BOERSCH & ILLOVSKY LLP
Martha Boersch (State Bar No. 126569)
martha@boersch-illovsky.com
Eugene Illovsky (State Bar No. 117892)
eugene@boersch-illovsky.com
Matthew Dirkes (State Bar No. 255215)
matt@boersch-illovsky.com
Kevin Calia (State Bar no. 227406)
kevin@boersch-illovsky.com
1611 Telegraph Ave., Ste. 806
Oakland, CA 94612
Telephone: (415) 500-6640

Attorneys for Defendant
Adam Bowen

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

This Documents Relates to:

ALL ACTIONS

Case No. 19-md-02913-WHO

NOTICE OF MOTION AND MOTION TO DISMISS RICO CLAIMS AGAINST DEFENDANT BOWEN FROM PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT AND SEVEN GOVERNMENT ENTITY AMENDED COMPLAINTS; MEMORANDUM OF POINTS AND AUTHORITIES

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

NOTICE OF MOTION AND MOTION

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, Defendant Adam Bowen will and does hereby move to dismiss the RICO claims against him contained in the Second Amended Consolidated Class Action Complaint (ECF No. 1135) and in in the Amended Complaints for the following Government Entities—Tucson Unified School District 3:19-cv-07335-WHO (ECF No. 26); The Livermore Valley Joint Unified School District 3:19-cv-08176-WHO (ECF No. 22); The School Board of Broward County, Florida 3:19-cv-08289-WHO (ECF No. 21); The School Board of Escambia County, Florida 3:20-cv-00459-WHO (ECF No. 37); Three Village Central School District 3:19-cv-07028-WHO (ECF No. 26); Central Bucks School District 3:19-cv-08023-WHO (ECF No. 21); and County of Santa Cruz, Individually And on Behalf of The People of The State of California 3:20-cv-02261-WHO (ECF No. 30) pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure. In light of the Court's orders on phased motions practice, Defendant Bowen does not waive any Rule 12 defenses to these or any other complaints in the MDL by not asserting them in this Motion. This Motion is based on this Notice of Motion, the Memorandum of Points of Authorities served concurrently herewith, the Motions to Dismiss RICO claims filed by other defendants in the case, and on any oral argument the Court may consider at a hearing on the matter.

Dated: January 4, 2021

BOERSCH & ILLOVSKY LLP
MARTHA A. BOERSCH
EUGENE ILLOVSKY
MATTHEW DIRKES
KEVIN CALIA

/s/Eugene Illovsky
Eugene Illovsky

Attorneys for Defendant
Adam Bowen

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STATEMENT OF THE ISSUES TO BE DECIDED

- Whether the RICO claims against Bowen in the Second Amended Consolidated Class Action Complaint ("SAC") and Amended Government Entity Complaints should be dismissed for failure to plead an enterprise separate and distinct from JLI's ordinary business activities.
- Whether the RICO claims in the SAC and Amended Government Entity Complaints against Bowen should be dismissed for failure to plead facts demonstrating that he conducted the affairs of the enterprise rather than his own affairs as an executive and board member.
- Whether the RICO claims in the SAC and Amended Government Entity Complaints should be dismissed for failure to plead acts of mail or wire fraud by Bowen that "naturally induced" any plaintiff or part with money or property.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Court should dismiss the revised RICO claims in the Second Amended Consolidated Class Action Complaint, ECF No. 1135 ("SAC").[1] Plaintiffs' attempt to replace the purported association-in-fact enterprise from the Class Action Complaint with JLI as the enterprise does not solve, but only compounds, the deficiencies identified in the Court's prior Order. In addition, the new enterprise allegations prompt an evaluation of the criminal predicate acts alleged against defendant Adam Bowen and the other RICO defendants. None of the alleged statements that purportedly constitute acts of mail or wire fraud could reasonably be seen as having been in furtherance of any alleged fraud scheme.[2]

II. Plaintiffs Fail to Remedy the Deficiency in Their "Enterprise" Allegations

For the reasons stated in the Altria Defendants' Motion to Dismiss, which Bowen joins, Plaintiffs' abandonment of the so-called association-in-fact "Nicotine Market Expansion Enterprise" and the re-casting of their RICO claims does not cure the defect in their allegations. The Court had dismissed the RICO claims because Plaintiffs failed to "plausibly allege[] the existence of a distinct enterprise, separate and apart from the general business of JLI." Order on Substantive Motions to Dismiss, ECF No. 1084 ("Order"), at pp. 45-46. The Court gave Plaintiffs an opportunity to re-plead, noting that they "need to assert *plausible* allegations to support the existence of this AIF 'Nicotine Market Expansion Enterprise' separate and apart from the regular business of JLI." Order at p. 41. Instead of responding to the Court's Order by alleging an enterprise "separate and apart from" JLI, Plaintiffs have opted to plead an enterprise that is no longer an association-in-fact but is precisely *the same* as JLI. SAC ¶ 864.

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[1] The RICO allegations in the SAC are essentially the same as those in the Amended Government Entity Complaints ("GEC"). This brief cites only to the allegations in the SAC, but the arguments apply equally to the amended GECs and the RICO claims in those complaints should be dismissed for the same reasons.

[2] Bowen joins in the other defendants' motions to dismiss the RICO claims. The applicable standards for this Motion under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure have been briefed sufficiently and Bowen does not repeat the discussion in this brief.

As the Altria Defendants show in their motion, making JLI the enterprise does not save the RICO claims because the alleged goals, schemes, and activities of the purported JLI Enterprise are no different from the "general business of JLI" as reflected in the various other allegations made by the Plaintiffs. The SAC, despite its completely new enterprise allegations, thus suffers from the same deficiencies the Court found in the Amended Complaint and should be dismissed for that reason.

III. Plaintiffs Fail to Show That Bowen Conducted an Enterprise's Affairs Rather Than His Own Affairs

The Court also held that "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." Order at 40. This comports with the Supreme Court's long-settled rule that RICO liability requires "showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 163 (2001). *See Reves v. Ernst & Young,* 507 U.S. 170, 185 (1993). This requirement of *Reves* and *Cedric Kushner* cannot be jettisoned by making Bowen's employer, JLI, the enterprise. Plaintiffs' re-cast RICO claim therefore still offers nothing more than allegations that describe executives and board members of JLI, including Bowen, conducting their own affairs as JLI executives and board members.

For instance, other than group-pled allegations, the specific allegations about Bowen describe his activity as a designer of the JUUL product, *see* SAC ¶¶ 873-77, or are conclusory allegations that he "developed JLI's marketing strategy" or "helped finalize the messaging framework" (even though he was allegedly the Chief Technology Officer). SAC ¶ 879, 899. These allegations simply reflect Bowen conducting his own affairs working for JLI. This is also true of the allegations of Bowen's participation in the marketing activities underlying the purported schemes in plaintiffs' RICO claims. And as to those, Bowen has argued they are merely general or group-pled allegations that "JLI" or "Defendants" or the "Board" approved marketing materials, *see, e.g.*, SAC ¶¶ 38, 40, 56, 186, 313,

376, 383, 386, 390, but do not sufficiently show how he individually played a role in the allegedly fraudulent marketing efforts in any capacity other than as a JLI executive or Board member.[3]

IV. Plaintiffs Do Not Sufficiently Plead the Racketeering Acts of Mail or Wire Fraud

Plaintiffs' revised RICO claims are based on allegations that defendants Monsees, Bowen, Pritzker, Huh, Valani, and Altria conducted JLI's affairs "through a pattern of racketeering activity." SAC ¶¶ 857, 864, 957. The supposed "racketeering" activity consists of "falsely and misleadingly using the mail and wires," SAC ¶ 957-958, in violation of 18 U.S.C. § 1341 and § 1343.[4]

In broad strokes, Plaintiffs allege supposed schemes to defraud "involving the use of mail and wires" by "fraudulently misrepresenting or omitting the truth about JUUL products to adult consumers and the public at large." SAC ¶ 865. The schemes include a so-called "fraudulent marketing scheme," the "youth access scheme," the "nicotine content misrepresentation scheme," the "flavor preservation scheme," and the "cover-up scheme." SAC ¶¶ 897-949. This Court, recognizing that actionable mail and wire fraud schemes require allegations of an intent to defraud another of money or property, concluded that plaintiffs previous RICO claim sufficiently alleged only a "scheme . . . to secure the money and property of end consumers, in particular new and youth users who were not previously addicted to nicotine." Order, at p. 63.

Plaintiffs allege five categories of statements that supposedly furthered the various "schemes to defraud": 1) omissions relating to nicotine content; 2) that JUUL is a smoking cessation device; 3) regarding JUUL pod nicotine content; 4) to prevent regulation of mint flavor; 5) to prevent a ban on JUUL products. SAC ¶ 955, *see also* ¶959. The specific criminal acts — statements allegedly made by mail or wire in furtherance of the schemes to defraud — are set forth at SAC ¶¶ 959, 960. Attached as Exhibit A is a chart of the statements alleged in Paragraph 959, with each allegedly fraudulent statement numbered for reference.

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[3] Bowen joins in the non-management directors' motion to dismiss, which points out deficiencies in the allegations about board members.

[4] Because plaintiffs allege a different RICO enterprise consisting only of JLI, and mail and wire fraud schemes that now do not include JLI as a RICO defendant, we respectfully submit that the Court can consider again the legal adequacy of the alleged racketeering acts. Bowen also reserves all arguments made in his prior motion to dismiss the RICO claims. *See* Defendant Adam Bowen's Motion to Dismiss RICO Claims (ECF No. 645).

There are 26 allegedly false statements that were transmitted in furtherance of the various alleged mail and wire fraud schemes. Only six of those statements are attributed to an alleged member of one of the fraud schemes (Monsees and Willard). Of the remaining 20 statements, 18 were allegedly made by JLI, which is now the alleged RICO Enterprise but not a RICO Defendant or purported co-schemer. Two are attributed to Burns, also not an alleged co-schemer. SAC ¶ 959. None of the actual statements allegedly in furtherance of a crime is attributed to Bowen.

The allegations of 100 individual plaintiffs are set forth in Appendix A to the SAC (ECF No. 1135-1), and no class has yet been certified.[5] The general allegations of the SAC are not incorporated by reference into any of the individual plaintiffs' allegations. None of the individual plaintiffs independently alleges *any* of the elements of mail or wire fraud and none alleges specific false statements with any particularity, much less that required by Rule 9(b).[6]

A. The Elements of Mail or Wire Fraud and RICO's Requirements.

It is not enough to allege a generic fraud scheme; the alleged mail or wire fraud must be "indictable" to be a RICO predicate. 18 U.S.C. § 1961(1)(B).[7] Within those bounds, a plaintiff must allege the defendant: 1) formed a scheme to defraud; 2) used or caused the use of interstate wires or mails in furtherance of that scheme; and 3) with the specific intent to deceive or defraud. *Schreiber Distributing Co. v. Serv-Well Distributing Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986). The mail fraud statute, 18 U.S.C. § 1341, prohibits use of the mail for the purpose of executing "any scheme or artifice to defraud, or for obtaining money or property *by means of* false or fraudulent pretenses,

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[5] Bowen also joins the Altria Defendants' Motion to Dismiss the claims of 28 state subclasses and 59 of the 100 individual plaintiffs for lack of subject matter jurisdiction.

[6] For this reason alone, the RICO claims can and should be dismissed since not a single plaintiff alleges facts that would state a RICO claim. *See, e.g., U.S. v. International Longshoreman's Ass'n,* 518 F.Supp.2d 422, 478 (E.D.N.Y. 2013) (dismissing government's civil RICO claims premised on mail and wire fraud for failure to satisfy Rule 9(b) and rejecting allegations not specifically incorporated in the complaint as required by Fed. R. Civ. P. 10).

[7] It is settled that "[m]ere common-law fraud does not constitute racketeering activity for RICO purposes." *New York State Catholic Health Plan v. Academy O & P Assoc.*, 312 F.R.D. 278, 296 (E.D.N.Y. 2015). A scheme merely to induce a victim to enter a transaction that he otherwise would have avoided is not mail or wire fraud. *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016); *United States v. Starr*, 816 F.2d 94, 98 (2nd Cir. 1987). The focus of the federal statutes is the "misuse of the instrumentality of communication," which must be in furtherance of the alleged scheme. *United States v. Hussain*, 972 F.3d 1138, 1143-44 (9th Cir. 2020).

representations, or promises." (Emphasis added). The wire fraud statute similarly prohibits transmissions "*by means of* wire, radio, or television communication in interstate or foreign commerce" for the purpose of executing such a scheme. 18 U.S.C. § 1343 (emphasis added).

"By means of" means that the false "pretenses, representations, or promises" must be "the mechanism naturally inducing a [consumer] to part with money." *Loughrin v. U.S.*, 573 U.S. 351, 363 (2014) (construing identical language in the federal bank fraud statute). This limitation on the reach of the mail and wire fraud statutes is, like the similar limitation in the bank fraud statute, necessary to avoid construing the statutes as a "plenary ban on fraud," which would "effect a significant change in the sensitive relation between state and federal criminal jurisdiction." *Id.* Alleged false statements must therefore be material, *i.e.*, have "a natural tendency to influence, or [be] capable of influencing, the decision of the [person] to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999) (citation omitted)

Even if alleged false statements are actionable, a defendant is liable for another's statements only if the other is a member of the alleged scheme to defraud, thereby giving rise to so-called "co-schemer" liability. *See, e.g., United States v. Stapleton*, 293 F.3d 1111 (9th Cir. 2002) (vicarious liability for false statements applies to co-schemers).

Importantly, each mailing or wiring must be in furtherance of the fraud scheme, that is, the use of the mails or interstate wire communications must be "part of the execution of the fraud," *Kann v. United States*, 323 U.S. 88, 95 (1944). Mailings or wirings that occur after "the scheme ... has reached fruition" are not "in furtherance of" the scheme and therefore are not crimes. *United States v. Maze*, 414 U.S. 395, 400 (1974); *see also United States v. Vonsteen*, 872 F.2d 626, 629 (9th Cir. 1989).

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B. The SAC Fails to Allege Material False Statements Indictable Under the Mail or Wire Fraud Statutes.

Plaintiffs fail to specifically allege indictable acts of mail or wire fraud.

1. The Alleged False Statements Cannot Plausibly be Viewed as Material and Many Were Not Even Communicated to the Purported Victims

Plaintiffs fail to allege any materially false statement "naturally inducing" an underage, or any, consumer to part with money or property. While some individual plaintiffs allege in a conclusory fashion that he or she "would not have purchased or started using JUUL's products" if he or she had been adequately warned about its nicotine content or the risks of addiction, none of the individual plaintiffs alleges he or she was induced to purchase a JUUL – *i.e.,* to part with money – by virtue of the specific false statements alleged as mail or wire fraud in SAC ¶ 959. In fact, none of the individual plaintiffs alleges that any of the specific false statements alleged in SAC ¶ 959 were communicated to them at all. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010) (affirming dismissal of RICO claims predicated on mail or wire fraud where plaintiffs failed to allege which of them received the allegedly false communication or identified any specific mailings).

Instead, the individual plaintiffs simply reproduce or refer generally to advertisements, social media, or store or gas station displays they allegedly saw without identifying a specific statement that induced them to part with money. Many or most admit that they purchased a JUUL for reasons unrelated to any of the specific alleged false statements. For example, Shurjo Ali (Plaintiff #2) "began using JUUL products in September 2018 after seeing advertisements at gas stations and hearing about JUUL from friends." App'x A at 7. Meredith Caddell (Plaintiff #10) "began using JUUL's products in January 2017 after seeing advertisements through social media and hearing about it from friends." *Id.* at 50. Carlee Goldston (Plaintiff #35) alleges she "began using JUUL's products in March 2017 "after seeing advertisements at gas stations and hearing about it through friends." *Id.* at 161. Noah Matarazzo (Plaintiff #57) "began using JUUL in 2017 as a result of online fanfare and peer pressure from his classmates." *Id.* at 281. These are the typical allegations of the vast majority

of the individual plaintiffs' claims and they do not state an actionable mail or wire fraud.[8] Even if these vague and general references to various advertisements or store displays were sufficient to state a mail or wire fraud claim, the plaintiffs' claims would still be deficient because the plaintiffs do not allege facts establishing any RICO defendants' connection to those specific advertisements or displays. *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 730 (7th Cir. 1998) (affirming dismissal of RICO predicated on mail and wire fraud where the complaint simply lumped defendants together without specifying which allegedly fraudulent statements were attributable to which defendants).

Furthermore, the allegedly fraudulent statements that were mailed or wired as set forth in SAC ¶ 959 could not be in furtherance of a scheme to defraud since they could not plausibly induce any underage (or other) consumer to part with money even if they were communicated to and specifically alleged by the individual plaintiffs. As for the so-called youth scheme, a statement that the founders intended JUUL to be an alternative for adult smokers and related statements about adult smokers could not plausibly induce an underage person to buy a JUUL. It is also implausible that an underage non-smoker consumer would be induced to buy a JUUL with a statement that JUUL is a smoking cessation device (*see, e.g.*, Attachment A, Alleged Statement 3, 6, 13-17) or a statement that JLI did not want youth using JUUL products (*see, e.g., id.* Statement 18-25). These statements would logically *deter* an underage non-smoker from purchasing a JUUL and would not "naturally induce" plaintiffs to buy a JUUL. While plaintiffs allege these statements were false, falsity without materiality is insufficient to state an indictable mail or wire fraud. *Neder*, 527 U.S. at 25 (materiality of falsehood is an element of federal mail and wire fraud).

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[8] In their responses to interrogatories, the class representatives confirm that they did not purchase a JUUL because of the false statements alleged in the SAC. In response to an interrogatory asking the plaintiffs to describe the circumstances under which they first used JUUL, plaintiff Lauren Gregg said she first used a JUUL because "all her friends were doing it" and she got it from a friend; Joseph DiGiacinto likewise said he first used JUUL "because it was popular with his brother and his friends" and got one from his friends; Jill Nelson, on behalf of L.B., says L.B. first used JUUL because she "liked the flavors," "thought it was safe," and "because of its popularity among other" students; Mary Young, on behalf of Aiden Young, says he tried JUUL because "he thought it was 'cool,' and he felt peer pressure;" and Bradley Colgate says he did because he "had seen a lot of JUUL advertisements which he understood as representing that JUUL products were not unhealthy and were less addictive than cigarettes." In short, the individual plaintiffs do not allege that any of the false statements alleged in the SAC induced them to part with money.

2. The Alleged Mailed and Wired Statements are not False or Fraudulent

Subjective statements of belief, aspiration, or sales "puffery" can be neither false nor fraudulent and thus are not indictable. *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1471 (9th Cir. 1987); *Eclectic Properties E., LLC v. Marcus & Millichap Co.,* 751 F.3d 990, 1000 (9th Cir. 2014) ("'Puffing' or related expressions of opinion that are common in sales [are] not actionable as fraud."). Such statements therefore cannot support a civil RICO claim. *County of Marin v. Deloitte Consulting LLP,* 836 F.Supp.2d 1030, 1039 (N.D. Cal. 2011).

Most of the alleged statements are just that, however. For instance, the statements that JUUL Labs had the "goal of improving the lives of" adult smokers (Ex. A, Statement 2); that its founders "envision[ed] a world where fewer adults use cigarettes," or that "we believe e-vapor products present an important opportunity to adult smokers" (*id.*); that "we want to be an offramp for adult smokers" (*id.*, Statement 3); or that JLI "exists to help adult smokers switch off combustible cigarettes" (*id.,* Statement 4). *See also, e.g., id.,* Statements 5, 6, 16, 17, 18, 20, 21, 24, 25, 26).[9]

3. Many of the Alleged Mailings or Wirings Were After the Object of the Scheme (an Underage Purchase of JUUL) Was Achieved

The alleged fraudulent use of mails or wires – *i.e.,* the transmissions alleged in SAC ¶ 959 – cannot be "in furtherance of" a scheme to defraud, and thus not indictable, because they were made after the object of the scheme had been achieved. Most of the allegedly false or fraudulent mailings and wirings were made after October 2018, *see, e.g.,* Ex. A, Statements 3-7, 10-16, 18-22, 24-26) and thus post-date many of the plaintiffs' decisions to purchase JUUL products, the object of the alleged schemes to defraud. *See, e.g.,* App'x A at 7 (Shurjo Ali began using JUUL products in September

[9] On the prior version of the RICO claims, this Court addressed the argument that predicate acts of mail or wire fraud cannot be based on "puffery" or opinion, finding it was an issue for "the trier of fact." Order at 60. But "[d]istrict courts often resolve whether a statement is puffery when considering a motion to dismiss pursuant to Federal Rule of Civil procedure 12(b)(6) and we can think of no sound reason why they should not do so." *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service, Inc.,* 911 F.2d 242, 245 (9th Cir. 1990). Bowen respectfully submits that whether the alleged statements are opinion or "puffery" is a legal question that can be resolved on this motion.

2018); *id.* at 15 (Addison Altizer began in 2017); *id*. at 20 (B.C. began in 2016); *id.* at 40 (E.B. began in 2017); *id.* at 44 (C.S.B. began in 2018); *id.* at 50 (Meredith Caddell began in 2017). There are many more examples demonstrating there is little, if any, alleged connection between the allegedly false statements and the plaintiffs' purchases of JUUL. Absent facts alleged to show the false statements "naturally induced" the plaintiffs to purchase a JUUL, plaintiffs have failed to state indictable mail or wire fraud.

4. Statements Made by Non-Schemers Cannot Be In Furtherance of an Indictable Scheme to Defraud or Conspiracy

A person cannot be indicted for another's allegedly false or fraudulent statements unless that other person is a co-schemer. *Stapleton,* 293 F.3d at 1116-17. The majority of purportedly false or fraudulent statements are not attributed to RICO defendants but to JLI, which is not alleged to be a co-schemer or RICO conspirator. *See* Ex. A, Statements 1, 2, 4, 7-10, 12-18, 20, 22, 23.

Plaintiffs try to avoid this problem by alleging that the "five individual defendants . . . controlled JLI and "caused those statements to be made through their control of JLI." SAC ¶ 958. But that cannot be correct as to alleged co-schemers acting in their capacity as Board members. The Court has ruled the assertion that individuals "had 'final say' over JLI's marketing materials does not establish the requisite individual 'direction or control' to pin liability for marketing acts or even specific marketing campaigns on . . . any of the defendants in their individual capacity as Board members." Order at p. 52-53.

As to Bowen, the allegation that he "caused" JLI to make the fraudulent statements is only a conclusion without a factual basis connecting him to the statements. That is insufficient to establish that JLI's alleged statements were in furtherance of an alleged mail or wire fraud committed by Bowen. Absent any allegation in the RICO claim that JLI was a co-schemer or a RICO conspirator, the allegations are insufficient to state a claim that Bowen or the other RICO defendants committed an "indictable" act of mail or wire fraud with respect to those statements.

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5. The Alleged Omissions are Not Mail or Wire Fraud Because Plaintiffs Have Not Alleged that the RICO Defendants Owed a Fiduciary Duty to Plaintiffs

Plaintiffs allege various unspecified or general omissions, claiming that the "Vaporized Campaign" and "other advertising campaigns transmitted via the mails and wires which targeted under-age vapers" "omitted any reference to JUUL's nicotine content." SAC ¶ 959, Ex. A (Statement 1). These omissions are not indictable as mail or wire fraud because plaintiffs do not allege Bowen owed a fiduciary or other duty of disclosure to them. *See, e.g., United States v. Shields*, 844 F.3d 819, 822 (9th Cir. 2016) (fraud may be based on a non-disclosure only when "there exists an independent duty that has been breached by the person so charged" (citations omitted)); *Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092 (9th Cir. 2015) (absent "an independent duty, such as a fiduciary duty or an explicit statutory duty, failure to disclose cannot be the basis of a [RICO] fraudulent scheme.").

Plaintiffs' only allegation of duty is a generic one that *JLI* (but not the RICO defendants) owed them a duty to disclose certain *other* facts (not specifically Statement 1 in the RICO claim) *See, e.g.,* SAC ¶¶ 794, 813, 823, 834, 1008. Because JLI is not an alleged co-schemer, any duty it allegedly owed is irrelevant.

Finally, the vagueness and breadth of the "statement" – the "Vaporized Campaign" and "other advertising" or the "Make the Switch" advertising – does not satisfy the particularity requirements of Rule 9(b). The plaintiffs allege no specific false statement within the "Vaporized Campaign" or "other advertising" as an indictable mail or wire fraud nor do they allege particular facts showing the RICO defendant's individual responsibility for any specific false statement or an individualized contemporaneous intent to defraud.

6. The Plaintiffs Have Not Alleged Bowen's Role in Any of the Alleged Fraudulent Statements with Sufficient Specificity

In its order on the earlier version of the RICO claims, this Court held that plaintiffs' allegation that Bowen, as a member of the JLI Board of Directors, had "final say" over JLI's marketing, was insufficient for liability. Order, at pp. 48-50. The SAC does not cure this defect. The SAC continues

to allege no more than that Bowen designed the JUUL (*e.g.,* SAC ¶ 4), understood the product and the industry (*e.g.,* SAC ¶¶72), and as a director generally "controlled" JLI (*e.g.* SAC ¶¶ 40, 56, 931). While this Court held these allegations were sufficient to state Bowen's "role in conducting the RICO Enterprise," as previously alleged, Order at p. 48, they are not sufficient to state his role in the allegedly false statements. *Moore v. Kayport Package Exp., Inc.,* 885 F.2d 531, 541 (9th Cir. 1989) (plaintiffs must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation). Apart from vague "control" allegations, no specific facts are alleged tying Bowen individually to the statements pled as mail and wire fraud. The general allegations of the SAC thus do not state an indictable mail or wire fraud against him.

V. The SAC Fails to Allege a RICO Conspiracy

Because the SAC fails to allege a RICO enterprise, actionable predicate acts, or facts demonstrating Bowen's role in the false statements alleged as mail and wire fraud, the SAC also fails to state a RICO conspiracy claim. *Howard v. America Online Inc.,* 208 F.3d 741, 751 (9th Cir. 2000) (failure to plead a substantive RICO violation precludes conspiracy claim).

Dated: January 4, 2021

BOERSCH & ILLOVSKY LLP
MARTHA A. BOERSCH
EUGENE ILLOVSKY
MATTHEW DIRKES
KEVIN CALIA

/s/Eugene Illovsky
Eugene Illovsky

Attorneys for
Defendant Adam Bowen