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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CASES

Case No.: 19-MD-02913-WHO

ALTRIA DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' UCL AND RICO CLAIMS AGAINST THE ALTRIA DEFENDANTS FROM THE SECOND AMENDED CLASS ACTION COMPLAINT AND THE AMENDED RICO CLAIMS OF SEVEN PUBLIC ENTITIES; MEMORANDUM OF POINTS AND AUTHORITIES

Judge: Hon. William H. Orrick
Date: March 26, 2021
Time: 9:00 a.m.
Ctrm: 2

PLEASE TAKE NOTICE that on March 26, 2021, at 9:00 a.m., or as soon thereafter as this matter may be heard, in Courtroom 2 of this Court, located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California, Defendants Altria Group, Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC (the "Altria Defendants") will and hereby do move the Court for an order dismissing the UCL and RICO claims alleged in the Second Amended Consolidated Class Action Complaint (ECF 1135) and the RICO claims alleged in Second Amended Complaints filed by seven government entities chosen as bellwethers for purposes of motions to dismiss[1], as set forth in the accompanying Memorandum, and pursuant to Federal Rules of Civil Procedure 9(b) and 12(b). In light of the Court's orders regarding phased motion practice, the Altria Defendants do not waive other Rule 12(b) defenses to these or any other complaints in this MDL by not asserting those defenses by this Motion. This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the Declaration of David E. Kouba and exhibits attached thereto, the Request for Consideration of Documents Incorporated by Reference and/or for Judicial Notice, any Reply Memorandum, the pleadings and files in this MDL, and such other matters as may be presented at or before the hearing.

Dated: January 4, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ John C. Massaro
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[1] *Tucson Unified School District v. JUUL Labs, Inc., et. al.*, 3:19-cv-07335 (ECF 25); *The School Board of Broward County, Florida v. JUUL Labs, Inc., et. al.*, 3:19-cv-08289 (ECF 20); *Central Bucks School District, Bucks County, Pennsylvania v. JUUL Labs, Inc., et. al.*, 3:19-cv-08023 (ECF 20); *The School Board of Escambia County, Florida, et. al. v. JUUL Labs, Inc. et. al.*, 3:20-cv-00459 (ECF 36); *The Livermore Valley Joint Unified School District v. JUUL Labs, Inc. et. al.*, 3:19-cv-08176 (ECF 21); *County of Santa Cruz, Individually and on Behalf of the People of California v. JUUL Labs, Inc. et. al.*, 3:20-cv-02261 (ECF 29); and *Three Village Central School District v. JUUL Labs, Inc., et. al.*, 3:19-cv-07028 (ECF 25).

CLIENT SERVICES LLC, ALTRIA GROUP DISTRIBUTION COMPANY, and ALTRIA ENTERPRISES LLC

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 4

I. PLAINTIFFS PROVIDE ADDITIONAL DETAILS BUT ALLEGE THE SAME BASIC CONDUCT BY THE ALTRIA DEFENDANTS 4

II. PLAINTIFFS' NEW ALLEGATIONS REGARDING THE CALIFORNIA PLAINTIFFS DO NOT INVOLVE THE ALTRIA DEFENDANTS 6

ARGUMENT 7

I. PLAINTIFFS AGAIN FAIL TO ALLEGE A RICO ENTERPRISE 7

II. PLAINTIFFS AGAIN FAIL TO ALLEGE THAT THE ALTRIA DEFENDANTS JOINED AND DIRECTED THE ALLEGED ENTERPRISE 10

A. JLI Is A Separate, Pre-Existing Corporation Directed By Other Parties 10

B. Plaintiffs' New Allegations Concerning The Altria Defendants Still Do Not Show They Joined The Alleged Enterprise Or Participated Its Direction 12

III. PLAINTIFFS STILL DO NOT ALLEGE UCL STANDING AGAINST THE ALTRIA DEFENDANTS 18

IV. PLAINTIFFS STILL DO NOT ALLEGE A BASIS FOR RESTITUTION FROM THE ALTRIA DEFENDANTS 22

V. THE ENTITITES ALSO FAIL TO ALLEGE RICO INJURY AND CAUSATION 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 16

Bible v. United Student Aid Funds, Inc.,
799 F.3d 633 (7th Cir. 2015) 9

C&M Café v. Kinetic Farm, Inc.,
2016 WL 6822071 (N.D. Cal. 2016) 14

Canyon County v. Syngenta Seeds, Inc.,
519 F. 3d 969 (9th Cir. 2008) 24

Cedric Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001) 9, 10

City & Cty. of San Francisco v. Purdue Pharma L.P.,
2020 WL 5816488 (N.D. Cal. 2020) 24, 25

City of Almaty v. Khrapunov,
956 F.3d 1129 (9th Cir. 2020) 24

In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.,
2012 WL 10731957 (C.D. Cal. 2012) 14

Crimson Galeria Ltd. P'ship v. Healthy Pharms, Inc.,
337 F. Supp. 3d 20 (D. Mass. 2018) 17

Dep't of Econ. Dev. v. Arthur Anderson & Co. (U.S.A.),
924 F. Supp. 449 (S.D.N.Y. 1996) 11, 18

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 23

Eclectic Props. E., LLC v. Marcus & Millichap Co.,
2010 WL 384736 (N.D. Cal. 2010) 24, 25

Eclectic Props. E., LLC v. Marcus & Millichap Co.,
2012 WL 713289, *aff'd*, 751 F.3d 990 (9th Cir. 2014) 15

Efron v. Embassy Suites (Puerto Rico),
223 F.3d 12 (1st Cir. 2000) 9

Ferrari v. Mercedes-Benz USA, LLC,
2016 WL 7188030 (N.D. Cal. 2016) 8, 9

Fitzgerald v. Chrysler Corp.,
116 F.3d 225 (7th Cir. 1997) 8

Gardner v. Starkist Co.,
418 F. Supp. 3d 443 (N.D. Cal. 2019) 9, 15

Goldfine v. Sichenzia,
118 F. Supp. 2d 392 (S.D.N.Y. 2000) 10

Goren v. New Vision Int'l, Inc.,
156 F.3d 721 (7th Cir. 1998) 16

Hemi Grp., LLC v. City of N.Y.,
559 U.S. 1 (2010) 25

J.C. v. Choice Hotels Int'l, Inc.,
2020 WL 6318707 (N.D. Cal. 2020) 24

Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.,
46 F.3d 258 (3d Cir. 1995) 11

Jennings v. Auto Meter Prods.,
495 F.3d 466 (7th Cir. 2007) 9

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 4

Miranda v. Ponce Fed. Bank,
948 F.2d 41 (1st Cir. 1991) 10

Potter v. Hughes,
546 F.3d 1051 (9th Cir. 2008) 10

Ray v. Spirit Airlines, Inc.,
836 F.3d 1340 (11th Cir. 2016) 9

Reves v. Ernst & Young,
507 U.S. 170 (1993) ..... *passim*

Schlafly v. United States,
4 F.2d 195 (8th Cir. 1925) 10

Schoon v. Smith,
953 A.2d 196 (Del. 2008) 10

Sever v. Alaska Pulp Corp.,
978 F.2d 1529 (9th Cir. 1992) 10

Troyk v. Farmers Group, Inc.,
171 Cal. App. 4th 1305 (2009) 23, 24

Zoumboulakis ex rel. VeriFone Sys., Inc. v. McGinn,
2014 WL 3926565 (N.D. Cal. 2014) 10

Wagh v. Metris Direct, Inc.,
348 F.3d 1102 (9th Cir. 2003), *overruled on other grounds*,
Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) 2, 10

Statutes

18 U.S.C. § 1962(c) 12

Del. Gen. Corp. L. § 141(a)..... 10

ISSUES TO BE DECIDED

1. Whether the Class Action Plaintiffs' and public entity Plaintiffs' claims against the Altria Defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO") should be dismissed for failure to state a claim upon which relief may be granted.

2. Whether the Class Action Plaintiffs' claims against the Altria Defendants under California's Unfair Competition Law ("UCL") should be dismissed for failure to state a claim upon which relief may be granted.

INTRODUCTION

In ruling on the Altria Defendants' initial motions to dismiss, the Court found four defects with respect to Plaintiffs' claims:

- Plaintiffs failed to allege the existence of a RICO enterprise, Order on Substantive Mots. to Dismiss at 45-46 (Oct. 23, 2020) (ECF 1084) ("Op.");
- Plaintiffs failed to allege that the Altria Defendants joined or directed any purported enterprise, as opposed to simply acting on their own (separate) behalf, *id.* at 56-57;
- The two Plaintiffs asserting UCL claims against the Altria Defendants, C.D. and L.B., failed to allege "that Altria's unfair conduct contributed to their use of JUUL," *id*. at 95-96; and
- The same two Plaintiffs also failed to allege that Altria "received money traceable to its general unfair conduct that impacted C.D. and L.B," *id*. at 97.

Remarkably, Plaintiffs have done nothing in their amended complaints to cure these defects. *First*, Plaintiffs' only "solution" to the RICO enterprise problem is a shell game in which Plaintiffs have moved JUUL Labs, Inc. ("JLI") from a RICO defendant to the alleged RICO enterprise itself. This Court has observed that JLI is "by all measures" one of the "central defendants" in this case. Order re: (1) Lexecon & Bellwether Selection & (2) Class Rep. Personal Injury Claims at 2 (Nov. 9, 2020) (ECF 1125). But under Plaintiffs' new RICO claim, JLI would be the only defendant to avoid liability under RICO, while everyone else – from passive investors, to JLI's officers and directors, to providers of limited services to JLI – would have to pay treble damages for conduct that is alleged to have been undertaken by JLI. Not only does this sleight of hand not address the Court's previous ruling, it flies in the face of basic RICO jurisprudence, since Plaintiffs still do not identify anything other than a group of defendants engaged in ordinary corporate activities.

The Court was clear when questioning Plaintiffs about "the enterprise and how it's conducting business and how it's doing something other than regular conduct" that RICO "doesn't fit with every case that's brought." 9/21/20 Tr. at 49 (Ex. 1).[2] The Court was correct. Intense

[2] "Ex. __" and Exhibit __" refer to the exhibits attached to the Declaration of David E. Kouba, filed herewith. The Altria Defendants request that the Court incorporate by reference or take judicial notice of these exhibits as set forth in their separately filed Request to Incorporate by Reference or Take Judicial Notice.

scrutiny of RICO claims at the pleadings stage is appropriate to prevent abuse of this potent statute where it does not belong. *See, e.g.*, *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1108 (9th Cir. 2003) (explaining courts should "strive to flush out frivolous RICO allegations at an early stage of the litigation" given the "consequent 'stigmatizing effect on those named as defendants'"), *overruled on other grounds, Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007). Gamesmanship of the sort Plaintiffs use here is precisely what should not occur when attempting to plead such claims.

Second, as before, Plaintiffs fail to allege that the Altria Defendants "joined" the alleged enterprise and "conducted" or "directed" the business of JLI after doing so. Plaintiffs' burden on these elements is even more challenging now that they allege that JLI, a separate and pre-existing corporate entity, is the purported RICO enterprise. It is a fundamental precept of corporate law that a corporation's board of directors controls that corporation in all meaningful respects and the activities of a corporation are conducted through the instrumentalities of its officers and employees, who report to the board of directors. The Altria Defendants are not now, and never have been, any of these things with respect to JLI. JLI was formed in 2007 without any involvement by the Altria Defendants, and at all times JLI has been controlled by — and its business has been conducted by — members of the JLI board of directors and officers and employees of JLI. None of the Altria Defendants have ever been voting shareholders, board members, officers, or employees of JLI. Plaintiffs make no allegations to the contrary. Nor is there any allegation of secret or *de facto* control of JLI's board of directors by the Altria Defendants. The Altria Defendants did not, and as a matter of law cannot, control or conduct the business of JLI.

Moreover, when amending their complaints, Plaintiffs simply ignore this Court's previous ruling that the Altria Defendants' alleged actions were consistent with the Altria Defendants simply acting *on their own behalf* and in the service of their *own businesses*, and were thus insufficient to constitute conducting the affairs of any RICO enterprise. As the Court observed:

> Plaintiffs respond that, taking the inferences in their favor, their pre-December 2018 allegations (the shelf space, Altria's possession of JLI sales data from 2017, and Altria's efforts to keep mint on the market to benefit JLI) establish non-routine coordination between Altria and JLI in the pre-December 2018 period. They also argue that the services contract… provided only a 'veneer of legitimacy' for Altria's

> coordinated fraudulent conduct with JLI. These are thin reeds on which to allege that Altria actively joined an existing RICO enterprise and then 'conducted or participated in the conduct of the enterprises affairs, not just their own affairs.' Plaintiffs need to do more.

Op. at 56 (citations omitted). Plaintiffs did not "do more," as the Court directed. Instead, they provide additional details, but continue to allege the same basic conduct by the Altria Defendants already found to be insufficient: that Altria and JLI intermittently met, communicated, and negotiated a potential Altria acquisition or investment between the Spring of 2017 and December 2018; Altria purchased a 35% non-voting interest in JLI in December 2018; two former Altria executives joined JLI in the Fall of 2019; and the Altria Defendants provided contracted-for services to JLI. These allegations are no more sufficient now than they were in October.

Third, with respect to the two Plaintiffs bringing UCL claims against the Altria Defendants, C.D. and L.B., Plaintiffs have done nothing to add "allegations and facts" showing that "Altria's unfair conduct contributed to their use of JUUL." *Id.* at 95. While the amended complaints add some detail to these two plaintiffs' allegations, none of that new information even mentions the Altria Defendants, much less provides a basis to establish standing and causation under the UCL. Indeed, likely recognizing this problem, Plaintiffs add a third California resident, Aiden Young, as a named plaintiff. But like the others, Mr. Young offers nothing to connect his alleged JUUL use to anything the Altria Defendants said or did. In fact, his allegations *refute* such an inference.

In directing Plaintiffs to amend their complaint to allege standing and causation, the Court observed that the deficient allegations "presumably can be easily rectified." *Id.* at 96. And, indeed, it should have been easy to do so if there was any merit to Plaintiffs' claims. Plaintiffs' failure to add these necessary allegations highlights a simple truth about this case: the Altria Defendants had no role in the misconduct Plaintiffs allege and their limited services did not cause any minors to use JUUL because all of those services were directed to adult cigarette smokers.

Finally, as before, these individuals fail to allege a basis for restitution from the Altria Defendants. There is no allegation showing that "Altria's conduct . . . contributed to [their] continued use of JUUL." *Id.* at 97. And, even if there were, Plaintiffs have not alleged that Altria "received money traceable" — directly or indirectly — to these three UCL plaintiffs. *Id.* at 98.

Plaintiffs have had ample opportunity to plead their RICO and UCL claims against the Altria Defendants. They have tried, yet again, in the most recent amended complaints and still fail. The Court should dismiss these claims, this time with prejudice.[3]

BACKGROUND

I. PLAINTIFFS PROVIDE ADDITIONAL DETAILS BUT ALLEGE THE SAME BASIC CONDUCT BY THE ALTRIA DEFENDANTS[4]

Plaintiffs no longer allege a separate "Nicotine Market Expansion Enterprise" and instead allege that JLI itself was the enterprise. *See, e.g.*, Second Am. Consolidated Class Action Compl. ¶ 864 ("SAC" or "Complaint").[5] Plaintiffs' allegations concerning the Altria Defendants resemble their prior allegations in most respects. Plaintiffs continue to allege that Altria engaged in on-again, off-again communications and negotiations with JLI from Spring of 2017 until December 2018, *see id.* ¶¶ 497-531, while at the same time competing with JLI through its own company, Nu Mark LLC, *id.* ¶¶ 43, 639. Plaintiffs again rely on Altria's October 25, 2018 letter to FDA, *id.* ¶¶ 644-46, even though that letter advanced Altria's interests *at the expense of JLI*, explaining that Altria "believe[ed] that pod-based products significantly contribute to the rise in youth use of e-vapor products" and "flavors" "further compounded" underage usage. October 25, 2018 Letter at 2 (Ex.

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[3] The Altria Defendants preserve the other arguments raised in their prior motions and those filed by other defendants. *See, e.g.*, Mot. Dismiss UCL and RICO Claims Against Altria (ECF 632) ("AD MTD CAC"); Altria Reply Supp. Mot. Dismiss UCL & RICO Claims Against Altria (ECF 810) ("AD Reply MTD CAC"); Altria Mot. Dismiss Altria Seven Gov't Entity Compls. (ECF 738); Reply Mem. Supp. Altria Mot. Dismiss Seven Gov't Entity Compls. (ECF 879) ("Gov't Entity Reply MTD"). In addition, the Altria Defendants preserve their objections, based on personal jurisdiction and *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), to the claims of out-of-state plaintiffs proceeding against the Altria Defendants in this Court. *See* Altria Mem. re: Pers. Injury Bellwether Selection, *Lexecon*, & Jurisdiction (ECF 1076).

[4] Plaintiffs again rely on group pleading, arguing that they were unable to "identify the specific Altria Defendant which undertook certain acts." *See* Second Am. Class Action Compl. ¶¶ 20-21. The Altria Defendants disagree and reserve their right to raise defenses and arguments specific to each Altria Defendant. The Court, however, need not reach this issue here. Even if the Altria Defendants were treated as a single entity, Plaintiffs still fail to state a claim under RICO and the UCL.

[5] The allegations concerning Defendants' conduct in the SAC are the same as the allegations in the government entity complaints. *Compare* SAC ¶¶ 32-663 *with, e.g.*, Am. Compl. ¶¶ 33-676, *Tucson Unified Sch. Dist* (Nov. 12, 2020). Accordingly, this brief cites the SAC unless otherwise indicated.

2). Plaintiffs continue to allege that the Altria Defendants provided JLI with distribution and retail services and disseminated JUUL advertising — at JLI's request under the Services Agreement entered at the time of the December 2018 transaction — while acknowledging this agreement was amended, and services ended, in early 2020. SAC ¶¶ 570-83. And they again allege that two former Altria executives, K.C. Crosthwaite and Joe Murillo, left Altria and later took positions at JLI in 2019, *id.* ¶ 552, Altria purchased shelf space in 2017 and 2018, *id.* ¶¶ 543-47, and Altria acquired a minority interest in Avail Vapor ("Avail"), which owned a chain of vapor stores, through which it obtained sales data about JLI, *id*. ¶¶ 500, 923.

Rather than allege new conduct by the Altria Defendants, Plaintiffs supplement their prior allegations with additional *details* about the same conduct the Court found insufficient. Plaintiffs provide more information about correspondence and meetings allegedly involving JLI and Altria and details about information allegedly possessed by Altria. *See, e.g., id.* ¶¶ 503-05, 511-23, 525-31. But these additional details show only that individuals from two separate companies met to discuss and negotiate a possible Altria purchase or investment that was not consummated until December 2018. *See, e.g., id.* ¶ 55 (alleging "confidential discussions"); *id.* ¶¶ 511-13, 521, 525 (alleging meetings between Altria and JLI to discuss possible relationship); *id.* ¶¶ 514, 516-17, 528-29 (alleging communications between Altria and JLI about possible relationship). And Plaintiffs' allegations elsewhere show the uncertain, contentious nature of the discussions. *See, e.g., id.* ¶ 422 (citing April 2018 emails about "how to resolve a standstill and restart the Altria deal negotiation").

Plaintiffs also provide more detail about the scope of the services allegedly provided by the Altria Defendants in 2019 and early 2020. *See id.* ¶¶ 574, 576-83. The documents underlying these allegations, however, show that the services provided by the Altria Defendants were identified and requested *by JLI*, paid for *by JLI*, and performed *under JLI's direction.* In particular, the December 20, 2018 Services Agreement between Altria and JLI provided that:

> During the applicable Term, [Altria] shall provide or caused to be provided, or shall cause one or more of its Subsidiaries to provide or cause to be provided, to [JLI] and its Subsidiaries, the Services [JLI] elects to purchase and receive pursuant to and in accordance with this Agreement. For the avoidance of doubt, [Altria] does not have an exclusive right to provide the Services to [JLI], and except as

> provided herein [JLI] is not obligated to purchase any particular types or quantities of the Services from [Altria] hereunder.

Services Agreement § 2.1 (Dec. 20, 2018) (Ex. 3). Each Statement of Work cited by Plaintiffs makes clear it was entered into "pursuant to the Services Agreement." *See, e.g.*, JLI10490204; JLI01339886; JLI01339878 (Ex. 4) (cited at SAC ¶ 574).

In addition, Plaintiffs supplement their allegations about Crosthwaite by describing communications between Crosthwaite and JLI executives. *See, e.g.*, SAC ¶¶ 503, 515, 525-28, 530. But they still do not allege facts that show Crosthwaite or Murillo were acting on Altria's behalf, instead of JLI's behalf, after they joined JLI. Nor do they allege any facts showing that these individuals were acting on JLI's behalf before they joined the company. Instead, when discussing the period before Crosthwaite joined the company, Plaintiffs claim only that Altria suggested that JLI's board of directors consider a "change in leadership" and "new direction." *Id*. ¶¶ 559, 562. Finally, Plaintiffs also now claim that Altria shared its October 25, 2018 letter with JLI, but admit that Altria did so only *after* sending that letter to FDA. *Id.* ¶ 529.

II. PLAINTIFFS' NEW ALLEGATIONS REGARDING THE CALIFORNIA PLAINTIFFS DO NOT INVOLVE THE ALTRIA DEFENDANTS

Plaintiffs attach an amended Appendix A to the SAC that adds 21 new class representatives and removes 28 other representatives. Collectively, these individuals continue to vary with respect to when they started using JUUL products, whether they began using JUUL products as adults, the reasons they began using JUUL products, and how they obtained those products, among other things. *See* Appendix A (ECF 1135-1). In addition, as before, only a tiny fraction of them — this time, a mere *3* out of *100 plaintiffs* — claims to have started using JUUL products after Altria's December 2018 investment. *See* App. A (Aceti, July 2019; Lawless, 2019; Young, April 2019).

Plaintiffs' new appendix also amends the allegations of the two California residents who previously asserted a UCL claim against the Altria Defendants, C.D. and L.B., but only in limited respects. *See* Exhibit 5 (redline showing changes to C.D. and L.B.'s allegations). As before, neither plaintiff says a single word about the Altria Defendants. *See id.* The new appendix also adds a third California resident asserting a UCL claim against the Altria Defendants, Aiden Young.

But like C.D. and L.B., he too does not claim to have seen, heard, or been affected by anything the Altria Defendants purportedly said or did. *See* App. A ¶¶ 1203-12.

ARGUMENT

I. PLAINTIFFS AGAIN FAIL TO ALLEGE A RICO ENTERPRISE

At the September 21, 2020 hearing, the Court probed Plaintiffs' counsel about their obligation to allege an enterprise: "So, I'm really interested in the enterprise and how it's conducting business and how it's doing something other than regular conduct." 9/21/20 Tr. at 49 (Ex. 1). Plaintiffs alluded to "pages and pages" and "scores and scores of allegations," but failed to explain how the Plaintiffs' purported "Nicotine Market Expansion Enterprise" was anything more than individual defendants advancing their own business interests. *Id.* at 61, 84. The Court recognized this glaring deficiency when dismissing these claims, explaining that Plaintiffs had not "plausibly alleged the existence of a distinct Enterprise, separate and apart from the general business of JLI." Op. at 45-46. As the Court explained, "where the individual constituents of an asserted enterprise are alleged only to have conducted the 'regular business' of the corporate entity or business in their own interests, those allegations are insufficient to support a RICO enterprise." *Id.* at 40.

Plaintiffs do not even attempt to cure the problems with their purported "Nicotine Market Expansion Enterprise." Instead, they drop this fictional "Nicotine Market Expansion Enterprise" altogether and now allege that JLI itself is the RICO enterprise rather than a RICO defendant. SAC ¶ 864. But this attempt to recast JLI as an innocent vehicle for RICO purposes creates a wholly contradictory result where peripheral defendants face greater liability than the central defendant in this litigation. Under Plaintiffs' amended theory, JLI is no longer a RICO defendant at all and would incur no RICO liability or treble damages for the schemes it is alleged to have created, implemented, and benefited from, while the other defendants would face the quasi-criminal penalties of RICO. Such a result is both unfair and nonsensical.

Indeed, Plaintiffs' allegations that the remaining RICO Defendants — but not JLI — perpetuated a number of fraudulent schemes contradict the other allegations and claims in their complaints. JLI remains the primary — and in some instances only — defendant in other claims based on the same conduct. For example, Plaintiffs allege that the "RICO Defendants," which no

longer include JLI, engaged in fraudulent schemes, including alleged "sales to youth and fraudulently misrepresenting or omitting the truth about JUUL products to adult consumers and the public at large" purportedly to "expand the e-cigarette market, particularly among youth." *Id.* ¶¶ 895-96. But elsewhere Plaintiffs claim that JLI itself "created and implemented" the scheme to "substantially increase sales of JUUL through a pervasive pattern of false and misleading statements and omissions" and "portray JUUL products as cool and safe alternatives to combustible cigarettes, with a particular emphasis on appealing to minors, while misrepresenting or omitting key facts concerning JUUL products' nicotine content and doses, addictiveness, and significant risks . . . ." *Id.* ¶ 828. Plaintiffs also claim that each RICO class member was induced by the RICO Defendants' conduct into "purchas[ing] JUUL products that they would not have purchased or, in the alternative, to pay more for JUUL products . . . ." *Id.* ¶ 969. But elsewhere, in a claim alleged only against JLI, they assert that it was JLI's conduct that "was likely to, and in fact did, deceive reasonable consumers" about JUUL and that "JLI's conduct actually and proximately" caused Plaintiffs to purchase "JUUL products they would not [have] otherwise" or pay more for them. *Id.* ¶¶ 812, 815; *see also id.* ¶¶ 823, 825. The inconsistencies in Plaintiffs' theories confirm that their efforts to salvage their RICO claims are nothing more than pleading gamesmanship.

Moreover, re-labeling JLI as the enterprise does not cure the deficiencies the Court directed Plaintiffs to address. Plaintiffs still do not identify anything other than a group of defendants engaged in ordinary corporate activities and do not explain "how [the enterprise is] doing something other than regular conduct." 9/21/20 Tr. at 49 (Ex. 1). To allege that a legal entity was also a RICO enterprise, plaintiffs typically allege an entity that more closely approximates the paradigmatic organized crime case that RICO was designed to prevent or one in which the defendants infiltrate or seize a legitimate firm and use it as a passive vehicle to magnify their unlawful ends. *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997). Allegations of routine corporate activity undertaken by officers and directors, by contrast, do not allege an enterprise. *See Ferrari v. Mercedes-Benz USA, LLC*, 2016 WL 7188030, at *3-4 (N.D. Cal. 2016) (dismissing RICO claims where complaint failed to allege conduct by defendants distinct from their roles as officers and employees of the companies alleged to be RICO enterprises); *Ray v. Spirit Airlines, Inc.*, 836 F.3d

1340, 1357 (11th Cir. 2016) ("[A] corporate defendant acting through its officers, agents, and employees is simply a corporation. Labeling it as an enterprise as well would only amount to referring to the corporate 'person' by a different name.") (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001)).[6]

Yet that is precisely what Plaintiffs offer here. Once again, the activities of the allegedly separate "JLI Enterprise" described in the complaints are *identical* to the business goals, schemes, and activities alleged against JLI as a defendant to Plaintiffs' state law claims. *Compare* SAC ¶ 865 *with* SAC ¶ 828. At most, Plaintiffs allege a "run-of-the-mill commercial relationship where each entity acts in its individual capacity to pursue its individual self-interest." *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 655-56 (7th Cir. 2015). As this Court has recognized, however, "characterizing routine commercial dealings as a RICO enterprise is not enough." *Gardner v. Starkist Co.*, 418 F. Supp. 3d 443, 461 (N.D. Cal. 2019); *see also* Op. at 40-41 (citing cases). Allowing Plaintiffs to turn a corporation's routine commercial dealings into a RICO enterprise made up of the corporation's officers and directors — and a passive, minority investor for a mere portion of the relevant time period — through artful pleading would be directly contrary to this well-established authority. *See Ferrari*, 2016 WL 7188030, at *3 ("Even a liberal reading of the RICO pleading requirements is stretched to the breaking point with such a theory.").

More is required. RICO "was never intended to allow plaintiffs to turn garden-variety state law fraud claims into federal RICO actions." *Jennings v. Auto Meter Prods.*, 495 F.3d 466, 472 (7th Cir. 2007). Accordingly, RICO mail or wire fraud claims "must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Efron v. Embassy Suites (Puerto Rico)*, 223 F.3d 12, 20 (1st Cir. 2000); *see also, e.g.*, *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 397 (S.D.N.Y. 2000) ("[C]ourts must always be on the lookout for the putative RICO case that is really nothing more than an

[6] While in *Cedric Kushner*, the Court held that the alleged RICO enterprise, a corporation, was distinct from the alleged RICO person, the holding in that case was focused on a corporate employee unlawfully conducting the affairs of a corporation of which he is the sole owner. 533 U.S. at 166. Nothing in that decision minimized the requirement that RICO liability "depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." *Id.* at 163 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)).

ordinary fraud case clothed in the Emperor's trendy garb."). Indeed, given that civil RICO "is an unusually potent weapon — the litigation equivalent of a thermonuclear device," *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991), the Court should "strive to flush out frivolous RICO allegations at an early stage of the litigation," *Wagh*, 348 F.3d at 1108. Plaintiffs' failure to plead a RICO enterprise alone warrants dismissal of their RICO claims against the Altria Defendants.

II. PLAINTIFFS AGAIN FAIL TO ALLEGE THAT THE ALTRIA DEFENDANTS JOINED AND DIRECTED THE ALLEGED ENTERPRISE

A. JLI Is A Separate, Pre-Existing Corporation Directed By Other Parties

When the alleged RICO enterprise was the "Nicotine Market Expansion Enterprise" — a concept Plaintiffs invented with no clear governance structure — it was one thing for Plaintiffs to claim the Altria Defendants were among those who controlled, directed, and conducted the business of the entity Plaintiffs had invented. Now that Plaintiffs claim that JLI *itself* is the enterprise, alleging control and direction by the Altria Defendants becomes even more of a stretch. JLI at all times — both before and after any relationship with the Altria Defendants — was a standalone corporation that had a clearly defined governance structure. *See* SAC ¶¶ 12-13. As a matter of law, JLI is and was "directed" by its board of directors;[7] the business of JLI is and was conducted by its officers and employees,[8] and JLI is and was controlled by its board of directors and voting shareholders.[9] The Altria Defendants do not hold – and have never held – any of these positions.

The Supreme Court acknowledged these principles in *Reves v. Ernst & Young*, 507 U.S. 170 (1993). The Court explained that a corporate enterprise is "operated" by upper management and by

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[7] *See, e.g., Schoon v. Smith*, 953 A.2d 196, 206 (Del. 2008) (recognizing "bedrock statutory principle" of Delaware law that the "business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors") (citing Del. Gen. Corp. L. § 141(a)); *Zoumboulakis ex rel. VeriFone Sys., Inc. v. McGinn*, 2014 WL 3926565, at *5 (N.D. Cal. 2014) ("directors of a corporation and not its shareholders manage the business and affairs of the corporation").

[8] *See, e.g., Cedric Kushner*, 533 U.S. at 165-66 (2001) (recognizing "the principle that a corporation acts only through its directors, officers, and agents"); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (describing "inability of a corporation to operate except through its officers").

[9] *See, e.g., Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008) ("[T]he general rule of American law is that the board of directors controls a corporation."); *Schlafly v. United States*, 4 F.2d 195, 200 (8th Cir. 1925) ("[T]he control of one corporation over another is ordinarily had by reason of control of the voting stock therein, and not through control of the non-voting stock.").

"lower rung participants in the enterprise who are under the direction of upper management." *Id.* at 184; *see also Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267 (3d Cir. 1995) ("Implicit in the Court's analysis [in *Reves*] was the recognition that 'inside' managers are the 'persons' §1962(c) was designed to reach."). When a corporation is the alleged enterprise, liability reaches corporate "outsiders" only in limited circumstances where the corporation's management structure has been subverted by, for example, bribery. *Reves*, 507 U.S. at 184. Because the outsider must be "responsible for or in control of management decision making" of the corporation, the circumstances in which RICO reaches corporate outsiders who subvert or infiltrate the corporation as a passive tool are "rare." *Jaguar Cars*, 46 F.3d at 267; *see also, e.g., Dep't of Econ. Dev. v. Arthur Anderson & Co. (U.S.A.)*, 924 F. Supp. 449, 467 (S.D.N.Y. 1996) ("The Court's choice of bribery as an example of an act that might qualify as 'operation or management' emphasizes how difficult it is to hold an outsider liable under § 1962(c) after *Reves*.").

Plaintiffs fail to allege that these "rare" circumstances exist with respect to the Altria Defendants. It is not enough for Plaintiffs to allege that the Altria Defendants were able to influence JLI, because "merely enjoy[ing] 'substantial persuasive power to induce management to take certain actions' . . . does not exercise control over the enterprise within the meaning of *Reves*." *Arthur Anderson*, 924 F. Supp. at 467 (citation omitted). It is also not enough to allege that the Altria Defendants provided services to JLI because "'[s]imply performing services for the enterprise,' or failing to stop illegal activity, is not sufficient." Op. at 33-34 (citation omitted).

If Plaintiffs want this Court to ignore JLI's presumed corporate structure and infer that the Altria Defendants conducted JLI as "outsiders," they need to plead specific facts demonstrating that somehow this structure was disregarded and replaced by another means of direction, control, and action. Plaintiffs utterly fail to do this. According to their own allegations, JUUL Labs, Inc. is a Delaware corporation incorporated years before the Altria Defendants' alleged involvement. SAC ¶ 12. The company's mission was not set by the Altria Defendants, and its products were invented, designed, manufactured, and sold by others. *See, e.g.*, *id*. ¶¶ 13, 102-28, 140-47. Plaintiffs do not allege that the Altria Defendants have ever been voting shareholders of JLI, board members of JLI, officers of JLI, or employees of JLI. Nor do they allege that the Altria Defendants usurped JLI's

decision-making authority, engaged in bribery, or took any other steps tantamount to gaining control over JLI. JLI is its own corporation with its own controllers and the Altria Defendants indisputably were not among them. Plaintiffs have not plausibly alleged any facts suggesting otherwise.[10]

B. Plaintiffs' New Allegations Concerning The Altria Defendants Still Do Not Show They Joined The Alleged Enterprise Or Participated Its Direction

"In order to 'participate, directly or indirectly, in the conduct of [an] enterprise's affairs,' one must have some part in directing those affairs." *Reves*, 507 U.S. at 179 (1993) (quoting 18 U.S.C. § 1962(c)). The Court explained in its dismissal order that "[t]his requirement does not limit RICO liability 'to those with primary responsibility for the enterprise's affairs,' nor does it require a participant to exercise 'significant control over or within an enterprise.'" Op. at 33 (citations omitted). At the same time, the Court made clear that "'some part in directing the enterprise's affairs is required,' . . . and '[s]imply performing services for the enterprise,' or failing to stop illegal activity, is not sufficient." *Id.* at 33-34 (citations omitted). Plaintiffs' amended allegations still fail to plead these requirements against the Altria Defendants.

Indeed, most of their allegations were raised in their prior complaints. *See supra* at 4-6. The Court already found that those allegations did not state a RICO claim against the Altria Defendants:

> Plaintiffs respond that, taking the inferences in their favor, their pre-December 2018 allegations (the shelf space, Altria's possession of JLI sales data from 2017, and Altria's efforts to keep mint on the market to benefit JLI) establish non-routine coordination between Altria and JLI in the pre-December 2018 period. They also argue that the services contract, under which Altria was reimbursed for the services its employees provided to JLI, provided only a "veneer of legitimacy" for Altria's coordinated fraudulent conduct with JLI. Oppo. JLI/Altria RICO at 27. These are thin reeds on which to allege that Altria actively joined an existing RICO Enterprise and then "conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs."

Op. at 56. Plaintiffs' allegations are no more sufficient now than they were in October.

1. Allegations that Altria communicated and negotiated with JLI before December 2018 do not show that it joined or participated in directing JLI. Plaintiffs previously alleged

[10] Altria's minority investment in JLI in December 2018 also did not give Altria the ability to influence the board's decisions. This minority interest consisted of *non-voting* shares. *See supra* 2.

that Altria and JLI engaged in "confidential discussions" and "coordination" between Spring 2017 and December 2018. *Id.* at 55-56. Plaintiffs make the same claims now but offer additional details about Altria and JLI's communications during this time. SAC ¶¶ 54-57, 503-31. These new details do not support Plaintiffs' RICO claims; they confirm that Altria and JLI were separate corporations engaged in arms-length negotiations about a possible acquisition or investment by Altria.

Indeed, rather than allege direction or control by Altria, Plaintiffs spend an entire section alleging that "Pritzker and Valani [two members of JLI's Board] *directed and controlled* JLI's negotiations with Altria." SAC § IV.E.9 (emphasis added); *see also id.* ¶ 422 (alleging that Pritzker and Valani were "the real power brokers for JLI" during these discussions). This allegation alone is sufficient to defeat Plaintiffs' new RICO theory.

The documents cited to support these new allegations further refute any claim that Altria directed JLI during negotiations. Paragraph 516 describes an April 13, 2018 email from Altria's former CEO, Howard Willard, to several JLI officers, *id.* ¶ 516, but this email simply suggests a call to discuss "proposals" on issues being discussed and therefore, at most, shows ongoing arms-length negotiations. JLIFTC00639178 (Ex. 6). Paragraph 517 cites a May 3, 2018 letter from Willard to several JLI officers, but this letter communicates possible terms by one party to negotiations to the other, *see* ALGAT0004031645 (Ex. 7), and does not seek to "influence Pritzker and Valani and indirectly control JLI," as Plaintiffs allege. SAC ¶ 517. Nor can Plaintiffs state a claim by cherry-picking the word "back-channel" from one of the millions of produced documents, an internal presentation by ALCS, and claiming it shows control by the Altria Defendants over JLI. SAC ¶ 518 (citing ALGAT0002817356). The document in question, and the discussions taking place around this time, show only that conversations took place between the officers and directors of JLI and those of Altria regarding a possible Altria investment or acquisition.[11] *See* ALGAT0002817356

[11] Plaintiffs claim that the fact that Altria communicated with Pritzker and Valani shows Altria sought control over JLI. *See* SAC ¶¶ 503-31. But Altria's meetings with Pritzker and Valani are consistent with the ongoing discussions about a possible relationship. Pritzker and Valani controlled majority voting power at JLI at the time, *id.* ¶ 507, and thus were critical to those discussions. And contrary to any suggestion that such communications sought an improper purpose, these meetings included other JLI decision-makers who are not alleged to be members of the alleged

(Ex. 8). The same is true for the other documents Plaintiffs cite, which show only that Altria was acting in its own interest when negotiating with JLI. *See, e.g.*, SAC ¶¶ 505-07, 521 (citing internal Altria presentations on possible negotiations).

In short, discussions and negotiations between two separate corporations, Altria and JLI, which in fact were competitors at the time, do not allege that Altria joined the purported "JLI enterprise" or directed the affairs of JLI during this time. *See, e.g.*, *C&M Café v. Kinetic Farm, Inc.*, 2016 WL 6822071, at *5 (N.D. Cal. 2016) (Orrick, J.) ("Participation in the conduct" of an enterprise requires more than being "affiliated with a RICO enterprise"); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 2012 WL 10731957, at *8 (C.D. Cal. 2012) ("Parties that enter commercial relationships 'for their own gain or benefit' do not constitute an 'enterprise.'").

2. Even with additional details, allegations concerning retail and distribution services and advertisements sent to adult smokers do not allege the Altria Defendants joined or participated in directing the alleged JLI enterprise. Plaintiffs provide additional details about the retail and distribution services allegedly provided by the Altria Defendants to JLI and the JUUL advertisements allegedly sent by the Altria Defendants to adult smokers. *See* SAC ¶¶ 205, 570-75, 582-84. These allegations still do not state a RICO claim. Even with the additional details, they show only that the Altria Defendants provided *services for payment* at *JLI's direction*.

Indeed, the Services Agreement under which JLI purchased these services made clear that *JLI* alone controlled what services it would purchase and when. *See supra* at 5-6. So too do the contracts for specific services cited by Plaintiffs, which expressly incorporated the Services Agreement. *See supra* at 6. Plaintiffs cite language in these agreements requiring that JLI "cooperate fully with the Altria Company in its performance of the Services, including without limitation, by timely providing all information, materials, resources, decisions, and access to personnel and facilities necessary for the proper performance of the Services by the Altria Company." SAC ¶ 572. This does not show direction of JLI by the Altria Defendants. The quoted language was included to ensure that the Altria Defendants had access to the limited information

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enterprise. *See, e.g., id.* ¶ 516 (describing Altria correspondence with Pritzker, Valani, and Kevin Burns, then-CEO of JLI and not a RICO defendant).

and materials needed to perform the services that JLI hired them to provide — access that the Altria Defendants, as separate companies, otherwise would not have had.[12] Moreover, allegations elsewhere show that the Altria Defendants did not control what services JLI purchased. *See, e.g.*, *id.* ¶ 281 (alleging that "Altria offered to [JLI] services relating to underage prevention efforts" but, as of October 2019, "JUUL [had] not accepted Altria's offer[]").[13]

The Court's prior order made clear that "[s]imply performing services for the enterprise . . . is not sufficient" to allege participation in the direction of the enterprise. Op. at 33 (citation omitted); *see also, e.g.*, *Gardner*, 418 F. Supp. 3d at 443 ("characterizing routine commercial dealing as a RICO enterprise is not enough"); *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 2012 WL 713289, at *7 (alleged marketing and misrepresentations "insufficient to show direction of the enterprise"), *aff'd*, 751 F.3d 990 (9th Cir. 2014). Despite the additional details in the amended complaints, the services alleged by Plaintiffs are still only that – services – and do not even suggest that the Altria Defendants were directing the business activities of JLI.

3. Allegations that Altria possessed data on retail sales of JUUL products do not show that it joined or participated in directing the alleged JLI enterprise. Plaintiffs also add detail to their allegations that Altria had information about sales of JUUL products by third-party retailers before December 2018, including from Avail. But even if that data related to sales to youth (and Plaintiffs have cited no evidence that it did), the Court already made clear that "failing to stop illegal activity[] is not sufficient" to state a RICO claim. Op. at 33 (citations omitted). Accordingly, allegations that Altria possessed information about JLI or JUUL products do not suffice. *See, e.g.*, *Walter*, 538 F.3d at 1248 ("It is not enough that [the attorney] failed to stop illegal activity, for *Reves* requires 'some degree of direction.'"); *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 728 (7th Cir.

[12] Plaintiffs claim that "a March 18, 2019 AGDC presentation of its work to sell JUUL showed that it was pushing Mint more than Menthol and Virginia Tobacco combined." SAC ¶ 577 (citing ALGAT0000772561). But the document they cite contains an image of a JUUL Labs order form for 7-11, and there is no allegation that the Altria Defendants designed this order form, or took any other action to "push" mint products. ALGAT0000772561 (Ex. 9).

[13] Plaintiffs' claim that the Altria Defendants believed they should be viewed as "strategic partners" with JLI is belied by the document they cite. SAC ¶ 587. That document — a 2019 internal AGDC presentation — shows the current relationship was *not* a partnership; any purported "strategic partner[ship]" was a "goal" included in a "long-term proposal." ALGAT0000772561 (Ex. 9).

1998) ("Simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough."). Nor does it provide any basis to infer "collusion" between Altria and JLI. As Altria's Nu Mark subsidiary was competing in the e-vapor market at the time, it should be no surprise that Altria possessed data relating to retail sales of competitive products such as JUUL. Indeed, such sales data was publicly available, as demonstrated by the fact some of these plaintiffs and counsel cited similar data when they began filing lawsuits against JLI eight months *before* Altria's December 2018 investment. Class Action Compl., *Colgate v. JUUL Labs, Inc.*, No. 3:18-cv-2499 (N.D. Cal. Apr. 26, 2018). As the Court previously explained, "the presence of limited data in Altria's possession regarding JLI's sales data in 2017 is a thin reed to rest a claim that Altria and JLI were part of an association in fact prior to Altria's formal investment." Op. at 45. [14]

4. Altria's October 2018 Letter to the FDA. Plaintiffs also have added more detail to their complaints relating to Altria's 2018 letter to then-Commissioner Scott Gottlieb. The Court is already familiar with the parties' differing views of the significance of this letter. Plaintiffs allege that the letter demonstrates a collusive effort by JLI and Altria to defraud the FDA into allowing mint products to be sold. As Altria has pointed out, the plain text of the letter indicted JLI's entire line of e-vapor products as allegedly contributing to the youth usage epidemic and proposed solutions for the FDA to address the youth issue. But what's important here is that the new details

[14] Plaintiffs also misrepresent the information possessed by Altria. Plaintiffs speculate that Altria identified JLI as a "good partner because it shared a similar vision of preserving flavors." SAC ¶ 539. But the document they cite does not describe efforts to "preserve flavors," it simply states that, at that time, JLI offered "mint, berry, tobacco and cream varieties." ALGAT0002412177 (Ex. 10). And contrary to claims that underage vapor use motivated Altria's interest in JLI, the document notes that JUUL products appealed to consumers 21 years of age and older. *Id*. Plaintiffs also claim that "it was clear to Altria and [ALCS] that they were operating within a closing window in which JLI's sales to youth could continue unabated." SAC ¶ 506. But the cited document did not even mention underage vapor use; it simply recognized that FDA had not granted pre-market approval to any "closed-pod products." *Id*.; *see also* ALGAT0002412181 (Ex. 11). Plaintiffs also incorrectly claim that Altria possessed research by JLI that allegedly found that "mint pods were as popular with teens as Mango pods" when it sent the October 25, 2018 letter. SAC ¶ 540. But Plaintiffs elsewhere allege that the study was "made available" to Altria as part of due diligence, *id.* ¶ 540, and Altria did not provided its initial diligence list until October 30, 2018 — five days *after* the letter was sent. *Id.* ¶ 530. Moreover, any claim that JLI provided research to a direct competitor is implausible, unsupported, and insufficient for this reason also. *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545-47, 555 (2007).

Plaintiffs have included in their complaints completely undermine their claim that Altria colluded with JLI and was directing the alleged JLI enterprise when Altria sent its letter to the FDA. Plaintiffs admit that Altria only shared its letter with JLI *after* it sent the letter to FDA, SAC ¶ 529, and there is no allegation to show Altria attempted to influence JLI's own submission to FDA in any way. *Id.* Plaintiffs offer no explanation as to how Altria sending a letter from the CEO of Altria (not JLI) on the letterhead of Altria (not JLI) committing to discontinue products sold by a subsidiary of Altria (not JLI) somehow directed the affairs of JLI and not the ordinary business of Altria.

5. Despite additional details, the allegations concerning Crosthwaite and Murillo still do not show the Altria Defendants joined or directed the purported JLI enterprise. Plaintiffs return to allegations that two former Altria executives, Crosthwaite, and Murillo, took positions at JLI after leaving Altria. Although Plaintiffs include additional paragraphs discussing these individuals, they still do not allege that Altria joined and directed the JLI Enterprise by virtue of these two individuals leaving Altria and taking new jobs at JLI. To do so, Plaintiffs would need to allege facts showing that these two JLI employees were doing Altria's bidding after they joined JLI. But no such facts are alleged in the complaints.

What Plaintiffs do allege is essentially the same as before and plainly insufficient, as the Court has already found. Plaintiffs allege, for example, that while Crosthwaite was still employed by Altria, he served as a "non-voting observer" on the JLI Board of Directors (a role created by Altria's investment), SAC ¶ 555, but the title alone — *non-voting observer* — shows this position did not give Crosthwaite the ability to direct the affairs of JLI. *See Crimson Galeria Ltd. P'ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 44 (D. Mass. 2018) ("The mere fact that officers of Healthy Pharms also occupy a role in Red Line and Tomolly does not sufficiently show that these entities joined the [RICO] conspiracy and furthered its criminal endeavors"). Plaintiffs also allege that Crosthwaite "agreed to have dinner" with Valani and Pritzker and attended meetings with JLI, and that JLI Board members "continued to communicate with Crosthwaite" during the Spring of 2019. SAC ¶¶ 556-59. Given Crosthwaite's status as a non-voting observer, it is not surprising that he might "continue to be involved in meetings between Altria and the Management Defendants." *Id.* ¶ 557. But attending meetings does not allege direction or control.

In fact, other allegations concerning this time period show that Altria did not participate in directing JLI. Plaintiffs allege that, in April 2019, Crosthwaite "expressed concerns about JLI's leadership's ability to guide JLI," and in June 2019, Howard Willard allegedly "reiterated that he believed JLI would benefit from a new direction." SAC ¶¶ 558, 562. These allegations reflect opinions by third parties about a separate corporation's leadership — they do not show that Altria exercised control or direction over JLI, a separate corporation with its own board and officers. *See supra* at 6. At most, they show an attempt to influence those who actually exercised control over JLI to lead JLI into a new direction different from the alleged business activities that form the basis for Plaintiffs' claims — but, as noted above, "merely enjoy[ing] 'substantial persuasive power to induce management to take certain actions' . . . does not exercise control over the enterprise within the meaning of *Reves*." *Arthur Anderson*, 924 F. Supp. at 467 (citation omitted).

6. Allegations that Altria purchased and provided shelf-space to JLI do not show the Altria Defendants joined or directed JLI. As before, Plaintiffs allege that Altria purchased shelf-space in 2017 and 2018 for the purpose of ultimately displaying JUUL products (as opposed to the MarkTen products of Altria's subsidiary). SAC ¶¶ 543-47. The Court, however, has already taken these allegations "as true for purposes of motion to dismiss" and assumed that "Altria worked to support [the general business of JLI] in advance of the culmination of its investment in December 2018," Op. at 45, but found these allegations insufficient to sustain Plaintiffs' RICO claim. Now that Plaintiffs claim that JLI itself is the alleged enterprise, this shelf-space allegation is even more insufficient because, if true, it would suggest that JLI was directing Altria, not the other way around.

In sum, the Court was clear that Plaintiffs needed "to allege more" than "thin reeds" to meet their burden of pleading "that Altria actively joined an existing RICO Enterprise and then 'conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs.'" Op. at 56 (citation omitted). The amended complaints do not cure these deficiencies.

III. PLAINTIFFS STILL DO NOT ALLEGE UCL STANDING AGAINST THE ALTRIA DEFENDANTS

The Court previously granted the two California Plaintiffs asserting UCL claim against the Altria Defendants leave to amend their claims to add "allegations and facts" showing that "Altria's

unfair conduct contributed to [their] use of JUUL." Op. at 95. While the Court believed the lack of such allegations "presumably [could] be easily rectified on amendment," *id*. at 96, Plaintiffs still fail to make such allegations. These claims should therefore be dismissed — this time with prejudice.

The two Plaintiffs at issue in the Altria Defendants' prior motion to dismiss were C.D. and L.B. Both allegedly began using JUUL products in 2016 — before the Altria Defendants are alleged to have engaged in any conduct with JLI — and already had joined a lawsuit against JLI before the Altria Defendants provided services to JLI. App. A ¶¶ 768, 257. As a result, in the briefing on the Altria Defendants' prior motion, Plaintiffs were forced to admit that the Altria Defendants could not have caused C.D. or L.B. to start using JUUL products. In an attempt to salvage their claims, Plaintiffs contended — for the first time in their opposition to the Altria Defendants' motion — that the Altria Defendants somehow caused C.D. and L.B. to *continue* using JUUL products. The Court recognized that neither C.D. nor L.B. had actually alleged this theory of standing and causation in their complaint and directed them to amend their complaints to include "allegations and facts" that "Altria's unfair conduct contributed to C.D. and L.B.'s use of JUUL." Op. at 95.

Despite having ample opportunity, C.D. and L.B. have failed to do so. To be sure, Plaintiffs did add more allegations relating to these two plaintiffs. But none of the new "facts" or "allegations" addresses the missing elements of standing and causation:

- C.D. now alleges that he saw advertisements for "sweet and fruity JUUL pods," but there is no allegation that the Altria Defendants had anything to do with these ads. App. A ¶ 155.
- C.D. now alleges that he "became a regular user of Cool Cucumber JUUL pods" after seeing an Instagram post that presented "JUUL's Cool Cucumber pods as an experience similar to a day on a secluded tropical beach," *id.* ¶¶ 255, 260, but there is no allegation that the Altria Defendants had anything to do with whatever Instagram post he claims to have seen.
- C.D. now claims that he "purchased from Al Sahara Smoke Shop," *id*. ¶ 257, but there is no allegation that the Altria Defendants had any relationship with the Al Sahara Smoke Shop or provided any services to that establishment, and it is not included on the Complaint's list of retailers to whom Altria provided services. SAC ¶ 574(c).

- L.B. now claims that she was "drawn to the sweet and fruity JUUL pod flavors depicted in JUUL's [point-of-sale] displays," which "conveyed to L.B. that JUUL was a tasty indulgence that, much like candy, was appropriate for teen use and presented no threat to her health or wellbeing." App. A. ¶ 771. But there is no allegation that the Altria Defendants had any role in the displays she saw or in JUUL's point-of-sale displays generally.
- L.B. now claims that she saw an advertisement from JLI's "Vaporized" campaign, *id.* ¶ 774, but there are no allegations that the Altria Defendants were involved in that advertising campaign, which took place long before Altria's investment in JLI. *See* SAC ¶ 382.
- L.B. now claims to have received emails directly from JLI, App. A. ¶ 779, but there are no allegations that the Altria Defendants played any role in JLI's emails to consumers.
- And L.B. now claims that she "purchased JUUL products from Shell and Arco gas stations, and a local 7-11," *id.* ¶ 777, but there is no allegation the Altria Defendants provided services to those locations, much less that L.B. purchased JUUL because of those services.

Likely recognizing that C.D. and L.B. cannot state a claim against the Altria Defendants, Plaintiffs attempt a *fifth* bite at the apple by adding a new plaintiff, Aiden Young. *See* App. A ¶¶ 1203-12.[15] But his claims are just as deficient as the others'.

The main difference between Mr. Young and C.D. and L.B. is that Mr. Young alleges that he began using JUUL products in April 2019 — after Altria's minority investment in JLI. App. A ¶ 1204. But this allegation alone does not meet the Court's instruction to Plaintiffs to raise "allegations and facts" showing that "Altria's unfair conduct contributed to [his] use of JUUL . . . ." Op. at 95. And the rest of Mr. Young's allegations refute such a showing, making clear that — like C.D. and L.B. — he is the wrong plaintiff, who allegedly purchased JUUL products in the wrong place, for the wrong reasons, and lacks standing under the UCL against the Altria Defendants.

Mr. Young, for example, does not allege that he saw advertisements for JUUL products that came from the Altria Defendants. App. A ¶¶ 1203-12. Indeed, such allegations would be

[15] Plaintiffs initially brought UCL claims against the Altria Defendants on behalf of two other individuals, M.D. and Bradley Colgate, but dismissed or abandoned those claims in response to the prior motion to dismiss. Pls. Opp. Mot. Dismiss CA Claims at 1 n.1, 28 n.17 (ECF 758).

implausible given that the Altria Defendants are alleged only to have disseminated advertisements for JUUL through packages of cigarettes and to a database of adult smokers, SAC ¶¶ 583-84, and Mr. Young alleges that he "never used nicotine before trying JUUL products" and does not claim to have ever smoked cigarettes. App. A. ¶ 1205. Mr. Young also does not allege that he purchased JUUL products because of the Altria Defendants' distribution and retail services. Nor could he. Mr. Young alleges only that he "purchased JUUL pods from smoke shops though friends," App. A ¶ 1208, and the Altria Defendants are not alleged to have provided services at smoke shops. SAC ¶ 574(c). And the only point of sale displays for JUUL products he claims to have seen were located on counters or in display cases that were not located on shelf-spaces allegedly provided by Altria next to Marlboro cigarettes. *Id.* ¶ 588. Finally, although Mr. Young alleges that "he was attracted to JUUL because of . . . the variety of flavors it came in," he does not claim to have used the mint-flavored products about which Altria allegedly conspired with JLI. App. A. ¶ 1209.

That none of these three plaintiffs was influenced by anything the Altria Defendants said or did is literally illustrated by the retail photographs they include in Appendix A. Recall Plaintiffs' allegation that JLI used product displays at retail that were intended to attract minors and that, after Altria's investment, the Altria Defendants provided services that allowed JUUL products to be displayed behind the counter next to Marlboro cigarettes. *See supra* at 5-6. Which retail displays do the three UCL plaintiffs say they saw? None of them claims to have seen JUUL displayed behind the counter next to Marlboro (or any other brand of) cigarette. The only alleged displays they claim to have seen were JUUL products on countertops, accessible to consumers, and not next to cigarettes, as illustrated below:[16]

[16] C.D. does not identify any displays that he allegedly saw in stores.

Product displays that L.B. allegedly saw

Product displays that Aiden Young allegedly saw

It is therefore clear from the three UCL plaintiffs' own allegations that, to the extent they were influenced by anything a defendant did, it was not the Altria Defendants. The record now as to Plaintiffs' UCL claim against the Altria Defendants thus remains as it did before — not a single Plaintiff alleges any facts to support the causation and standing elements of their claim. The only difference now is that the Altria Defendants and the Court have repeatedly pointed Plaintiffs to this failure and they still cannot correct it. Plaintiffs' claim should be dismissed with prejudice.

IV. PLAINTIFFS STILL DO NOT ALLEGE A BASIS FOR RESTITUTION FROM THE ALTRIA DEFENDANTS

In its October 23, 2020 ruling, the Court found that Plaintiffs failed to allege a basis for restitution from the Altria Defendants under the UCL because they had not alleged that the Altria

Defendants "received money traceable to [the Altria Defendants'] general unfair conduct that impacted CD and LB" and directed Plaintiffs to cure these deficiencies. Op. at 98. Plaintiffs again have done nothing to respond to the Court's order.

As an initial matter, Plaintiffs do not allege that the Altria Defendants' conduct "impacted" C.D., L.B, or Mr. Young at all. *See supra* 6-7. This alone precludes any claim that the money they spent on JUUL products is "traceable" to the Altria Defendants' alleged conduct.

In addition, despite the Court's instruction that Plaintiffs allege that the Altria Defendants received money, either directly or indirectly, that was traceable to the conduct alleged in their complaints, Plaintiffs have failed to do so. Nowhere in the hundreds of pages and thousands of paragraphs of allegations is there even a conclusory allegation — let alone a plausible one supported by specific facts — that even a dollar spent on JUUL products by the three UCL plaintiffs (or anyone else for that matter) ended up, directly *or indirectly*, in the possession of the Altria Defendants. The reason is clear: Plaintiffs can allege no such facts. At most, they claim that Altria owns a 35% interest in JLI. SAC ¶ 549. But stock ownership does not support a claim for restitution, *see, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) ("the corporation and its shareholders are distinct entities"), especially given that Altria's minority interest is worth billions of dollars *less* than what Altria paid for it.[17] Indeed, the Court's treatment of restitution claims against the directors and officers confirms that stock ownership is insufficient. The Court raised "serious concerns [about] whether restitution could be appropriate against these Officer and Directors given the size of JLI, the number of officers and directors on its board, and that some aspect of JLI's business was legitimate." Op. at 99. Allowing restitution from Altria based on its shareholder status — a relationship even more removed from the corporation — should raise greater concerns.[18]

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[17] Since December 2018, Altria's interest has lost much of its value and is now worth billions of dollars *less*; in fact, Altria's most recent 10-Q set the valuation as of September 30, 2020 at $1.6 billion. Altria Group, Inc. Form 10-Q at 15 (Ex. 12).

[18] The decision in *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305 (2009), cited at Op. at 98, does not instruct otherwise. In *Troyk*, the court allowed restitution against a parent corporation only after concluding that its wholly owned subsidiary was created solely for the purpose of engaging in the transaction and acted as an alter ego of the parent corporation. *Troyk*, 171 Cal. App. 4th at 1340-41. The facts alleged here are fundamentally different. JLI was not a "wholly owned subsidiary." Altria was only a minority, non-voting shareholder, and only for a portion of the relevant period.

V. THE ENTITIES ALSO FAIL TO ALLEGE RICO INJURY AND CAUSATION

Finally, if the Court concludes, despite the arguments above, that Plaintiffs have pled the other elements of a RICO claim, the Altria Defendants respectfully request that it re-visit whether the public entities allege RICO injury and proximate causation against the Altria Defendants. *See Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 2010 WL 384736, at *4 (N.D. Cal. 2010) (dismissing RICO claim in part because "the complaint [did] not adequately allege that each defendant proximately caused plaintiff's damages"). The Ninth Circuit addressed the RICO injury requirement for government entities: "[w]hen a governmental body acts in its sovereign or quasi-sovereign capacity, seeking to enforce the laws or promote the public well-being, it cannot claim to have been 'injured in [its] . . . property' for RICO purposes based solely on the fact that it has spent money in order to act governmentally." *Canyon County v. Syngenta Seeds, Inc.*, 519 F. 3d 969, 975-76 (9th Cir. 2008) (alteration in original). Judge Breyer recently explained when dismissing governmental claims under RICO that "*Canyon County* established that governmental entities cannot assert a RICO claim based on expenditures or services provided in their sovereign or quasi-sovereign capacities," and "[t]he Ninth Circuit reaffirmed this rule recently in *City of Almaty v. Khrapunov*." *City & Cty. of San Francisco v. Purdue Pharma L.P.*, 2020 WL 5816488, at *19 (N.D. Cal. 2020) (citing 956 F.3d 1129, 1133 (9th Cir. 2020)).

In its October 23, 2020 Order, this Court correctly observed that "[i]f I were to follow [*City and County of San Francisco*], a large segment of the PEC damages under RICO would be cut away." Op. at 73. The Court, however, found the public entities adequately alleged injury and causation after concluding they had "also allege[d] that they have suffered damage directly to their physical property and that suffices to confer standing." *Id.* The Court acknowledged that "[t]he disposal of hazardous waste" alleged by the public entities "is similar to an alleged property injury that Judge Breyer rejected as too indirectly caused to satisfy proximate causation" in *City and*

Nor do Plaintiffs allege a level of control similar to that in *Troyk*, let alone that JLI was Altria's alter ego. Because Plaintiffs do not even *allege* facts analogous to those in *Troyk*, a "full evidentiary record" is unnecessary to conclude that *Troyk* does not apply. "Dismissal under Rule 12(b)(6) is proper" when Plaintiffs "fail[] to allege sufficient facts to support a cognizable legal theory." *J.C. v. Choice Hotels Int'l, Inc.*, 2020 WL 6318707, at *2 (N.D. Cal. 2020) (Orrick, J.) (citation omitted).

County of San Francisco. *Id*. But the Court concluded the public entities alleged injury and causation based on allegations that "defendants not only intentionally targeted youth but also conducted programs on school grounds," and the purported existence of "many more interim links" between the defendants' conduct and plaintiffs' alleged injuries in *San Francisco*.

This reasoning does not apply to the Altria Defendants. Indeed, any link between the public entities' alleged harm and their allegations *against the Altria Defendants* is even more attenuated than the link found insufficient in *San Francisco*. Unlike JLI, the Altria Defendants are not alleged to have "conducted programs on school grounds" and the only activities they allegedly took with respect to consumers were — *by the public entities' own admission* — directed toward adults and not minors. *See* Gov't Entity Reply MTD at 4-5, 7-10. Much like the *San Francisco* plaintiffs, which failed as a matter of law to allege that defendants proximately caused plaintiffs' alleged property damage, Plaintiffs here fail to allege that the Altria Defendants proximately caused the public entities' alleged harm. 2020 WL 5816488, at *26-27; *see also, e.g.*, *Eclectic Props.*, 2010 WL 384736, at *4 (dismissing RICO claim in part because "the complaint [did] not adequately allege that each defendant proximately caused plaintiff's damages").[19]

CONCLUSION

For the foregoing reasons, the Court should dismiss the class plaintiffs' claims under RICO and the UCL against the Altria Defendants and the RICO claims brought against the Altria Defendants by the seven government entities identified as exemplar cases for motions to dismiss.

[19] The public entities cannot allege proximate causation by claiming Altria's October 25, 2018 letter encouraged regulatory inaction with respect to mint products. That letter did not impact FDA's regulatory actions: the agency banned fruit- and dessert- flavored products and mint-products at the same time. FDA Press Release (Jan. 2, 2020) (Ex. 13). Moreover, reliance upon the Altria Defendants' purported interactions with FDA would require too many steps in the causal chain to show "some direct relation between the injury asserted and the injurious conduct alleged." *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010) (citation omitted). Indeed, the Court's discussion of whether communications with regulators could be used to allege proximate causation focused on the class plaintiffs and the fact that, unlike the public entity cases, the class plaintiffs were consumers. Op. at 68 ("[T]he aim of the scheme and those who most directly suffered the harm plaintiffs allege, for purposes of the CAC allegations, were the end consumers of JLI's products."). In addition, the Court denied the Altria Defendants' motions to dismiss after concluding they did not contest intent. Op. at 59. To the contrary, Altria specifically contested this element of the RICO claims when seeking dismissal and renews those arguments here. *See* AD MTD CAC at 30, 34.

Dated: January 4, 2021

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CERTIFICATE OF SERVICE

I, Lauren S. Wulfe, hereby certify that on the 4th day of January, 2021, I electronically filed the foregoing **ALTRIA DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' UCL AND RICO CLAIMS AGAINST THE ALTRIA DEFENDANTS FROM THE SECOND AMENDED CLASS ACTION COMPLAINT AND THE AMENDED RICO CLAIMS OF SEVEN PUBLIC ENTITIES** with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notifications to all counsel of record.

By: */s/ Lauren S. Wulfe*

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