Adolescent Drug Trends in 2018*, Univ. of Mich. Inst. for Soc. Res. (Dec. 17, 2018), <http://monitoringthefuture.org/pressreleases/18drugpr.pdf>.

<sup>503</sup> *Teens Using Vaping Devices in Record Numbers*, Nat’l Insts. of Health (Dec. 17, 2018), <https://www.nih.gov/news-events/news-releases/teens-using-vaping-devices-record-numbers>.

<sup>504</sup> See Jan Hoffman, *Addicted to Vaped Nicotine, Teenagers Have no Clear Path to Quitting*, N.Y. Times (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/health/vaping-nicotine-teenagers.html>.

<sup>505</sup> *Id.*

<sup>506</sup> *National Youth Tobacco Survey (2019)*, *supra* note 6; Cullen, *supra* note 249.

324. The Secretary of HHS declared that “[w]e have never seen use of any substance by America’s young people rise as rapidly as e-cigarette use [is rising].”<sup>507</sup> Then-FDA Commissioner Gottlieb described the increase in e-cigarette consumption as an “almost ubiquitous—and dangerous—trend” that is responsible for an “epidemic” of nicotine use among teenagers.<sup>508</sup> The rapid—indeed infectious—adoption of e-cigarettes “reverse[s] years of favorable trends in our nation’s fight to prevent youth addiction to tobacco products.”<sup>509</sup> CDC Director Robert Redfield agreed, “The skyrocketing growth of young people’s e-cigarette use over the past year threatens to erase progress made in reducing tobacco use. It’s putting a new generation at risk for nicotine addiction.”<sup>510</sup> Then-Commissioner Gottlieb identified the two primary forces driving the epidemic as “youth appeal and youth access to flavored tobacco products.”<sup>511</sup>

325. Within days of the FDA’s declaration of an epidemic, Surgeon General Dr. Jerome Adams also warned that the “epidemic of youth e-cigarette use” could condemn a generation to “a lifetime of nicotine addiction and associated health risks.”<sup>512</sup> The Surgeon General’s 2018 Advisory states that JUUL, with its combination of non-irritating vapor and potent nicotine hit, “is of particular concern for young people, because it could make it easier for

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<sup>507</sup> Hoffman, *supra* note 12; Bahl, *supra* note 12.

<sup>508</sup> *FDA Launches New, Comprehensive Campaign to Warn Kids About the Dangers of E-Cigarette Use as Part of Agency’s Youth Tobacco Prevention Plan, Amid Evidence of Sharply Rising Use Among Kids*, FDA (Sept. 18, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm620788.htm>.

<sup>509</sup> *Id.*

<sup>510</sup> Vera, *supra* note 10.

<sup>511</sup> *Id.*

<sup>512</sup> Adams, *supra* note 2.

them to initiate the use of nicotine . . . and also could make it easier to progress to regular e-cigarette use and nicotine dependence.”<sup>513</sup>

326. As described above, JUUL uses patented nicotine salts rather than freebase nicotine.<sup>514</sup> Similarly, Big Tobacco and Eonsmoke launched their own JUUL lookalikes, using the same high concentrations of nicotine, formulated in the same manner; *myblu* contains 4.0% nicotine salts, *Vuse Alto* contains 5.0% nicotine salts, and Eonsmoke’s products contain 6.8% nicotine.<sup>515</sup> Between 2013 and 2018, the average nicotine concentration in e-cigarettes more than doubled.<sup>516</sup>

327. The increased nicotine exposure facilitated by JUUL and similar vape devices has serious health consequences. The ease of use and “smoothness” strip away external inhibitors and enable extreme levels of unfettered use. Using JLI’s own calculations, consuming two JUULpods in a day is the equivalent of consuming two to four packs of cigarettes a day. In this way, JLI has not only cultivated a new generation of e-cigarette smokers, but it has also accelerated a new style of smoking—vaping—that is more nicotine-saturated than ever before. Kids are consuming so much nicotine that they are experiencing symptoms of nicotine toxicity, including headaches, nausea, sweating, and dizziness, and they have even coined a term for it: “nic sick.” As one high school student explained to *CBS News*, it “kinda seems like a really bad

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<sup>513</sup> *Id.*

<sup>514</sup> Becker, *supra* note 318.

<sup>515</sup> *About INTENSE Flavors*, blu, <https://www.blu.com/en/US/explore/explore-vaping/about-blu-products/about-blu-intense-flavors> (last visited Mar. 28, 2020); faqs, Vuse Vapor, <https://vusevapor.com/faqs/product/> (last visited Mar. 28, 2020); *Eonsmoke Product*, *supra* note 304.

<sup>516</sup> Alexa R. Romberg et al., *Patterns of nicotine concentration in electronic cigarettes sold in the United States, 2013-2018*, 203 *Drug & Alcohol Dependence* 1 (2019), <https://www.sciencedirect.com/science/article/abs/pii/S0376871619302571>.

flu, like, just out of nowhere. Your face goes pale, you start throwing up and stuff, and you just feel horrible.”<sup>517</sup>

328. Increased rates and duration of vaping lead to greater overall exposure to nicotine. Nicotine is a highly addictive neurotoxin. Nicotine’s addictive properties are similar to heroin and cocaine.<sup>518</sup> Nicotine fosters addiction through the brain’s “reward” pathway. Both a stimulant and a relaxant, nicotine affects the central nervous system; increases blood pressure, pulse, and metabolic rate; constricts blood vessels of the heart and skin; and causes muscle relaxation. Long-term exposure to nicotine causes upregulation—an increase in the number of these high-affinity nicotinic receptors in the brain. When nicotine binds to these receptors it triggers a series of physiological effects in the user that are perceived as a “buzz” that includes pleasure, happiness, arousal, and relaxation of stress and anxiety. With regular nicotine use, however, these feelings diminish, and the user must consume increasing amounts of nicotine to achieve the same effects.

329. Youth are particularly vulnerable to nicotine addiction, as Defendants know well. As described by the Surgeon General, “Tobacco use is a pediatric epidemic.” Nine out of ten smokers begin by age eighteen and 80% who begin as teens will smoke into adulthood.<sup>519</sup>

330. The above statements apply equally, if not more so, to e-cigarettes. Further, the Surgeon General has explained how the nicotine in e-cigarettes affects the developing brain and

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<sup>517</sup> *High school students say about 20% of their peers are vaping, some as young as 8th grade*, CBS News (Aug. 30, 2019), <https://www.cbsnews.com/news/high-school-students-say-about-20-of-their-peers-are-vaping-some-as-young-as-8th-grade/>.

<sup>518</sup> *See e.g.*, U.S. Dep’t of Health & Human Servs., *The Health Consequences of Smoking: Nicotine Addiction, A Report of the Surgeon General*, DHHS Publication Number (CDC) 88-8406 (1988), [https://stacks.cdc.gov/view/cdc/22014/cdc\\_22014\\_DS1.pdf](https://stacks.cdc.gov/view/cdc/22014/cdc_22014_DS1.pdf).

<sup>519</sup> *2012 Surgeon General Report*, *supra* note 246 at 1.

can addict kids more easily than adults: “Until about age 25, the brain is still growing. Each time a new memory is created, or a new skill is learned, stronger connections—or synapses—are built between brain cells. Young people’s brains build synapses faster than adult brains. Because addiction is a form of learning, adolescents can get addicted more easily than adults.”<sup>520</sup>

331. Studies confirm that exposure to nicotine as a teen—even minimal exposure—biologically primes the brain for addiction and greatly increases likelihood of dependence on nicotine as well as other substances later in life.<sup>521</sup> In a study done on mice, even “very brief, low-dose exposure to nicotine in early adolescence increases the rewarding properties of other drugs, including alcohol, cocaine, methamphetamine—and these are long-term changes.”<sup>522</sup> E-cigarette use also puts adolescents at increased risk for cigarette smoking. Compared to adolescents who do not use e-cigarettes, those who do are four times more likely to begin smoking cigarettes.<sup>523</sup>

332. The use of flavors only amplifies vape devices’ addictive qualities. Research done by Nii Addy, Associate Professor of psychiatry and cellular and molecular physiology at the Yale University School of Medicine, found that “sweet flavors can make the nicotine more

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<sup>520</sup> *Know The Risks: E-Cigarettes & Young People*, U.S. Dep’t Health & Human Servs., <https://e-cigarettes.surgeongeneral.gov/knowtherisks.html> (last visited Mar. 20, 2020).

<sup>521</sup> *Principles of Adolescent Substance Use Disorder: A Research Based Guide*, Nat’l Inst. on Drug Abuse (2014), <https://www.drugabuse.gov/publications/principles-adolescent-substance-use-disorder-treatment-research-based-guide/introduction>.

<sup>522</sup> Jon Hamilton, *How Vaping Nicotine Can Affect A Teenage Brain*, NPR (Oct. 10, 2019), <https://www.npr.org/sections/health-shots/2019/10/10/768588170/how-vaping-nicotine-can-affect-a-teenage-brain>.

<sup>523</sup> Kaitlyn M. Berry et al., *Association of Electronic Cigarette Use with Subsequent Initiation of Tobacco Cigarettes in US Youths*, JAMA Network Open (Feb. 1, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2723425>.

palatable . . . but also act in the brain to increase nicotine taking.”<sup>524</sup> This effect is especially troubling for teenage brains, which are more sensitive than adult brains to rewards. According to University of Pennsylvania psychologist Janet Audrain-McGovern, research shows that “if the first e-cigarette you used was flavored, then you’re more likely to go on and use an e-cigarette again.”<sup>525</sup>

333. As Dr. Winickoff explained in his testimony before Congress:

Nicotine addiction can take hold in only a few days, especially in the developing adolescent brain that is particularly vulnerable to addiction to nicotine. . . . Many of my patients find Juul nearly impossible to stop. Nicotine withdrawal can cause headaches, insomnia, irritability, anxiety, and depression, and these withdrawal symptoms are one of the primary reasons a nicotine addiction is difficult to overcome.”<sup>526</sup>

334. Moreover, there is a lack of effective tools to help adolescents overcome nicotine addiction: there is no good data on how to treat adolescents with e-cigarette dependence; there has not been enough research on youth tobacco cessation strategies; and most of the pharmacological therapies approved for adults have been shown to be ineffective or only marginally effective in adolescents.<sup>527</sup>

335. Research indicates that daily e-cigarette use is much more likely to continue than daily cigarette smoking. Out of surveyed students who reported ever using cigarettes daily, only 17% indicated that they remained daily smokers.<sup>528</sup> Out of surveyed students who reported ever using e-cigarettes daily, 58% remained daily users.<sup>529</sup> This data demonstrates both that e-

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<sup>524</sup> Hamilton, *supra* note 522.

<sup>525</sup> *Id.*

<sup>526</sup> Winickoff Testimony, *supra* note 252 at 2.

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*



cigarette use in teens is very persistent, a result consistent with the addictiveness of these products and the difficulty youth have in trying to quit.<sup>530</sup>

336. The effects of nicotine exposure on the brain of youth and young adults include not only addiction, priming for use of other addictive substances, but also reduced impulse control, deficits in attention and cognition, and mood disorders.<sup>531</sup> A psychoactive substance that targets brain areas involved in emotional and cognitive processing, nicotine poses a particularly potent threat to the adolescent brain, as it can “derange the normal course of brain maturation and have lasting consequences for cognitive ability, mental health, and even personality.”<sup>532</sup> Animal researchers from Yale University School of Medicine found that vaping during adolescence can lead to long-term brain changes, like attention deficit hyperactivity disorder.<sup>533</sup>

337. The dangerous and destructive nature of nicotine is no recent discovery. As a key ingredient in tobacco products, the drug and its deleterious effects have been the subject of scientific research and public health warnings for decades. Nicotine causes cardiovascular, reproductive, and immunosuppressive problems with devastating effects. In 2014, the Surgeon General reported that nicotine addiction is the “fundamental reason” that individuals persist in using tobacco products, and this persistent tobacco use contributes to millions of needless deaths

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<sup>530</sup> *Id.*

<sup>531</sup> Menglu Yuan et al., *Nicotine and the Adolescent Brain*, 593 *J. of Physiology* 3397 (2015), [www.ncbi.nlm.nih.gov/pmc/articles/PMC4560573/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4560573/); U.S. Surgeon General and U.S. Centers for Disease Control & Prevention, Office on Smoking and Health, *Know the Risks: E-Cigarettes and Young People* (2019), <https://e-cigarettes.surgeongeneral.gov/>.

<sup>532</sup> N.A. Goriounova & H.D. Mansvelder, *Short- and Long-Term Consequences of Nicotine Exposure during Adolescence for Prefrontal Cortex Neuronal Network Function*, *Cold Spring Harbor Persp. in Med.* 2(12) (Dec. 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3543069/>.

<sup>533</sup> Hamilton, *supra* note 522.

and many diseases, including diseases that affect the heart and blood vessels (cardiovascular disease), lung diseases (chronic obstructive pulmonary disease (“COPD”) and lung cancer), cancer almost anywhere in the body, and birth defects. Part of the reason the national decline in cigarette use in recent years was such a victory for public health was because there was a corresponding decline in youth exposure to nicotine. From 2000 to 2017, the smoking rate among high school students fell by 73%.<sup>534</sup>

338. In June 2014, the CDC reported that “by achieving a teen smoking rate of 15.7 percent, the United States has met its national Healthy People 2020 objective of reducing adolescent cigarette use to 16 percent or less.”<sup>535</sup> The Surgeon General reported in 2014:

We are at a historic moment in our fight to end the epidemic of tobacco use that continues to kill more of our citizens than any other preventable cause. The good news is that we know which strategies work best. By applying these strategies more fully and more aggressively, we can move closer to our goal of making the next generation tobacco-free.”<sup>536</sup>

339. That trend has completely reversed. In 2018, more than one in four high school students in the United States reported using a tobacco product in the past thirty days, a dramatic increase from just one year before.<sup>537</sup> But there was no increase in the use of cigarettes, cigars, or

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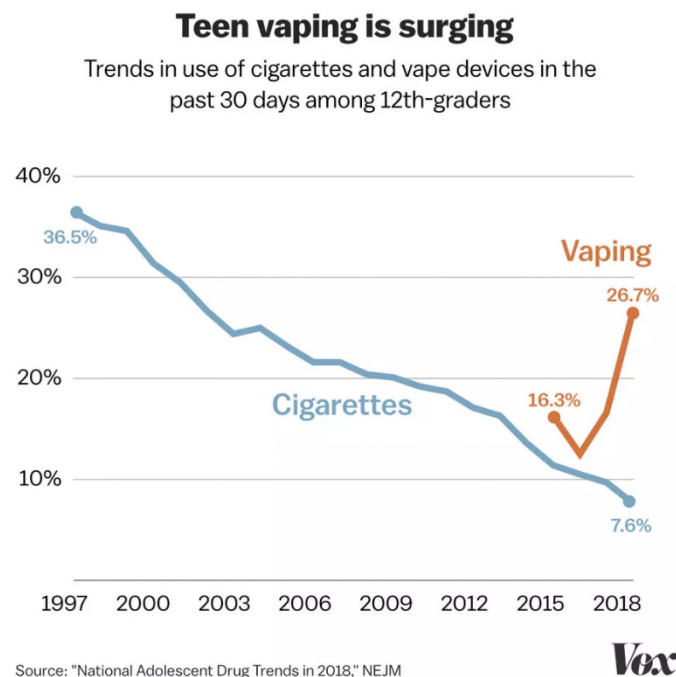
<sup>534</sup> Matthew L. Myers, *On 20th Anniversary of State Tobacco Settlement (the MSA), It’s Time for Bold Action to Finish the Fight Against Tobacco*, Campaign for Tobacco-Free Kids (Nov. 26, 2018), [https://www.tobaccofreekids.org/press-releases/2018\\_11\\_26\\_msa20](https://www.tobaccofreekids.org/press-releases/2018_11_26_msa20).

<sup>535</sup> *Current cigarette smoking among U.S. high school students lowest in 22 years*, CDC (June 12, 2014), <https://www.cdc.gov/media/releases/2014/p0612-YRBS.html>.

<sup>536</sup> *LET’S MAKE THE NEXT GENERATION TOBACCO-FREE: Your Guide to the 50th Anniversary Surgeon General’s Report on Smoking and Health*, U.S. Dep’t of Health & Human Servs. (2014), <https://www.hhs.gov/sites/default/files/consequences-smoking-consumer-guide.pdf>.

<sup>537</sup> *Progress Erased: Youth Tobacco Use Increased During 2017-2018*, CDC (Feb. 11, 2019), <https://www.cdc.gov/media/releases/2019/p0211-youth-tobacco-use-increased.html>.

hookahs during that same time period.<sup>538</sup> There was only increased use in a single tobacco product: e-cigarettes. While use of all other tobacco products continued to decrease as it had been for decades, e-cigarette use increased 78% in just one year.<sup>539</sup> This drastic reversal caused the CDC to describe youth vaping an “epidemic.”<sup>540</sup>



340. The teen vaping epidemic has had, and will continue to have, significant costs for individual users and society alike. Nicotine addiction alone carries significant health consequences, and these are exacerbated when adolescents are involved. Adolescent nicotine

<sup>538</sup> *Tobacco Use By Youth Is Rising: E-Cigarettes are the Main Reason*, CDC (Feb. 2019), <https://www.cdc.gov/vitalsigns/youth-tobacco-use/index.html>.

<sup>539</sup> Scott Gottlieb, Statement from FDA Commissioner Scott Gottlieb, M.D., on proposed new steps to protect youth by preventing access to flavored tobacco products and banning menthol in cigarettes, FDA (Nov. 15, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-proposed-new-steps-protect-youth-preventing-access>.

<sup>540</sup> Adams, *supra* note 2.

addiction leads to memory and attention problems, and increases chances of addiction later in life, all of which will continue to have long-lasting impacts on society.

341. Science is also beginning to show that e-cigarettes have the potential to cause even more distinct health risks and costs. E-cigarettes were initially considered to be a safer alternative to cigarettes, but recent studies done on rats and mice have demonstrated results that they are “as damaging to pulmonary structures as traditional tobacco cigarettes.”<sup>541</sup> Mice exposed to e-cigarette fluids containing nicotine experienced effects that are associated with chronic obstructive pulmonary disease, such as cytokine expression, airway hyper-reactivity, and lung tissue destruction.<sup>542</sup> The use of e-cigarettes also caused inflammation in mice and impaired their immune defenses against various bacterial and viral infections.<sup>543</sup> Moreover, a recent study that monitored 32,000 adults in the United States for three years found that e-cigarette users were 30% more likely to develop a chronic lung disease, such as asthma, bronchitis, and emphysema, than people who did not smoke either e-cigarettes or traditional cigarettes.<sup>544</sup>

342. It is not just these consequences that raise public health concerns. The CDC and FDA recently investigated an outbreak of e-cigarette, or vaping, product use associated lung

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<sup>541</sup> Viktorija Reinikovaite et al., *The effects of electronic cigarette vapour on the lung: direct comparison to tobacco smoke* at 2, 51 *Eur. Respiratory J.* (Jan. 23, 2018), <https://erj.ersjournals.com/content/erj/51/4/1701661.full.pdf>.

<sup>542</sup> Itsaso Garcia-Arcos et al., *Chronic electronic cigarette exposure in mice induces features of COPD in a nicotine-dependent manner*, 71 *Thorax*, 1119, 1119-29 (Aug. 24, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5136722/pdf/thoraxjnl-2015-208039.pdf>.

<sup>543</sup> *Id.*

<sup>544</sup> Dharma N. Bhatta & Stanton A. Glantz, *Association of E-Cigarette Use with Respiratory Disease Among Adults: A Longitudinal Analysis*, *Am. J. Preventive Med.* (Dec. 16, 2019), <https://www.sciencedirect.com/science/article/abs/pii/S0749379719303915>.

injuries, known as EVALI.<sup>545</sup> As of February 18, 2020, there were over 2,800 reported cases of hospitalization due to e-cigarette or vaping product use-associated lung injury (“EVALI”) in all fifty states and sixty-eight deaths had been confirmed by the CDC.<sup>546</sup> While public health officials believe this outbreak is associated with vitamin E acetate, which is often used in connection with vaping marijuana, 14% of patients have reported vaping nicotine only.<sup>547</sup>

343. Many teenagers are simply unaware of these risks, an ignorance that Defendants have capitalized on. According to Dr. Winickoff, many of his patients believe vaping is harmless:

Counseling teens and preteens on e-cigarette use is challenging. Many of my patients have wildly incorrect beliefs about e-cigarettes. They know that cigarettes are dangerous, but assume that Juul—since it’s ubiquitous, comes in child-friendly flavors, and is marketed as a healthier alternative to smoking—must be harmless. I have to explain to kids that e-cigarettes do not have the same positive health benefits as the fruits whose flavor they copy. Even the term vapor calls to mind harmless water vapor. There is no water in these products.<sup>548</sup>

#### **K. Vaping in Schools**

344. In addition to severe health consequences, widespread vaping and “juuling” has placed severe burdens on society and schools in particular. It is not an overstatement to say that JUUL has changed the educational experience of students across the nation. As one vape shop manager told KOMO News, “It’s the new high school thing. Everyone’s got the JUUL.”<sup>549</sup>

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<sup>545</sup> *Outbreak of Lung Injury Associated with E-cigarette Use, or Vaping*, CDC, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html) (last visited Mar. 28, 2020).

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> Winickoff Testimony, *supra* note 252 at 1.

<sup>549</sup> *Juuling at School*, *supra* note 275.

345. The JUUL youth addiction epidemic spread rapidly across high schools in the United States. JUUL surged in popularity, largely through social media networks, and created patterns of youth usage, illegal youth transactions, and addiction, that are consistent with this account from Reddit in 2017:

Between classes the big bathroom in my school averages 20-25 kids, and 5-10 JUULs. Kids usually will give you a dollar for a JUUL rip if you don't know them, if you want to buy a pod for 5\$ you just head into the bathroom after lunch. We call the kids in there between every class begging for rips 'JUUL fiends.' Pod boys are the freshman that say 'can I put my pod in ur juul?' and are in there every block. I myself spent about 180\$ on mango pods and bought out a store, and sold these pods for 10\$ a pod, making myself an absolutely massive profit in literally 9 days. Given because I'm 18 with a car and that's the tobacco age around here, I always get offers to get pod runs or juuls for kids. people even understand the best system to get a head rush in your 2 minutes between classes, is all the juuls at once. So someone yells "GIVE ME ALL THE JUULS" and 3-7 are passed around, two hits each. This saves us all juice, and gives you a massive head rush. Kids also scratch logos and words onto their juuls to make i[t] their own, every day you can find the pod covers in my student parking lot. I know this sounds exaggerated, but with a school with 1400 kids near the city and JUULs being perceived as popular, it's truly fascinating what can happen.<sup>550</sup>

346. In response to the post above, several others reported similar experiences:

- a. "[T]his is the exact same thing that happens at my school, we call [JUUL fiends] the same thing, kind of scary how similar it is."<sup>551</sup>
- b. "Same thing at my school. JUUL fiend is a term too."<sup>552</sup>
- c. "Yeah nicotine addiction has become a huge problem in my high school because of juuls even the teachers know what they are."<sup>553</sup>
- d. "[S]ame [expletive] at my school except more secretive because it's a private school. It's crazy. Kids hit in class, we hit 3-5 at once, and

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<sup>550</sup> *What's Juul in School*, [https://www.reddit.com/r/juul/comments/61is7i/whats\\_juul\\_in\\_school/](https://www.reddit.com/r/juul/comments/61is7i/whats_juul_in_school/) (last visited Mar. 20, 2020).

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

everyone calls each other a juul fiend or just a fiend. Funny how similar it all is.”<sup>554</sup>

- e. “[T]he same [expletive] is happening in my school. kids that vaped were called [expletive] for the longest time, that all changed now.”<sup>555</sup>
- f. “Made an account to say that it’s exactly the same way in my school! LOL. I’m from California and I think I know over 40 kids that have it here just in my school. We do it in the bathrooms, at lunch etc. LMAO. ‘Do you have a pod man?’”<sup>556</sup>
- g. “It’s the same at my school and just about every other school in Colorado.”<sup>557</sup>
- h. “2 months into this school year, my high school made a newspaper article about the ‘JUUL epidemic.’”<sup>558</sup>
- i. “Wow do you go to high school in Kansas because this sounds EXACTLY like my school. I’ll go into a different bathroom 4 times a day and there will be kids in there ripping JUUL’s in every single one.”<sup>559</sup>
- j. “At my high school towards the end of lunch everyone goes to the bathroom for what we call a ‘juul party.’ People bring juuls, phixes, etc. It’s actually a great bonding experience because freshman can actually relate to some upperclassmen and talk about vaping.”<sup>560</sup>
- k. “To everyone thinking that this is just in certain states, it’s not. This is a nationwide trend right now. I’ve seen it myself. If you have one you’re instantly insanely popular. Everyone from the high-achievers to the kids who use to say ‘e-cigs are for [expletives]’ are using the juul. It’s a craze. I love it, I’ve made an insane amount of money.

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<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> *Id.*

<sup>557</sup> *Id.*

<sup>558</sup> *Id.* (citing *Juuls Now Rule the School as Students Frenzy Over E-cig* (Oct. 5, 2016), <https://imgur.com/a/BKewp>).

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

It's something that has swept through our age group and has truly taken over. And it happened almost overnight.”<sup>561</sup>

347. E-cigarette use has completely changed school bathrooms—now known as “the Juul room.”<sup>562</sup> As one high school student explained, “it’s just a cloud.”<sup>563</sup> The ubiquity of e-cigarette use in high school bathrooms has generated numerous online spoofs about “the juul room.”



<sup>561</sup> *Id.* (emphasis added).

<sup>562</sup> Moriah Balingit, *In the ‘Juul room’: E-cigarettes spawn a form of teen addiction that worries doctors, parents and schools*, Wash. Post (July 26, 2019), [https://www.washingtonpost.com/local/education/helpless-to-the-draw-of-nicotine-doctors-parents-and-schools-grapple-with-teens-addicted-to-e-cigarettes/2019/07/25/e1e8ac9c-830a-11e9-933d-7501070ee669\\_story.html](https://www.washingtonpost.com/local/education/helpless-to-the-draw-of-nicotine-doctors-parents-and-schools-grapple-with-teens-addicted-to-e-cigarettes/2019/07/25/e1e8ac9c-830a-11e9-933d-7501070ee669_story.html).

<sup>563</sup> Greta Jochem, *Juuling in School: e-Cigarette Use Prevalent Among Local Youth*, Daily Hampshire Gazette (Nov. 13, 2018), <https://www.gazettenet.com/Juuling-in-Schools-21439655>.

<sup>564</sup> *Juul Hashtag Meme*, Stan. U. Res. into the Impact of Tobacco Advert. (2018), [http://tobacco.stanford.edu/tobacco\\_main/images\\_pods.php?token2=fm\\_pods\\_st681.php&token1=fm\\_pods\\_img37610.php&theme\\_file=fm\\_pods\\_mt068.php&theme\\_name=JUUL&subtheme\\_name=%23juul](http://tobacco.stanford.edu/tobacco_main/images_pods.php?token2=fm_pods_st681.php&token1=fm_pods_img37610.php&theme_file=fm_pods_mt068.php&theme_name=JUUL&subtheme_name=%23juul).



348. As another high school student explained, “You can pull it out, you can have it anywhere. To smoke a cigarette you have to hit the bus stop. You want a Juul you hit the bathroom, it’s easy.”<sup>565</sup> He added that JLI “market[s] it as an alternative to cigarettes but really it’s a bunch of kids who have never picked up a pack and they’re starting their nicotine addiction there.”<sup>566</sup> Students at another high school stated that classmates had “set off the fire alarm four times last year from vaping in the bathrooms [at school],” adding that it is commonplace to see students vaping in school bathrooms or in the parking lot.<sup>567</sup>

349. This impact was only made worse by JLI intentionally targeting schools, as described above.

350. Such rampant vapor product use has effectively added another category to teachers’ and school administrators’ job descriptions; many now receive special training to respond to the various problems that vaping presents, both in and out of the classroom. A national survey of middle schools and high schools found that 43.3% of schools have had to implement not only an e-cigarette policy but a e-cigarette-specific policy. Participants in the survey reported multiple barriers to enforcing these policies, including the discreet appearance of the product, difficulty pinpointing the vapor or scent, and the addictive nature of the product.

351. Across the United States, schools have had to divert resources and administrators have had to go to extreme lengths to respond to the ever-growing number of students vaping on

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<sup>565</sup> Alison Grande, ‘*Juuling*’: *Vaping device that looks like USB drive popular with teens*, KIRO 7 (Dec. 8, 2017), <https://www.kiro7.com/news/local/juuling-vaping-device-that-looks-like-usb-drive-popular-with-teens/660965605/>.

<sup>566</sup> *Id.*

<sup>567</sup> Manisha Jha, ‘*You need to stop vaping right now*’: *Students and faculty react to Washington vape ban*, *The Daily, U. of Wash.* (Sept. 30, 2019), [http://www.dailyuw.com/news/article\\_960d8692-e324-11e9-870c-9f9d571115d6.html](http://www.dailyuw.com/news/article_960d8692-e324-11e9-870c-9f9d571115d6.html).

school grounds. According to the *Truth Initiative*, more than 40% of all teachers and administrators reported that their school uses camera surveillance near the school's restroom, almost half (46%) reported camera surveillance elsewhere in the school, and 23% reported using assigned teachers for restroom surveillance.<sup>568</sup> Some schools have responded by removing bathroom doors or even shutting bathrooms down, and schools have banned flash drives to avoid any confusion between flash drives and JUULs or the new "JUULalike" products—like Eonsmoke's device or the other copycats. Schools have also paid thousands of dollars to install special monitors to detect vaping, which they say is a small price to pay compared to the plumbing repairs otherwise spent as a result of students flushing vaping paraphernalia down toilets. Other school districts have sought state grant money to create new positions for tobacco prevention supervisors, who get phone alerts when vape smoke is detected in bathrooms.

352. Many schools have also shifted their disciplinary policies in order to effectively address the youth vaping epidemic. Rather than immediately suspending students for a first offense, school districts have created anti-vaping curricula which students are required to follow in sessions held outside of normal school hours, including on Saturdays. Teachers prepare lessons and study materials for these sessions with information on the marketing and health dangers of vaping—extra work which requires teachers to work atypical hours early in the mornings and on weekends. Some schools will increase their drug testing budget to include random nicotine tests for students before they join extracurricular activities. Under this drug-testing protocol, first offenders will undergo drug and alcohol educational programming; second

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<sup>568</sup> *How are schools responding to JUUL and the youth e-cigarette epidemic?*, Truth Initiative (Jan. 18, 2019), <https://truthinitiative.org/research-resources/emerging-tobacco-products/how-are-schools-responding-juul-and-youth-e-cigarette>.

and third offenders with be forced to sit out from extracurriculars and attend substance abuse counseling.

353. JUUL’s prevalence in schools is not a coincidence; JLI actively sought to enter school campuses while it was coordinating with Altria. The U.S. House Subcommittee on Economic and Consumer Policy (“Subcommittee”) conducted a months-long investigation of JLI, including reviewing tens of thousands of internal documents, and concluded that JLI “deliberately targeted children in order to become the nation’s largest seller of e-cigarettes.”<sup>569</sup> The Subcommittee found that “(1) JUUL deployed a sophisticated program to enter schools and convey its messaging directly to teenage children; (2) JUUL also targeted teenagers and children, as young as eight years-old, in summer camps and public out-of-school programs; and (3) JUUL recruited thousands of online ‘influencers’ to market to teens.”<sup>570</sup>

354. According to the Subcommittee, JLI was willing to pay schools and organizations hundreds of thousands of dollars to have more direct access to kids. For example, JLI paid a Baltimore charter school organization \$134,000 to start a summer camp to teach kids healthy lifestyles, for which JLI itself would provide the curriculum; offering schools \$10,000 to talk to students on campus; and giving the Police Activities League in Richmond, California, almost \$90,000 to provide JLI’s own vaping education program, “Moving On,” to teenage students suspended for using cigarettes. Meanwhile, JLI would collect data about test scores, surveys, and activity logs about the students.

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<sup>569</sup> *Memorandum*, U.S. House Subcommittee on Econ. & Consumer Policy (July 25, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Supplemental%20Memo.pdf>.

<sup>570</sup> *Id.*

355. Among the more egregious incidents reported by the Subcommittee was a July 24, 2019 presentation in which no parents or teachers were in the room for the presentation, the message conveyed was that JUUL was “totally safe,” and the presenter even demonstrated to the students how to use a JUUL. The school was presumably paid for this meeting, which was marketed to the school as an anti-smoking initiative. A JLI spokesman said the company is no longer funding such programs.

356. The problems with JLI’s youth prevention programs were widespread. According to outside analyses, “the JUUL Curriculum is not portraying the harmful details of their product, similar to how past tobacco industry curricula left out details of the health risks of cigarette use.”<sup>571</sup> Although it is well-known that teaching children to deconstruct ads is one of the most effective prevention techniques, JLI programs entirely omitted this skill, and JLI’s curriculum barely mentioned JUUL products as among the potentially harmful products to avoid.<sup>572</sup> As one expert pointed out, “we know, more from anecdotal research, that [teens] may consider [JUULs] to be a vaping device, but they don’t call it that. So when you say to a young person, ‘Vapes or e-cigarettes are harmful,’ they say, ‘Oh I know, but I’m using a JUUL.’”<sup>573</sup>

357. Internal emails confirm both that JLI employees knew about the similarities of JLI’s “youth prevention program” to the earlier pretextual antismoking campaigns by the cigarette industry and that JLI management at the highest levels was personally involved in these

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<sup>571</sup> Victoria Albert, *Juul Prevention Program Didn't School Kids on Dangers, Expert Says: SMOKE AND MIRRORS. JUUL—which made up 68 percent of the e-cigarette market as of mid-June—seems to have taken a page from the playbook of Big Tobacco*, The Daily Beast (Oct. 19, 2018), <https://www.thedailybeast.com/juul-prevention-program-didnt-school-kids-on-dangers-expert-says>.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

efforts. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>574</sup> [REDACTED]

[REDACTED] <sup>575</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] <sup>576</sup> [REDACTED]

[REDACTED] <sup>577</sup> The paper

concluded that “the Philip Morris[’s ‘youth prevention’] campaign had a counterproductive influence.”<sup>578</sup>

358. The Board was intimately involved in these “youth prevention” activities. For example, [REDACTED]

[REDACTED]

[REDACTED] <sup>579</sup>

359. [REDACTED]

[REDACTED] <sup>580</sup> Eventually, JLI ended this

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<sup>574</sup> INREJUUL\_00197608.

<sup>575</sup> INREJUUL\_00197607.

<sup>576</sup> INREJUUL\_00196624.

<sup>577</sup> INREJUUL\_00265202.

<sup>578</sup> Matthew C. Farrelly et al., *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 Am. J. Public Health 901 (2002).

<sup>579</sup> JLI00151300.

<sup>580</sup> INREJUUL\_00194646.

version of its youth prevention program, but the damage had been done: following the playbook of Big Tobacco, JLI had hooked more youth on nicotine.

**L. Impact of the Youth Vaping Crisis on Plaintiff City and County of Denver**

360. Plaintiff City and County of Denver is home to approximately 715,000 residents.<sup>581</sup> Denver is the capital of Colorado, the largest city in the state, and the fastest-growing city and county within Colorado.<sup>582</sup> Approximately 19% of Denver's residents are under the age of eighteen.<sup>583</sup>

361. Denver has been hit hard by the youth vaping epidemic. In 2013, only 11% of students in Colorado Region 20, which encompasses Plaintiff's community, had ever tried e-cigarettes.<sup>584</sup> By 2017, that number had skyrocketed to 40% of students in Colorado Region 20 reportedly having tried electronic vapor products, with approximately 18% of Plaintiff's high school students reportedly having used an electronic vapor product in the past thirty days.<sup>585</sup> These numbers are self-reported, and many public health officials believe they likely underestimate the actual prevalence of youth vaping.

362. Not only are Defendants' products being used frequently by youth in Plaintiff's community, but data indicates that these numbers are likely to continue to rise. Almost one-half of students in Colorado Region 20 said it would be easy for them to get electronic vapor

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<sup>581</sup> *Quick Facts Denver County, Colorado*, U.S. Census Bureau (July 1, 2018), <https://www.census.gov/quickfacts/fact/table/denvercountycolorado/PST045218>.

<sup>582</sup> *Denver, Colorado Population 2020*, World Population Rev. (Oct. 29, 2019), <http://worldpopulationreview.com/us-cities/denver-population/>.

<sup>583</sup> *Quick Facts Denver County*, *supra* note 581.

<sup>584</sup> *2013 Healthy Kids Colorado Survey Results*, *supra* note 7 at 52.

<sup>585</sup> *2017 Healthy Kids Colorado Survey Results*, *supra* note 8 at 76.

products, and one-third of these students said they would likely use an electronic vapor product if one of their friends offers it.<sup>586</sup>

363. These increasing numbers are consistent with the rise in youth vaping throughout the State of Colorado, which tops the nation for youth e-cigarette use.<sup>587</sup> An estimated 27,000 Colorado high school students reported vaping more than ten days a month.<sup>588</sup> Vaping is also much more common among youth than with adults in Colorado. In 2017, 27% of Colorado youth were currently vaping—more than twice the national average—and almost 45% reported experimenting with vaping.<sup>589</sup> By comparison, in 2018, only 7.5% of Colorado adults were actively vaping, and only 27% had ever tried it.<sup>590</sup>

364. According to the Executive Director and Chief Medical Officer of the Colorado Department of Public Health and Environment: “Vaping has replaced cigarettes as a way for underage youth to use nicotine[.] . . . Too many of our young people don’t realize the health risks involved.”<sup>591</sup> While about 85% of high school students in Plaintiff’s region view smoking cigarettes as risky, only about 45% of these students feel the same way about vaping.<sup>592</sup>

365. Data and feedback from Denver Public Schools (“DPS”), the sole public school district in Plaintiff’s jurisdiction, show the scope of the youth vaping epidemic in Plaintiff’s

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<sup>586</sup> *Id.* at 78.

<sup>587</sup> D’Argonne, *supra* note 9.

<sup>588</sup> John Daley, *Colorado Is a Hotbed of Teen Vaping, But Lacks the Tools to Help Kids Quit*, CPR News (July 30, 2019), <https://www.cpr.org/2019/07/30/colorado-is-a-hot-bed-of-teen-vaping-but-lacks-the-tools-to-help-kids-quit/>.

<sup>589</sup> D’Argonne, *supra* note 9.

<sup>590</sup> *2018 Colorado Behavioral Risk Factor Surveillance System (BRFSS)*, Colo. Dep’t of Pub. Health & Env’t (2018), <https://drive.google.com/file/d/1sBj5BZCNWWBdEOmAPu3c65XAg99Zh3da/view>.

<sup>591</sup> D’Argonne, *supra* note 9.

<sup>592</sup> *2017 Healthy Kids Colorado Survey Results*, *supra* note 8, at 78.

community. Vaping has become highly disruptive to DPS's operations, as DPS has had to respond to many disciplinary issues and confiscate hundreds of vape devices from its students.

366. Even beyond the negative health and wellness effects on Denver youth, Plaintiff and DPS are concerned about the hazardous nature of e-cigarette and e-liquid waste. DPS is considered a large generator of hazardous waste due to the immense volume of vape confiscations and therefore must comply with standards established by the United States Environmental Protection Agency. However, in Denver there is no central repository for public disposal of hazardous waste. Therefore, Plaintiff and DPS, along with other community entities, are faced with the challenge of proper disposal, which has become an increasing public health concern. Unfortunately, Plaintiff has limited staff capacity and resources to help provide an immediate solution, and Plaintiff's dedicated staff has not had the time or resources to address this impact on Plaintiff's land and property.

367. In order to combat the public health crisis caused by Defendants' conduct, Plaintiff spent significant and unexpected levels of time and resources on addressing the pervasiveness of youth use of vaping products. For example, Denver Department of Public Health and Environment ("DDPHE") created an enforcement program in order to mitigate the accessibility of Defendants' products to minors. According to a 2017 survey, 47.6% of students said they could easily get tobacco products if they wanted.<sup>593</sup> Approximately 27% of students younger than eighteen years of age who reported current electronic vapor product use were able

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<sup>593</sup> 2017 *Healthy Kids Colorado Survey Results*, *supra* note 8 at 80.



to purchase their own electronic vapor products from a gas station, convenience store, grocery store, or drugstore.<sup>594</sup>

368. Plaintiff has prioritized retailer compliance enforcement with respect to Electronic Nicotine Devices (“ENDs”). Beginning in 2017, DDPHE implemented a sting operation in which minors attempt to buy cigarettes and ENDs.<sup>595</sup> Compliance is more effective with respect to traditional cigarette sales than ENDs, reflecting the extent of the misinformation and confusion spread by Defendants: between 7% and 10% of Denver tobacco retailers sold cigarettes to minors, however, 27% sold minors ENDs.<sup>596</sup> DDPHE’s enforcement team has seen a significant increase in violation rates since it began prioritizing purchasing ENDs in its product-purchasing program in 2018. This program remains a high priority for Plaintiff moving forward, but it consumes a large amount of Plaintiff’s limited resources. In order to fully respond to the youth vaping epidemic, Plaintiff will likely need to hire additional dedicated staff to conduct enforcement activities.

369. To combat the issue of access to youth, Denver passed its Tobacco 21 Law (“T21”) in the fall of 2019.<sup>597</sup> T21’s goal is to “protect the approximately 120,700 people under twenty-one years of age in the City and County of Denver from tobacco-related morbidity and mortality by limiting access.”<sup>598</sup> Mayor Michael B. Hancock recognizes that “youth who try e-cigarettes are more likely to begin smoking tobacco later” and “raising the age of purchase to 21

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<sup>594</sup> *Id.*

<sup>595</sup> David Sachs, *Denver raises smoking and vaping age to 21 and will track who’s selling the stuff*, Denverite (Sept. 30, 2019), <https://denverite.com/2019/09/30/denver-raises-smoking-and-vaping-age-to-21-and-will-track-whos-selling-the-stuff/>.

<sup>596</sup> *Id.*

<sup>597</sup> Denver Rev. Municipal Code § 24-402.

<sup>598</sup> Sachs, *supra* note 595.

years old for tobacco and nicotine products is a step we can take as a city to curb this rising trend of youth use and promote public and personal health among our young residents.”<sup>599</sup> This law also required all tobacco and nicotine retailers to obtain a license from Plaintiff in order to continue to sell tobacco products, including e-cigarettes, within Plaintiff’s boundaries. Any retailer applying for a license after July 1, 2020 will be required to be located at least 1,000 feet away from schools, city-owned recreation centers, and city-owned outdoor pools.

370. Plaintiff expended substantial amounts of time and resources in order to develop and implement T21. Plaintiff’s DDPHE first began developing the T21 policy in 2018 based on the data derived from the *Healthy Kids Colorado Survey*. Survey results indicated that perception of risk among youth related to vaping nicotine was particularly low compared to the risk of smoking cigarettes. As mentioned above, while 85% of youth said they thought smoking is risky, only 45% said they believed vaping to be risky. Additionally, the survey results suggested that ease of access was much higher for youth purchasing vape-related products than cigarettes. DDPHE focused its efforts on raising Denver’s minimum purchasing age for tobacco products to the age of twenty-one to help eliminate the “pipeline” through which students were obtaining vape products from eighteen-year-old classmates who could legally purchase them.

371. Recognizing the widespread impact of Defendants’ actions on Plaintiff’s community, DDPHE pursued a thoughtful and deliberate stakeholder engagement to develop and implement T21. All Denver tobacco retailers were invited to two separate listening sessions to learn and ask questions about changes brought by the new law. DDPHE is only able to employ

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<sup>599</sup> Denver Pub. Health & Env’t (@DDPHE), Twitter (Sept. 30, 2019), [https://twitter.com/DDPHE/status/1178797284013690880?ref\\_src=twsrc%5Etfw](https://twitter.com/DDPHE/status/1178797284013690880?ref_src=twsrc%5Etfw) (last visited Mar. 28, 2020).

one full-time investigator and two part-time minors to help with compliance checks of approximately 500 different retailers. DDPHE conducts compliance checks of retailers to ensure they are not selling to underage customers. Following the passage of T21 in 2019, this team administered a “soft enforcement” round of compliance checks with no penalty to retailers. Businesses receive feedback from the checks before the enforcement program returns to routine compliance and enforcement. Ultimately, to address the prolific nature of the vaping epidemic, Plaintiff’s enforcement team will need to continue conducting at least four visits per retailer per year, requiring an estimated 2,000 visits a year, for the indefinite future.

372. Plaintiff has been taking important steps to combat the youth vaping epidemic, but it cannot fully address the existing widespread use of vapor products and resulting nicotine addiction among youth. Because of the potency of Defendants’ nicotine salts, combined with the discreet device design and the ease of delivery—allowing youth to take a puff as often as every few minutes—widespread vaping has resulted in a higher incidence of addiction than that caused by youth cigarette smoking. In other words, unlike a combustible cigarette with its telltale smoke, there is nothing about the JUUL device that prevents kids from taking a puff behind the closed doors of their bedrooms or even the moment a teacher’s back is turned in the classroom. As the researchers conducting the national *Monitoring the Future* survey wrote in a letter to the *New England Journal of Medicine*:

Current efforts by the vaping industry, government agencies, and schools have thus far proved insufficient to stop the rapid spread of nicotine vaping among adolescents. Of particular concern are the accompanying increases in the proportions of youth who are physically addicted to nicotine, an addiction that is very difficult to overcome once established. The substantial levels of daily vaping suggest the development of nicotine addiction. New efforts are needed to protect youth from using nicotine during adolescence, when the developing brain is

particularly susceptible to permanent changes from nicotine use and when almost all nicotine addiction is established.<sup>600</sup>

373. Therefore, while Plaintiff has been working tirelessly to address the youth vaping crisis, more resources are needed to fully counter Defendants' conduct. With additional resources, Plaintiff would expand its educational and training efforts, including developing educational materials and trainings for students and their families and creating a more robust education and prevention program that engages leadership at schools. In addition, Plaintiff would conduct more traditional outreach efforts such as media development and targeted marketing campaigns to support Plaintiff's prevention work.

374. Additionally, a major concern for Plaintiff is the lack of treatment options for a generation of addicted youth that reside within Plaintiff's community. The State of Colorado has few programs, shrinking resources, and little research available to help youth stop vaping.<sup>601</sup> Colorado spends nearly \$24 million a year on tobacco prevention,<sup>602</sup> but youth e-cigarette use continues to rise.<sup>603</sup> Money available to support anti-smoking efforts has been declining as youth use of traditional cigarettes goes down, such that remaining tobacco prevention funds are inadequate to address skyrocketing rates of youth vaping.

375. According to a State of Colorado communication strategist: "Our young people are facing an epidemic of vaping. We're not funded to deal with vaping products. And so we've got more problems than we've seen before and fewer resources with which to deal with them."<sup>604</sup>

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<sup>600</sup> Miech, *supra* note 4. **Error! Hyperlink reference not valid.**

<sup>601</sup> *Id.*

<sup>602</sup> Colorado, Campaign for Tobacco-Free Kids (Dec. 18, 2019), <https://www.tobaccofreekids.org/what-we-do/us/statereport/colorado>.

<sup>603</sup> 2017 *Healthy Kids Colorado Survey Results*, *supra* note 8.

<sup>604</sup> Daley, *supra* note 588.

As for treatment options, the director of Behavior Health Services at Denver Health stated:

“Really, we have almost nothing in terms of treatment for these kids.”<sup>605</sup>

376. Although creating treatment options for youth addicted to nicotine is a major priority for Plaintiff, these options will be difficult to develop. Many of the tobacco cessation products that are approved by the United States Food and Drug Administration are not approved for use by children. Plaintiff first needs additional research on what cessation options are possible and which ones will be effective for youth vaping. Vaping presents unique regulatory challenges because the ability to conceal Defendants’ products enables youth to vape more frequently and in more locations than they are able to when smoking traditional cigarettes. With additional resources, Plaintiff would support development of additional, youth-appropriate cessation options that can meet the needs of Plaintiff’s diverse community. Plaintiff would also support the development of vaping-specific cessation resources to address the ways in which vaping cessation may differ from traditional smoking cessation.

377. Fully addressing the harms to Plaintiff caused by Defendants’ conduct will require a comprehensive approach. Without the resources to fund measures such as those described herein, Plaintiff will continue to be harmed by the ongoing consequences of Defendants’ conduct.

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<sup>605</sup> *Id.*

**M. No Federal Agency Action, Including by the FDA, Can Provide the Relief Plaintiff Seeks Here**

378. The injuries Plaintiff has suffered and will continue to suffer cannot be addressed by agency or regulatory action. There are no rules the FDA could make or actions the agency could take that would provide Plaintiff the relief it seeks in this litigation.

379. Even if e-cigarettes were entirely banned today or only used by adults, millions of youth, including Plaintiff's residents, would remain addicted to nicotine.

380. Regulatory action would do nothing to compensate Plaintiff for the money and resources it has already expended addressing the impacts of the youth vaping epidemic and the resources it will need in the future. Only this litigation has the ability to provide Plaintiff with the relief it seeks.

381. Furthermore, the costs Plaintiff has incurred in responding to the public health crisis caused by youth vaping and in rendering public services described above are recoverable pursuant to the causes of actions raised by Plaintiff. Defendants' misconduct alleged herein is not a series of isolated incidents, but instead the result of a sophisticated and complex marketing scheme and related cover-up scheme that has caused a continuing, substantial, and long-term burden on the services provided by Plaintiff. In addition, the public nuisance created by Defendants and Plaintiff's requested relief in seeking abatement further compels Defendants to reimburse and compensate Plaintiff for the substantial resources it has expended and will need to continue to expend to address the youth vaping epidemic.

## V. CAUSES OF ACTION

### COUNT ONE — VIOLATIONS OF COLORADO PUBLIC NUISANCE LAW

382. Plaintiff City and County of Denver incorporates each preceding paragraph as though set forth fully herein.

383. Plaintiff brings this claim under Colorado Public Nuisance law as to all Defendants.

384. Under Colorado law, “[a] public nuisance is the doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public.” *State, Dep’t of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994).

385. Plaintiff and its residents have a right to be free from conduct that endangers their health and safety. Yet Defendants have engaged in conduct and omissions which unreasonably and injuriously interfered with the public health and safety in Plaintiff’s community and created substantial annoyance, inconvenience, and injury to the public by their production, promotion, distribution, and marketing of vapor products, including, but not limited to JUUL, for use by youth in the City and County of Denver. Defendants’ actions and omissions have substantially, unreasonably, and injuriously interfered with the functions and operations of the City and County of Denver and affected the public health, safety, and welfare of the Denver community.

386. Each Defendant has created or assisted in the creation of a condition that is injurious to the health and safety of Plaintiff and its residents and interferes with the comfortable enjoyment of life and property of the entire Denver community.

387. Defendants’ conduct has directly caused a severe disruption of the public health, order, and safety. Defendants’ conduct is ongoing and continues to produce permanent and long-lasting damage.

388. This harm to Plaintiff and the public is substantial, widespread, and ongoing. It outweighs any potential offsetting benefit of the Defendants’ wrongful conduct because Defendants’ conduct violates Colorado’s public policy against marketing vapor products to minors. This policy is expressed through Colorado then-Governor John Hickenlooper’s Executive Order B 2018 011, finding that “vaping products, and e-cigarettes are particularly harmful to children” and that “[e]ven as we have made progress discouraging cigarette use among youth, use of e-cigarettes and vaping devices among youth has increased, reaching epidemic proportions that are putting the health of our children at risk.”<sup>606</sup> This policy is also expressed through statutes and regulations, including but not limiting to:

1. CRS § 18-13-121(1), under which it is illegal to give, sell, distribute or offer for sale a nicotine product to any person under eighteen years of age;
2. CRS § 44-7-103(1), under which it is illegal to sell or permit the sale of nicotine products to minors;
3. CRS § 18-13-121(2), under which it is illegal for people under eighteen years of age to purchase nicotine products; and
4. CRS § 25-14-301, under which it is illegal for people under eighteen years of age to possess nicotine products.

389. Defendants’ conduct violated this public policy, including by:

1. Actively seeking to enter school campuses, targeting children as young as eight through summer camps and school programs, extensively targeting youth through social media campaigns, and recruiting “influencers” to market to teens;

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<sup>606</sup> John W. Hickenlooper, B 2018 011, Executive Order, State of Colo. (Nov. 2, 2018), <https://drive.google.com/file/d/1-EapnrOOLsvBxsYlkThi7-EZEyxGn3io/view>.



2. Engaging in marketing tactics specifically designed to mislead children and youth and to ensnare minors into nicotine addiction, including by explicitly adopting tactics prohibited from Big Tobacco, with the knowledge that those tactics were likely to ensnare children and youth into nicotine addiction, including using billboards and outdoor advertising, sponsoring events, giving free samples, paying affiliates and “influencers” to push vapor products, and by selling vapor products in flavors designed to appeal to youth;
3. Engaging in advertising modeled on cigarette ads and featuring youthful-appearing models and designing advertising in a patently youth-oriented fashion;
4. Directing advertising to youth media outlets and media designed to appeal to children and youth, such as Instagram and other social media channels;
5. Hosting youth-focused parties across the United States, at which free samples were dispensed and in which vaping was featured prominently across social media;
6. Formulating vapor products with flavors with the knowledge that such flavors appealed to youth and with the intent that youth become addicted or dependent upon vapor products; and
7. Promoting and assisting the growth of the vapor product market and its availability with knowledge that vapor products were being purchased and used by large numbers of youth.

390. The health and safety of the youth of the City and County of Denver, including those who use, have used, or will use vapor products, as well as those affected by others’ use of vapor products, are matters of substantial public interest and of legitimate concern to the Plaintiff, as well as to the entire City and County of Denver community.

391. Defendants’ conduct has affected and continues to affect a substantial number of people within the City and County of Denver and is likely to continue causing significant harm.

392. But for Defendants’ actions, vapor products, including, but not limited to JUUL, used by youth would not be as widespread as it is today, and the youth vaping public health crisis that currently exists as a result of Defendants’ conduct would have been averted.

393. Defendants knew or should have known that their conduct would create a public nuisance. Defendants knew or reasonably should have known that their statements regarding the risks and benefits of vaping were false and misleading, that their marketing methods were designed to appeal to minors, and that their false and misleading statements, marketing to minors, and active efforts to increase the accessibility of vapor products and grow JUUL's market share, or the market share of Defendants' products, were causing harm to you and to municipalities, schools, and counties, including youth in the City and County of Denver and to Plaintiff itself.

394. Thus, the public nuisance caused by Defendants was reasonably foreseeable, including the financial and economic losses incurred by Plaintiff.

395. Alternatively, Defendants' conduct was a substantial factor in bringing about the public nuisance even if a similar result would have occurred without it. By directly marketing to youth and continuing these marketing practices after it was evident that children were using JUUL products in large numbers and were specifically using these products in schools, JLI directly facilitated the spread of the youth vaping crisis and the public nuisance affecting the City and County of Denver.

396. By seeking to capitalize on JLI's success in addicting minors to nicotine and by directly marketing to youth and continuing these marketing practices after it was evident that children were using JUUL products and Eonsmoke products in large numbers and were specifically using these products in schools, Eonsmoke directly facilitated the spread of the youth vaping crisis and the public nuisance affecting the City and County of Denver.

397. Altria, by investing billions of dollars in JLI and actively working to promote the sale and spread of JUUL products with the knowledge of JLI's practice of marketing JUUL products to youth and its failure to control youth access to JUUL products, directly facilitated the spread of the youth vaping crisis and the public nuisance affecting the City and County of Denver.

398. Plaintiff has taken steps to address the harm caused by Defendants' conduct, including, but not limited to, those listed in Section IV.L above.

399. Fully abating the epidemic of youth vaping resulting from Defendants' conduct will require much more than these steps.

400. Plaintiff therefore requests all the relief to which it is entitled, including damages in an amount to be determined at trial and an order providing for the abatement of the public nuisance that Defendants have created or assisted in the creation of, and enjoining Defendants from future conduct contributing to the public nuisance described above.

**COUNT TWO — VIOLATIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (“RICO”), 18 U.S.C. § 1961 *ET SEQ.***

401. Plaintiff hereby incorporates by reference the allegations contained in the preceding paragraphs of this complaint.

402. This claim is brought by Plaintiff against Defendants JLI and the Altria Defendants (“Youth Marketing Cover-Up Enterprise Defendants”) for actual damages, treble damages, and equitable relief under 18 U.S.C. § 1964 for violations of 18 U.S.C. § 1961 *et seq.*

403. At all relevant times, each Youth Marketing Cover-Up Enterprise Defendant is and has been a “person” within the meaning of 18 U.S.C. § 1961(3), because they are capable of holding, and do hold, “a legal or beneficial interest in property.”

404. Plaintiff is a “person,” as that term is defined in 18 U.S.C. § 1961(3), and has standing to sue as it was and is injured in its business and/or property as a result of the Youth Marketing Cover-Up Enterprise Defendants’ wrongful conduct described herein.

405. Section 1962(c) makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . . .” 18 U.S.C. § 1962(c).

406. Section 1962(d) makes it unlawful for “any person to conspire to violate” Section 1962(c), among other provisions. *See* 18 U.S.C. § 1962(d).

407. Each Youth Marketing Cover-Up Enterprise Defendant conducted the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) and § 1962(d).

**A. Description of Defendants’ Youth Marketing Cover-Up Enterprise**

408. RICO defines an enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4).

409. Under 18 U.S.C. § 1961(4) a RICO “enterprise” may be an association-in-fact that, although it has no formal legal structure, has (i) a common purpose, (ii) relationships among those associated with the enterprise, and (iii) longevity sufficient to pursue the enterprise’s purpose. *See Boyle v. United States*, 556 U.S. 938, 946 (2009).

410. Defendants JLI and Altria formed an association-in-fact enterprise—referred to herein as the Youth Marketing Cover-Up Enterprise. This Enterprise exists separately from the otherwise legitimate business operations of JLI and Altria.

411. The Youth Marketing Cover-Up Enterprise is an ongoing and continuing business organization consisting of “persons” within the meaning of 18 U.S.C. § 1961(3) that created and maintained systematic links for a common purpose: fraudulently maintaining and expanding JLI’s massive, and ill-gotten, share of the e-cigarette market.

412. As set forth above, JLI obtained its massive market share over a short time period by successfully targeting youth and addicting youth to nicotine.

**B. The Enterprise Sought to Fraudulently Deny Having Marketed to Youth in Maintaining and Expanding JUUL’s Youth Market Share**

413. As described above, Altria—having long followed JUUL’s market-share dominance with envy—decided to go from JLI’s competitor to its co-conspirator. Altria and JLI thus formed the Youth Marketing Cover-Up Enterprise with the goal of preserving, and profiting from, JUUL’s ill-gotten market share.

414. The Youth Marketing Cover-Up Enterprise recognized that one of the keys to preserving JUUL’s market share was to continue to falsely deny that JLI marketed its tobacco products to youth. Both JLI and Altria knew that once JLI had established a base of young customers, the focus had to be on covering up JLI’s past youth marketing in order to keep JUUL products available in communities like Plaintiff’s. To further this effort, JLI and Altria have also made repeated statements through the mail and wires, in advertising and otherwise, that JLI does not market to youth and its marketing is only aimed at adult smokers, that none of the Youth Marketing Cover-Up Defendants want youth to vape, and vaping is for adults only. But this is

not now, and has not ever been, an effective tactic to prevent youth initiation, as Altria well knows. In upholding the United States’ lawsuit against Altria and other Big Tobacco defendants, for marketing and civil violations of RICO, the court recognized that “smoking has traditionally been viewed by adolescents and young adults as sophisticated adult behavior to be emulated.”<sup>607</sup> As mentioned above, “[e]mphasizing that smoking is an adult activity underscores the desirability of engaging in adult behavior for adolescents who are particularly motivated to appear mature.”<sup>608</sup>

415. JLI and the Altria Defendants worked in concert to defraud the public and regulators in order to quell a public outcry and prevent regulation that would have impeded their plan to maintain and expand sales of JUUL products to a customer base primarily consisting of youth. Specifically, they worked to ensure that certain flavors popular with youth such as mint remained on the market as long as possible, even while publicly declaring that they were removing flavors from the market to specifically address the youth vaping crisis and despite their knowledge that mint was a particularly attractive flavor to youth.

416. Thus, in furtherance of their Enterprise, JLI and Altria repeatedly made statements denying that youth were intended targets for JUUL products and asserting that JUUL products were really created and designed as a smoking cessation device, intended from the start for “switchers” (existing smokers who are open to vaping). These statements are false, and constitute mail and wire fraud, predicate acts under RICO.

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<sup>607</sup> *Philip Morris*, 449 F. Supp. 2d at 617.

<sup>608</sup> *Id.* at 669.

417. At all relevant times, each Youth Marketing Cover-Up Enterprise Defendant was aware of the conduct of the Youth Marketing Cover-Up Enterprise, was a knowing and willing participant in that conduct, and reaped profits from that conduct in the form of sales and distribution of JUUL products.

418. The persons engaged in the Youth Marketing Cover-Up Enterprise are systematically linked through contractual relationships, financial ties, and continuing coordination of activities.

419. There is regular communication between JLI and the Altria Defendants in which information regarding the Youth Marketing Cover-Up Enterprise Defendants' scheme to protect, maintain and expand JUUL's market share is shared. Typically, this communication occurred, and continues to occur, through the use of the mail and wires in which Defendants share information regarding the operation of the Youth Marketing Cover-Up Enterprise and its cover-up of JLI's efforts to target and addict youth.

420. The Youth Marketing Cover-Up Enterprise functions as a continuing unit for the purposes of executing and accomplishing its objectives, and when issues arise, each member of the Enterprise agrees to take action to support the Enterprise.

421. Each Youth Marketing Cover-Up Enterprise Defendant participated in the operation and management of the Youth Marketing Cover-Up Enterprise by directing its affairs as described herein.

422. While the Youth Marketing Cover-Up Enterprise Defendants participate in, and are members of, the Youth Marketing Cover-Up Enterprise, they have an existence separate from

the Enterprise, including distinct legal statuses, affairs, offices and roles, officers, directors, employees, and individual personhood.

423. Without the willing participation of each Youth Marketing Cover-Up Enterprise Defendant, the Youth Marketing Cover-Up Enterprise's common course of conduct would not be successful.

**C. Predicate Acts: Mail and Wire Fraud**

424. To carry out, or attempt to carry out, the objectives of the Youth Marketing Cover-Up Enterprise, the members of the Enterprise, each of whom is a person associated-in-fact with the Enterprise, did knowingly conduct or participate in, directly or indirectly, the affairs of the Enterprise through a pattern of racketeering activity within the meaning of 18 U.S.C. §§ 1961(1), 1961(5) and 1962(c), and employed the use of the mail and wire facilities, in violation of 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud).

425. Specifically, the members of the Youth Marketing Cover-Up Enterprise have committed, conspired to commit, and/or aided and abetted in the commission of, at least two predicate acts of racketeering activity (i.e., violations of 18 U.S.C. §§ 1341 and 1343), within the past ten years.

426. The multiple acts of racketeering activity which the members of the Youth Marketing Cover-Up Enterprise committed, or aided or abetted in the commission of, were related to each other, posed a threat of continued racketeering activity, and therefore constitute a "pattern of racketeering activity."

427. The racketeering activity was made possible by the Enterprise's regular use of the facilities, services, and employees of the Enterprise.



428. The members of the Youth Marketing Cover-Up Enterprise participated in the Enterprise by using mail, telephone, and the internet to transmit mailings and wires in interstate or foreign commerce.

429. The members of the Youth Marketing Cover-Up Enterprise used, directed the use of, and/or caused to be used, thousands of interstate mail and wire communications in service of the Enterprise's objectives through common misrepresentations, concealments, and material omissions.

430. In devising and executing the objectives of the Youth Marketing Cover-Up Enterprise, its members devised and knowingly carried out a material scheme and/or artifice to defraud the public by marketing JUUL products to youth, ensuring that youth could access JUUL products, and then denying that JUUL products were marketed to youth, and maintained that JUUL was really created and designed as a smoking cessation device.

431. For the purpose of furthering its desire to preserve and increase its market share, even at the expense of exposing and addicting youth to nicotine, the Youth Marketing Cover-Up Enterprise committed these racketeering acts, which number in the thousands, intentionally and knowingly with the specific intent to advance its objectives.

432. In order to protect JLI's ability to continue to sell JUUL products and market to youth, the Altria Defendants and JLI, through their operation of the Youth Marketing Cover-Up Enterprise, worked in concert to defraud the public and regulators in order to prevent the public and political condemnation that would have impeded the Youth Marketing Cover-Up Enterprise's common purpose: maintaining and expanding JLI's massive, and ill-gotten, share of the e-cigarette market.

433. In furtherance of their Enterprise, JLI and Altria repeatedly made statements to the public disclaiming any desire to build a youth market, and statements that JUUL was always intended for and marketed to adult smokers and/or as a smoking cessation device. In truth, JUUL was a potent nicotine delivery system designed to addict non-smokers, particularly youth, to nicotine, and in fact was specifically marketed to appeal to children. It was only in the face of widespread public outrage and increased scrutiny that Youth Marketing Cover-Up Enterprise dramatically re-shaped its marketing message and launched its “Make the Switch” campaign. In making these representations, JLI and Altria intended that consumers, the public, and regulators rely on misrepresentations that JUUL products were designed to assist smoking cessation, did not pose a threat to public health, and were never intended to be used or marketed to appeal to youth.

434. These statements by the Youth Marketing Cover-Up Enterprise Defendants are false, and constitute mail and wire fraud, predicate acts under RICO.

435. Each of the Youth Marketing Cover-Up Enterprise Defendants knew at the time of making these statements that they were untrue and misleading. JUUL is not FDA-approved as a cessation product.

436. Each of the foregoing statements and transmissions constitutes a predicate act of wire fraud. The Youth Marketing Cover-Up Enterprise Defendants made these transmissions and statements, knowing they would be transmitted via wire, with the intent to market to youth and to deceive the public, the FDA, and Congress as to JLI and its officers and directors’ true intentions of hooking underage users.

437. As set forth herein, JLI obtained its massive market share over a short time period by successfully targeting youth and addicting youth to nicotine. Altria's investment in and provision of "services" to JLI reflect an intention to further the Enterprise's common purpose of fraudulently maintaining and expanding JUUL's market share, including by maintaining and growing JLI's youth sales. JUUL's predominantly youth customer base ensures a steady supply of nicotine-addicted customers—creating a new generation of customers for Altria's products. The Enterprise has worked to maintain and expand JUUL's market share—which, based on Altria's own October 25, 2018 letter to the FDA, Altria believes was obtained by employing marketing and advertising practices that contributed to youth vaping. The Enterprise's efforts to cover up the role of youth in JUUL's sales are knowing, intentional, and fraudulent in violation of RICO.

438. The Youth Marketing Cover-Up Enterprise's predicate acts of racketeering (18 U.S.C. § 1961(1)) include, but are not limited to:

A. Mail Fraud: the Youth Marketing Cover-Up Enterprise violated 18 U.S.C. § 1341 by sending or receiving, or by causing to be sent and/or received, fraudulent materials via U.S. mail or commercial interstate carriers for the purpose of deceiving the public regarding its efforts to market to youth and the true purpose and design behind its products; and

B. Wire Fraud: the Youth Marketing Cover-Up Enterprise violated 18 U.S.C. § 1343 by transmitting and/or receiving, or by causing to be transmitted and/or received, fraudulent materials by wire for the purpose of deceiving the public regarding its efforts to market to youth and the true purpose and design behind its products.

439. The Youth Marketing Cover-Up Enterprise falsely and misleadingly used the mail and wires in violation of 18 U.S.C. § 1341 and § 1343. Illustrative and non-exhaustive examples include the following:

1. “Here at JUUL we are focused on driving innovation to eliminate cigarettes, with the corporate goal of improving the lives of the world’s one billion adult smokers.” (JLI’s Twitter Feed, July 5, 2017).<sup>609</sup>
2. “It’s a really, really important issue. We don’t want kids using our products.” (CNBC Interview of JLI’s Chief Administrative Officer, December 14, 2017).<sup>610</sup>
3. “We market our products responsibly, following strict guidelines to have material directly exclusively toward adult smokers and never to youth audiences.” (JLI Social Media Post, March 14, 2018).<sup>611</sup>
4. “JUUL Labs was founded by former smokers, James and Adam, with the goal of improving the lives of the world’s one billion adult smokers by **eliminating cigarettes**. We envision a world where fewer adults use cigarettes, and **where adults who smoke cigarettes have the tools to reduce or eliminate their consumption entirely**, should they so desire.” (JLI Website, April 2018 (or earlier)).<sup>612</sup>
5. “Our company’s mission is to eliminate cigarettes and help the more than one billion smokers worldwide switch to a better alternative,” said JUUL Labs Chief Executive Officer Kevin Burns. “We are already seeing success in our efforts to enable adult smokers to transition away from cigarettes and believe our products have the potential over the long-term to contribute meaningfully to public health in the U.S. and around the world. At the same time, we are committed to deterring young people, as well as adults who do not currently smoke, from using our products. We cannot be more emphatic on this point: No young person or non-nicotine user should ever try JUUL.” (JLI Press Release, April 25, 2018).<sup>613</sup>
6. “Our objective is to provide the 38 million American adult smokers with meaningful alternatives to cigarettes while also ensuring that individuals who are not already smokers, particularly young people, are not attracted to nicotine products such as JUUL,” said JUUL Labs Chief Administrative Officer Ashley Gould, who heads the company’s regulatory, scientific and youth education and prevention programs. “We want to be a leader in seeking solutions, and are

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<sup>609</sup> Jackler et al., *supra* note 46 at 25 (This was the first mention of the term “adult” or “adult smoker” on JLI’s Twitter Feed).

<sup>610</sup> Angelica LaVito, *Nearly one-quarter of teens are using pot*, CNBC (Dec. 14, 2017), <https://www.cnbc.com/2017/12/13/marijuana-and-nicotine-vaping-popular-among-teens-according-to-study.html> (Interview with Ashely Gould, JUUL Chief Administrative Officer).

<sup>611</sup> Jackler et al., *supra* note 46 at 2 (citing a JUUL social media post from March 14, 2018).

<sup>612</sup> *Our Mission*, JUUL Labs, Inc., <https://www.juul.com/mission-values> (last visited Mar. 28, 2020) (emphasis added).

<sup>613</sup> *JUUL Labs Announces Comprehensive Strategy*, *supra* note 400.

actively engaged with, and listening to, community leaders, educators and lawmakers on how best to effectively keep young people away from JUUL.” (JLI Press Release, April 25, 2018).<sup>614</sup>

7. “JUUL was not designed for youth, nor has any marketing or research effort since the product’s inception been targeted to youth.” (Letter to FDA, June 15, 2018).<sup>615</sup>
8. “With this response, the Company hopes FDA comes to appreciate why the product was developed and how JUUL has been marketed — to provide a viable alternative to cigarettes for adult smokers.” (Letter to FDA, June 15, 2018).<sup>616</sup>
9. “We welcome the opportunity to work with the Massachusetts Attorney General because, we too, are committed to preventing underage use of JUUL. We utilize stringent online tools to block attempts by those under the age of 21 from purchasing our products, including unique ID match and age verification technology. Furthermore, we have never marketed to anyone underage. Like many Silicon Valley technology startups, our growth is not the result of marketing but rather a superior product disrupting an archaic industry. When adult smokers find an effective alternative to cigarettes, they tell other adult smokers. That’s how we’ve gained 70% of the market share. . . Our ecommerce platform utilizes unique ID match and age verification technology to make sure minors are not able to access and purchase our products online.” (Statement from Matt David, JLI Chief Communications Officer, July 24, 2018).<sup>617</sup>
10. “We adhere to strict guidelines to ensure that our marketing and commercial communications are directed toward existing adult smokers.” (JLI Website, July 26, 2018).
11. “We did not create JUUL to undermine years of effective tobacco control, and we do not want to see a new generation of smokers.” (JLI’s website as of July 26, 2018).<sup>618</sup>

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<sup>614</sup> *Id.*

<sup>615</sup> Letter from JUUL’s Counsel at Sidley Austin to Matthew Holman, M.D., FDA at 2 (June 15, 2018).

<sup>616</sup> *Id.* at 3.

<sup>617</sup> *Statement Regarding The Press Conference Held By The Massachusetts Attorney General*, JUUL Labs, Inc. (July 24, 2018), <https://newsroom.juul.com/statement-regarding-the-press-conference-held-by-the-massachusetts-attorney-general/>.

<sup>618</sup> *Our Responsibility*, JUUL Labs, Inc. (July 26, 2018), <https://web.archive.org/web/20180726021743/https://www.juul.com/our-responsibility> (last visited Mar. 29, 2020).

12. “Although we do not believe we have a current issue with youth access to or use of our pod-based products, we do not want to risk contributing to the issue.” (Letter from Altria CEO to FDA Commissioner Gottlieb, October 25, 2018).<sup>619</sup>
13. “We believe e-vapor products present **an important opportunity to adult smokers to switch from combustible cigarettes.**” (Letter to FDA Commissioner Gottlieb, October 25, 2018).<sup>620</sup>
14. “We don’t want anyone who doesn’t smoke, or already use nicotine, to use JUUL products. We certainly don’t want youth using the product. It is bad for public health, and it is bad for our mission. JUUL Labs and FDA share a common goal – preventing youth from initiating on nicotine.” (JLI Website, November 12, 2018).<sup>621</sup>
15. “To paraphrase Commissioner Gottlieb, **we want to be the offramp for adult smokers** to switch from cigarettes, not an on-ramp for America’s youth to initiate on nicotine.” (JLI Website, November 13, 2018).<sup>622</sup>
16. “We won’t be successful in our mission to serve adult smokers if we don’t narrow the on-ramp. . . . Our intent was never to have youth use JUUL products.” (JLI Website, November 13, 2018).<sup>623</sup>
17. “***Altria and JUUL are committed to preventing kids from using any tobacco products.*** As recent studies have made clear, youth vaping is a serious problem, which both Altria and JUUL are committed to solve. As JUUL previously said, ‘Our intent was never to have youth use JUUL products.’” (Altria News Release, December 20, 2018).<sup>624</sup>
18. “Altria’s investment sends a very clear message that JUUL’s technology has given us a truly historic opportunity to improve the lives of the world’s one billion adult cigarette smokers,” said Kevin Burns, Chief Executive Officer of JUUL. “This investment and the service agreements will accelerate our mission to increase the number of adult smokers who switch from combustible cigarettes to JUUL devices.” (Altria News Release, December 20, 2018).<sup>625</sup>
19. “We have long said that **providing adult smokers with superior, satisfying products with the potential to reduce harm** is the best way to achieve tobacco

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<sup>619</sup> Willard, *Letter to Gottlieb*, *supra* note 426 at 2.

<sup>620</sup> *Id.* (emphasis added).

<sup>621</sup> *JUUL Labs Action Plan*, *supra* note 441 (statement of Ken Burns, former CEO of JUUL).

<sup>622</sup> *Id.*

<sup>623</sup> *Id.*

<sup>624</sup> Altria Minority Investment, *supra* note 451.

<sup>625</sup> *Id.*

harm reduction. **Through Juul**, we are making the biggest investment in our history toward that goal.” (Altria News Release, December 20, 2018).<sup>626</sup>

20. “We are taking significant action to prepare for a future where adult smokers overwhelmingly choose non-combustible products over cigarettes by investing \$12.8 billion in JUUL, **a world leader in switching adult smokers** . . . . We have long said that providing adult smokers with superior, satisfying products with the potential to reduce harm is the best way to achieve tobacco harm reduction.” (Altria News Release, December 20, 2018).<sup>627</sup>
21. “Almost my entire career, we have believed that our business would be better in the long term if we could offer harm reduced products that would represent attractive alternatives to our adult cigarette smokers to switch. And we have invested billions of dollars in it and lots of effort. And ultimately until December this year, we really didn’t have the product portfolio to fully achieve our harm reduction aspiration. And the opportunity to invest in JUUL, I think, really makes that harm reduction aspiration a reality.” (Altria Earnings Call, January 31, 2019).<sup>628</sup>
22. “Through JUUL, we have found a unique opportunity to not only participate meaningfully in the e-vapor category but to also **support and even accelerate transition to noncombustible alternative products by adult smokers**.” (Altria Earnings Call, January 31, 2019).<sup>629</sup>
23. “We expect the **JUUL product features that have driven JUUL's success in switching adult smokers in the U.S.** to strongly appeal to international adult cigarette smokers.” (Altria Earnings Call, January 31, 2019).<sup>630</sup>
24. “Throughout our analysis, it became clear that investing with JUUL to accelerate its global growth was more value accretive than investing internally to leap frog its product. We determined that our services and infrastructure could complement JUUL’s terrific product and capabilities, and help advance a compelling long-term commercial and harm-reduction opportunity.” (Remarks by Altria CEO, Feb. 20, 2019).<sup>631</sup>
25. “First of all, I’d tell them that I’m sorry that their child’s using the product. It’s not intended for them. I hope there was nothing that we did that made it appealing to them. As a parent of a 16-year-old, I’m sorry for them, and I have empathy for

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<sup>626</sup> *Id.* (emphasis added).

<sup>627</sup> *Id.* (emphasis added).

<sup>628</sup> *Altria Q4 2018 Earnings Call Transcript, supra* note 464.

<sup>629</sup> *Id.* (emphasis added).

<sup>630</sup> *Id.* (emphasis added).

<sup>631</sup> *Altria, supra* note 379.

them, in terms of what the challenges they're going through.” (CNBC Interview of JLI CEO, July 13, 2019).<sup>632</sup>

26. “We never wanted any non-nicotine user, and certainly nobody under the legal age of purchase, to ever use Juul products. . . .That is a serious problem. Our company has no higher priority than combatting underage use.” (Testimony of James Monsees, July 25, 2019).<sup>633</sup>
27. James Monsees, one of the company’s co-founders, said selling JUUL products to youth was “antithetical to the company’s mission.”(James Monsees’ Statement to *The New York Times*, August 27, 2019).<sup>634</sup>
28. “***Our focus is and will remain entirely on helping adult smokers switch*** away from combustible cigarettes, the leading cause of preventable death in the world.” (Statement by JLI spokesman to *The New York Times*, August 27, 2019).<sup>635</sup>
29. “We have no higher priority than to prevent youth usage of our products which is why we have taken aggressive, industry leading actions to combat youth usage.” (JLI Website, August 29, 2019).<sup>636</sup>
30. “JUUL Labs, which exists to **help adult smokers switch** off of combustible cigarettes. . .” (JLI Website, September 19, 2019).<sup>637</sup>

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<sup>632</sup> Angelica LaVito, *As Juul grapples with teen vaping ‘epidemic,’ CEO tells parent ‘I’m sorry’*, CNBC (July 13, 2019), <https://www.cnbc.com/2019/07/13/as-juul-deals-with-teen-vaping-epidemic-ceo-tells-parents-im-sorry.html>.

<sup>633</sup> *Examining JUUL’s Role in the Youth Nicotine Epidemic: Part II: Hearing Before the House Committee on Oversight and Reform Subcommittee on Economic and Consumer Policy* at 1 (July 25, 2019), <https://docs.house.gov/meetings/GO/GO05/20190725/109846/HHRG-116-GO05-Wstate-MonseesJ-20190725.pdf> (testimony of JUUL Founder James Monsees).

<sup>634</sup> Richtel & Kaplan, *supra* note 137.

<sup>635</sup> Sheila Kaplan, *Philip Morris and Altria Are in Talks to Merge*, N.Y. Times (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/health/philip-morris-altria-merger-tobacco.html> (statement made by Joshua Raffel, JUUL spokesperson).

<sup>636</sup> *Our Actions to Combat Underage Use*, JUUL Labs, Inc. (Aug. 29, 2019), <https://newsroom.juul.com/ouractions-to-combat-underage-use/> (JUUL statement in response to lawsuits).

<sup>637</sup> CONSUMER UPDATE: 9/19, JUUL Labs, Inc (Sept. 19, 2019), <https://newsroom.juul.com/consumer-update-9-19/> (emphasis added).



31. “We have never marketed to youth and we never will.”(JLI Statement to *Los Angeles Times*, September 24, 2019).<sup>638</sup>
32. “In late 2017 and into early 2018, we saw that the previously flat e-vapor category had begun to grow rapidly. JUUL was responsible for much of the category growth and **had quickly become a very compelling product among adult vapers**. We decided to pursue an economic interest in JUUL, believing that an investment would **significantly improve our ability to bring adult smokers a leading portfolio of non-combustible products** and strengthen our competitive position with regards to potentially reduced risk products.” (Letter from Altria CEO to Senator Durbin, October 14, 2019).<sup>639</sup>
33. “The growth of the e-vapor category since 2017 illustrates the willingness of adult smokers to try these products, and **JUUL in particular has been highly successful at moving adult smokers away from cigarettes**.” (Remarks by Altria CEO, Feb. 19, 2020).<sup>640</sup>
34. “**JUUL was designed with adult smokers in mind**. . . . By accommodating cigarette-like nicotine levels, JUUL provides **satisfaction to meet the standards of adult smokers** looking to switch from smoking cigarettes.” (JLI Website, last visited March 29, 2020).<sup>641</sup>

440. The mail and wire transmissions described herein were made in furtherance of the Youth Marketing Cover-Up Enterprise Defendants’ scheme and common course of conduct designed to fraudulently grow the market of nicotine-addicted youth and to cover up JLI and the its officers and directors’ marketing to youth, thereby increasing or maintaining JUUL’s market share, resulting in corresponding high profits for all Youth Marketing Cover-Up Enterprise Defendants.

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<sup>638</sup> Michael Hiltzik, *Column: Studies show how Juul exploited social media to get teens to start vaping*, L.A. Times (Sept. 24, 2019), <https://www.latimes.com/business/story/2019-09-24/hiltzik-juul-target-teens> (statement made on behalf of JUUL).

<sup>639</sup> Willard, *Letter to Senator Durbin*, *supra* note 23 at 3 (emphasis added).

<sup>640</sup> Altria Group, Inc., Current Report (Form 8-K), Ex. 99.1 at 5 (Feb. 19, 2020), <https://www.sec.gov/Archives/edgar/data/764180/000076418020000013/exhibit991-2020cagnyre.htm> (emphasis added).

<sup>641</sup> JUUL Labs, Inc., <https://www.juul.com/> (last visited Mar. 29, 2020) (emphasis added).

441. Some of the precise dates of the fraudulent uses of the mail and interstate wire facilities have been deliberately hidden and cannot be alleged without access to the Youth Marketing Cover-Up Enterprise Defendants' books and records. However, Plaintiff has described the types of predicate acts of mail and/or wire fraud, including the specific types of fraudulent statements upon which, through the mail and wires, the Youth Marketing Cover-Up Enterprise engaged in fraudulent activity in furtherance of its scheme.

442. The members of the Enterprise have not undertaken the practices described herein in isolation, but as part of a common scheme and conspiracy. In violation of 18 U.S.C. § 1962(d), the members of the Youth Marketing Cover-Up Enterprise conspired to violate 18 U.S.C. § 1962(c), as described herein. On information and belief, various other persons, firms, and corporations, including third-party entities and individuals not named as Defendants herein, have participated as co-conspirators with the Youth Marketing Cover-Up Enterprise Defendants and the members of the Youth Marketing Cover-Up Enterprise in these offenses and have performed acts in furtherance of the conspiracy to increase or maintain revenue, maintain or increase market share, and/or minimize losses for the Youth Marketing Cover-Up Enterprise Defendants and their named and unnamed co-conspirators throughout the illegal scheme and common course of conduct.

443. To achieve their common goals, the members of the Enterprise hid from Plaintiff and the public: (1) the fraudulent nature of the Youth Marketing Cover-Up Enterprise scheme; (2) the fraudulent nature of statements made by the Youth Marketing Cover-Up Enterprise Defendants regarding JLI's efforts to target youth and the nature of JLI's products; and (3) the true nature and objective of the relationship between the members of the Enterprise.

444. Each member of the Youth Marketing Cover-Up Enterprise, with knowledge and intent, agreed to the overall objectives of the schemes and participated in the common course of conduct. Indeed, for the conspiracy to succeed, each of the members of the Youth Marketing Cover-Up Enterprise had to agree to conceal their fraudulent scheme.

445. The members of the Youth Marketing Cover-Up Enterprise knew, and intended that, the public would rely on the material misrepresentations and omissions made by them.

446. As described herein, the members of the Youth Marketing Cover-Up Enterprise engaged in a pattern of related and continuous predicate acts for years. The predicate acts constituted a variety of unlawful activities, each conducted with the common purpose of maintaining JUUL's ill-gotten market share and thereby continuing to receive significant monies and revenues from the public, including youth, based on their misconduct.

447. The predicate acts also had the same or similar results, participants, victims, and methods of commission.

448. The predicate acts were related and not isolated events.

449. The public, including youth and parents in Plaintiff's community, relied on Defendants' fraudulent misrepresentations and omissions, as alleged above.

450. The Youth Marketing Cover-Up Enterprise Defendants' fraudulent concealment was material to Plaintiff and the public. The pattern of racketeering activity described above is currently ongoing and open-ended, and threatens to continue indefinitely unless this Court enjoins the racketeering activity.

**D. Plaintiff Has Been Damaged by the Youth Marketing Cover-Up Enterprise Defendants' RICO Violations**

451. Plaintiff has been injured by the Youth Marketing Cover-Up Enterprise Defendants' predicate acts. By fraudulently denying JLI's youth marketing and working to preserve and expand the market of underage JUUL customers, the Youth Marketing Cover-Up Enterprise caused the expansion of an illicit e-cigarette market for youth in Plaintiff's community and caused a large number of youth in Plaintiff's community to become addicted to nicotine. In addition, the Youth Marketing Cover-Up Enterprise Defendants intentionally sought to reach into schools and deceive public health officials in order to continue growing JLI's youth customer base. The repeated fraudulent misstatements by the Youth Marketing Cover-Up Enterprise Defendants denying that JLI marketed to youth have served to preserve JUUL's market share—a market share that is based upon children purchasing JLI's tobacco products.

452. Plaintiff was a direct victim of Defendants' misconduct. The Youth Marketing Cover-Up Enterprise Defendants displayed a wanton disregard for public health and safety by intentionally addicting youth, including youth in Plaintiff's community, to nicotine and then attempted to cover up their scheme in order to maintain and expand JUUL's market share. Defendants actively concealed that they marketed to youth in order to avoid public condemnation and keep their products on the market and continue youth sales. This forced Plaintiff to shoulder the responsibility for this youth vaping crisis created by Defendants' misconduct. The harm created by the illicit youth e-cigarette market created by Defendants required Plaintiff to expend its limited financial resources to mitigate the health crisis of youth vaping. The expansion of this youth e-cigarette market was the goal of the Youth Marketing

Cover-Up Enterprise and is critical to its success. Therefore, the harm suffered by Plaintiff because it must address and mitigate the youth vaping crisis was directly foreseeable and in fact an intentional result of Defendants' misconduct.

453. The creation and maintenance of this youth e-cigarette market directly harms Plaintiff by imposing costs on its business and property. Plaintiff's injuries were not solely the result of them having to spend money to act governmentally. Instead, as a result of Defendants' misconduct, Plaintiffs have been and will be forced to go far beyond what a governmental entity might ordinarily be expected to pay to enforce the laws to promote the general welfare in order to combat the youth vaping crisis. This includes providing new programs and new services as a direct result and in direct response to Defendants' misconduct. As a result of the conduct of the Youth Marketing Cover-Up Defendants, Plaintiff has incurred and will incur costs that far exceed the norm.

454. The Youth Marketing Cover-Up Enterprise Defendants' violations of 18 U.S.C. § 1962(c) and (d) have directly and proximately caused injuries and damages to Plaintiff, its community, and the public, and Plaintiff is entitled to bring this action for three times its actual damages, as well as for injunctive/equitable relief, costs, and reasonable attorneys' fees and costs pursuant to 18 U.S.C. § 1964(c).

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment as follows:

455. Entering an Order that the conduct alleged herein constitutes a public nuisance under Colorado law;

456. Entering an Order that Defendants are jointly and severally liable;

457. Entering an Order requiring Defendants to abate the public nuisance described herein and to deter and/or prevent the resumption of such nuisance;

458. Enjoining Defendants from engaging in further actions causing or contributing to the public nuisance as described herein;

459. Awarding equitable relief to fund prevention education and addiction treatment;

460. Awarding actual and compensatory damages;

461. Awarding statutory damages in the maximum amount permitted by law;

462. Awarding reasonable attorneys' fees and costs of suit;

463. Awarding pre-judgment and post-judgment interest; and

464. Such other and further relief as the Court deems just and proper under the circumstances.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

RESPECTFULLY SUBMITTED this 1st day of April, 2020.

**KELLER ROHRBACK L.L.P.**

By /s/ Dean Kawamoto

By /s/ Derek W. Loeser

By /s/ Gretchen Freeman Cappio

By /s/ Alison S. Gaffney

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