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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

This Document Relates to:

ALL ACTIONS

Case No. 19-md-02913-WHO

REPLY IN SUPPORT OF NON-MANAGEMENT DIRECTOR DEFENDANTS' MOTION TO DISMISS SECOND AMENDED CLASS ACTION COMPLAINT AND AMENDED GOVERNMENT ENTITY COMPLAINTS

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTE

INTRODUCTION

Despite this Court's clear holding that Plaintiffs must allege specific, concrete "acts" committed or controlled by the Non-Management Directors, such as a "Board vote or other *action*," Order on Substantive Motions to Dismiss ("Order"), at 53, ECF No. 1084, Plaintiffs repeat the same deficient allegations in their Second Amended Complaint ("SAC"), ECF No. 1135, without adding anything new of substance. Plaintiffs defend the SAC in their Opposition to Motions to Dismiss by Defendants Bowen, Monsees, Huh, Pritzker, Valani, and the Altria Defendants ("Opp."), ECF No. 1364, by arguing inferences from the same conclusory allegations the Court has already rejected: that the Non-Management Directors supposedly "approved" and "signed off on" marketing to youth and "controlled" other alleged wrongdoing by JLI. No amount of re-argument changes the fundamental fact that the SAC still does not allege particularized wrongdoing by any Non-Management Director.

Where the SAC does include new material, the additional volume does not create viable or relevant claims. All the new allegations in the SAC fall into two main categories: allegations of innocuous conduct or yet more conclusory assertions. *First*, Plaintiffs add reams of irrelevant allegations that describe the Non-Management Directors engaging in benign conduct, such as having dinner with representatives of Altria and negotiating Altria's investment in JLI. None of these allegations supports a claim against the Non-Management Directors. *Second*, Plaintiffs try to excuse their admitted inability to plead any actual misconduct by the Non-Management Directors with yet more unsupported and conclusory allegations, such as their unsubstantiated charge that JLI's Board meeting minutes were "sanitized."

Plaintiffs' reshuffled RICO claim is a new legal theory. The SAC now alleges that the Non-Management Directors "conducted the affairs" of the RICO enterprise (JLI) through a conspiracy with Altria. But this Court already rejected these conclusory, final-say type allegations against the Non-Management Directors, holding that Rule 9(b) and RICO require Plaintiffs to allege specific facts showing what *each defendant* personally did to participate knowingly in a scheme to defraud. As before, the SAC contains no specific allegations that a Non-Management Director made or directed the alleged false statements that undergird the RICO claims. To the

contrary, Plaintiffs' recycled chart of alleged false statements drives home the point that none of them was made by a Non-Management Director. *See* SAC ¶ 959.

Three years into this litigation, Plaintiffs still cannot answer this Court's basic question – why the Non-Management Directors should be in this case. The claims against them should be dismissed with prejudice.

ARGUMENT

I. PLAINTIFFS FAIL TO PLAUSIBLY ALLEGE THAT THE NON-MANAGEMENT DIRECTORS PERSONALLY PARTICIPATED IN ACTIONABLE CONDUCT

The SAC repeats all the deficient allegations of the CAC and supplements them with two kinds of allegations, both legally irrelevant. *First*, the SAC spends pages discussing innocuous conduct. These makeweight allegations recount more details of the Non-Management Directors' involvement with negotiating Altria's minority investment in JLI. *See*, *e.g.*, SAC ¶¶ 419, 421-424, 518-528 (describing dinners and other meetings between the Non-Management Directors and Altria executives, and the exchange of pleasantries). The Court has already held these allegations insufficient. The SAC also adds detail about how JLI's Board functions and alleges that two Non-Management Directors could name another Board member. SAC ¶¶ 360-367. But Plaintiffs admit (at 6) that they cannot point to any Board vote (or any other action) ratifying youth marketing, as this Court required (Order at 53).

Second, the SAC doubles down on asserting legal conclusions unsupported by facts. Plaintiffs' Opposition amplifies this defect, repeatedly making pronouncements about the Non-Management Directors that are not even supported by the cited allegations, much less facts. For example, Plaintiffs argue (at 3) that executives within JLI, "in consultation with Monsees, Pritzker, and Valani," manipulated the results of early studies, falsely portraying the nicotine strength of JUUL products. *See also* Opp. at 27. Plaintiffs cite paragraphs 101-128 for this sweeping assertion. Yet those paragraphs *do not mention Mr. Pritzker or Mr. Valani at all*. Rather, they describe the alleged actions of JLI executives, JLI marketing employees and consultants, and scientists and engineers – not the Non-Management Directors. The only allegation anywhere in the SAC that tries to link the Non-Management Directors to manipulation of early studies on nicotine is one this Court rejected: the allegation – repeated verbatim in the

SAC ¶ 197 (cited at Opp. at 27) – that explanations of the studies to the Board "did not note" the reasons for variations in the studies. *See* Order at 94 n.65. The SAC adds nothing new here,[1] so Plaintiffs' assertion that Mr. Pritzker and Mr. Valani consulted on manipulation of studies is baseless, as the Court already held. This pattern of making assertions about the Non-Management Directors that are unsupported, or even contradicted by, the allegations in the SAC is repeated throughout Plaintiffs' Opposition.

Effectively conceding that they cannot meet the requirements of Rules 8 and 9(b), Plaintiffs try to write the rules out of existence. Plaintiffs argue (at 38) that, because the Court held that they "sufficiently alleged the who, where, when, and what of the fraud" as to *other defendants*, they need not describe with particularity the alleged actions of the Non-Management Directors' "participation in that fraud." This turns Rule 9(b) on its head. *Each defendant* charged with fraud is entitled to the "who, what, where, when" that 9(b) requires. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The Court dismissed the CAC's claims against the Non-Management Directors precisely because it failed to plead such particulars against them.

Nor can Plaintiffs rely on a "relaxed" Rule 9(b) standard that may apply when key facts reside in defendant's sole control (Opp. at 14). Plaintiffs' problem is not a lack of access; they have received millions of documents and all relevant Board meeting minutes. Their problem is that these minutes and documents show no personal participation by the Non-Management Directors in any alleged wrongdoing.

A. The Only Particularized Facts in the SAC Describing the Non-Management Directors' Actions Fail to State a Claim of Wrongdoing

1. The Non-Management Directors' Alleged Role in Negotiating Altria's Investment in JLI Provides No Grounds for Liability

The SAC's allegations that the Non-Management Directors met with Altria executives to discuss an investment by Altria (SAC ¶¶ 8, 52-55, 419, 517, 525, 527, 531, 891, 893) are unremarkable and do not describe actionable conduct. Dismissing an abbreviated version of the

[1] Paragraphs 198-215, cited at Opp. at 27, do not allege any action by the Non-Management Directors and do not add any fact supporting the allegation that they knew of any misrepresentation of nicotine content.

same allegations in the CAC, this Court held (Order at 94) that the Non-Management Directors' alleged "acts of seeking the investment by Altria" are not "*by themselves* [ ] alleged unfair acts."

The SAC supplies no new allegations that would "support" an inference that participating in negotiations with Altria should be "section[ed] off . . . from the other presumably legitimate operations of" the Company. *Id.* at 94 n.66. It just provides irrelevant details about these meetings, such as *when* they took place (¶ 528 – dinner) and *where* they took place (¶ 514 – the Andaz 5th Avenue hotel in New York; ¶ 525 – a Park Hyatt in Washington, DC). Plaintiffs' attempt (Opp. at 7–10) to convert the Non-Management Directors' alleged meetings with Altria into actionable "back-channel negotiations" that support Plaintiffs' RICO and other claims is no more convincing the second time around. Negotiating an investment by Altria is not actionable.

Plaintiffs' "Make the Switch" fraud theory (Opp. at 13) fails for the same reason. Plaintiffs cite the allegation that a JLI executive forwarded an email to Mr. Valani and Mr. Pritzker, and then assert (without factual support) that Mr. Valani directed the selection of videos for the campaign. But the cited emails show only that Mr. Valani said he preferred longer videos to shorter ones. This is not an allegation of wrongdoing, there is no indication that the Company acted on Mr. Valani's view, and the SAC includes no explanation of how that email allowed Altria to "influence" JLI's marketing. Here again, Plaintiffs' effort to transform an innocuous comment – preferring long videos over short ones – into an act of racketeering serves only to highlight the weakness of the SAC. Plaintiffs offer only rhetoric, not well-pleaded facts.[2]

2. Plaintiffs Cannot State Any Claim Against the Non-Management Directors Just by Describing the Board's Voting Procedures

The SAC adds much detail about how JLI's Board made decisions and acted (by voting) and alleges that the Non-Management Directors controlled the Board at various points. SAC ¶¶ 360-367, 887-888. But Plaintiffs concede (at 6, 26) that they *cannot identify a single Board vote or other concrete Board action* supporting their claims of wrongdoing by the directors despite

[2] The same is true of Plaintiffs' contention (at 7) that Mr. Pritzker "dictated" some unspecified change to JLI's website. The SAC lacks any particularized allegations of wrongdoing.

having access to the minutes from dozens of Board meetings describing numerous Board votes. Without an allegation that the Board, under the Non-Management Directors' alleged control, took an unlawful vote or action, the extra detail about the Board's procedures adds nothing.[3] *See* Order at 53, 92.

Plaintiffs next argue (at 26) that the Court should disregard its prior holding that, to state a claim against the Non-Management Directors, the SAC must point to an "allegation of a Board vote or other *action*," such as "specific items proposed by the defendant Directors together or by one specific director and then approved through their numeric or other control over the full Board." Order at 53, 92.[4] Instead, Plaintiffs now argue they have satisfied their pleading burden by claiming that the Non-Management Directors "controlled JLI" because two of them were able to appoint another Board member. This is no more than the "final say" theory of liability that this Court rejected. It is not enough to allege that the Non-Management Directors controlled the Board,[5] or that the Board controlled the Company (as all corporate boards do, by definition). Rule 9(b) requires Plaintiffs to allege specific unlawful acts taken either by the Non-Management Directors themselves, or by the Board under their direction. Plaintiffs have pleaded neither here.

Finally, Plaintiffs seek to excuse their failure to allege any specific action by the Board by calling the Board minutes "highly sanitized." *See* Opp. at 6, 26; SAC ¶ 382. But Plaintiffs cannot cure a lack of specifics with yet another conclusory allegation. Plaintiffs argue (Opp. at 37–38) that they need not comply with Rule 9(b), because they do not allege that the supposed sanitizing itself was fraudulent. But that misses the point. Plaintiffs cannot satisfy Rule 8(a), much less 9(b), without pleading facts plausibly supporting an entitlement to relief. Plaintiffs' naked

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[3] The same is true of the argument (Opp. at 4, 45) that the Board had weekly calls. Having weekly calls does not connect the Board to any youth marketing or other actionable conduct.

[4] This holding is law of the case and Plaintiffs cannot move to reconsider the holding *sub silentio* through briefing. *See United States v. Alexander*, 106 F.3d 874, 877 (9th Cir. 1997) (explaining that the "law of the case doctrine ordinarily precludes reconsideration of a previously decided issue" and therefore holding that reconsideration of a previous order "was not warranted.").

[5] Plaintiffs do not even try to allege that any of the appointed Board members abdicated their duty to exercise independent judgment; Plaintiffs simply declare that they were "controlled."

assertion that someone (unknown) scrubbed some (unspecified) Board action from some (unspecified) Board minutes deserves no weight. Indeed, other allegations in the SAC and the documents on which they rely directly contradict allegations of sanitizing – the Board minutes show votes at virtually every meeting.[6]

B. Conclusory Allegations of "Involvement" with Youth Marketing and Other Alleged Schemes Do Not State Any Claim

1. The Court Must Disregard the Conclusory Allegations that the Non-Management Directors Participated in Marketing to Youth

The SAC recycles other conclusory allegations: the Non-Management Directors were "aligned in favor of" youth marketing, ¶ 382, "approved" a "youth-oriented" marketing plan, *id.*, "rejected" a plan to target only existing smokers, ¶¶ 380-381, and "overrode other board members' arguments" to end youth marketing, ¶ 39. This Court already dismissed these unsupported assertions,[7] and they are no more convincing the second time around.

In their Opposition, Plaintiffs reargue these[8] assertions, but the allegations cited simply do not support the inferences Plaintiffs seek to draw.[9] For example, on page 3, Plaintiffs state that the Non-Management Directors targeted youth with marketing that they controlled. But the cited allegations, SAC ¶¶ 38-42, are the same ones this Court already rejected – that the Non-Management Directors formed an executive committee, purportedly "overrode" other unidentified

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[6] For example, the minutes of the October 5, 2015 Board meeting document (among other actions) Board approval of employee stock options, capital expenditures, and the appointment of a Board secretary. *See* INREJUUL_00278406 *et seq.* (cited in SAC ¶ 399 n.463). The minutes of the November 10, 2015 Board meeting reflect a Board vote on stock option grants. *See* INREJUUL_00278402 *et seq*. (cited in SAC ¶ 399 n.464).

[7] The Court found allegations that the Non-Management Directors served on an Executive Committee and "made reporting structure decisions, . . . [and] helped 'manage people,'" insufficient to connect them to the direction or control of any unfair *acts* or youth-targeted marketing *acts*." Order at 92–93.

[8] Plaintiffs continue to cite the "more aggressive rollout and marketing" allegation (Opp. at 45) that the Court has already rejected, and even though the Non-Management Directors have pointed out that the cited slide deck was drafted by JLI officers, not any Non-Management Director, and relates to a cannabis strategy that was never pursued. *See* Non-Management Directors in the Motion to Dismiss the SAC ("Mot.") at 7 n.7, ECF No. 1221-3.

[9] In some instances, no allegation is cited. *See, e.g.,* Opp. at 12 (stating with no support that "Defendants" created a cover scheme in order to protect JUUL from public scrutiny).

board members who opposed youth marketing, dismissed other leaders, and took over the Company. Merely reiterating the same allegations does not solve the fundamental defect: it does not explain what the Non-Management Directors allegedly *did* to "override" these (unspecified) "other" board members. Neither "manag[ing] people," Order at 93, nor discussing an investment by Altria, is enough to state a claim.

Similarly, Plaintiffs' argument (at 5) that Mr. Pritzker "participated in planning discussions" about getting JUUL products into "the hands" of youth is not supported by the cited allegations, SAC ¶¶ 372-373, 898, which do not mention youth or teens.[10] Paragraph 372 of the SAC alleges that the Non-Management Directors discussed "the addiction issue" with executives. As this Court held, "identify[ing] a few internal comments made by the" Non-Management Directors that "show their general awareness of" issues such as addiction and "youth-targeting" is insufficient without "factual allegations of specific *conduct* of youth-targeting committed by, [or at the direction of]" those defendants. Order at 93.

No such conduct is alleged. Paragraph 373 merely states that the Board met in 2015 and discussed JLI's marketing – a routine, proper Board activity – and the cited Board presentation contradicts Plaintiffs' allegations, identifying JLI's "target consumer" as "25-34 year old premium-focused, innovation-driven and trend-setting socially active consumer."[11] Paragraph 375 does not mention teens, youth, or allege wrongdoing – it describes a Board discussion of innovation.[12] And paragraph 377 merely recites the same legal conclusion – that the Board "reviewed and approved" marketing – without identifying a Board vote or other action, as this Court required.[13]

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[10] *See also* Opp. at 44 (citing ¶¶ 382, 384-387 of the Three Village Complaint ("TVC"), which are identical to ¶¶ 373, 375-378 of the SAC).

[11] JLI00212013 (cited in JLI00212009).

[12] This Court has already held (Order at 93) that the allegation (¶¶ 313, 376) that the Board made "some commentary at the youthfulness of the models[,]" is insufficient.

[13] Dr. Huh was not even on the Board when these meetings occurred. Plaintiffs therefore continue (at 26, 44) to repeat the allegation that Dr. Huh said the Company "couldn't be blamed for youth nicotine addiction," even though the Non-Management Directors pointed out (Mot. at 12) that Plaintiffs omit the rest of the sentence quoted in the article: "*because it did not*

Plaintiffs try to bolster the allegations this Court already deemed inadequate by arguing (at 4, 44) that the Non-Management Directors were unusually "involved" board members, citing an email – not to or from any of them – in which a JLI executive allegedly worried that "the board [will] try and write copy." SAC ¶ 368. This allegation does not describe any actionable behavior by the Non-Management Directors or anyone else. "Writing copy" is not unlawful, and the SAC does not even allege that the Board ever "wrote copy." Once again, Plaintiffs offer no allegations that any Non-Management Directors actually did anything. Beyond that, Plaintiffs grossly mischaracterize the cited email, JLI00206239 (from June 2015), in which a JLI executive told the head of marketing about "scenarios that would have you revisit the branding (or dramatically adjust the messaging)" for JUUL based on the August 2015 sales results and suggested that "[i]f you had a one-page example of how the branding would change, we could lead that discussion, should it happen, rather than having the board try and write copy." The executive wrote that "[t]he JUUL brand has come up as a discussion point at each board call this month, but never as a top level concern," and that there was "always a comment, but never a deep discussion." The full text of the email affirmatively *contradicts* Plaintiffs' theory that the Board sought to control the Company's marketing.[14]

intentionally advertise or sell to teens" (quoting Chris Kirkham, *Juul Disregarded Early Evidence It Was Hooking Teens*, Reuters (Nov. 5, 2019), https://www.reuters.com/investigates /special-report/juul-ecigarette/ (emphasis added)).

[14] Plaintiffs also fail to offer any opposition to arguments raised by the Non-Management Directors that Plaintiffs mischaracterized this particular document. *See* Mot. at 12 n.14. Accordingly, the Plaintiffs concede this argument, and the Court should dismiss this allegation. *See Suarez v. Bank of Am. Corp.*, 2018 WL 2431473, at *7 (N.D. Cal. May 30, 2018) (quoting *Roy v. Contra Costa County*, 2015 WL 5698743, at *3 n.7 (N.D. Cal. Sept. 29, 2015) ("When a non-moving party's opposition to motion to dismiss fails to address the moving party's arguments regarding certain claims, the non-moving party has conceded that those claims fail."))). Likewise, Plaintiffs do not contest the Non-Management Directors' argument that Plaintiffs mischaracterized the document offered in support for their allegation that Valani sought to "debunk" certain studies, *see* Mot. at 14 n.15, or that they mischaracterized the management presentation cited in support of the allegation that the Non-Management Directors pushed for "more aggressive rollout and marketing," *see id.* at 7 n.7.

2. The Court Must Disregard the Conclusory Allegations that the Non-Management Directors Engaged in a "Flavor Preservation Scheme" or Any Other Scheme

Plaintiffs' attempt (Opp. at 27–28) to link Mr. Pritzker and Mr. Valani to a "scheme" to preserve the mint flavor fails, because the SAC contains no facts plausibly linking those defendants to any alleged "flavor preservation" scheme. The allegations Plaintiffs cite (¶¶ 621-638, 648-654, 924) do not mention the Non-Management Directors, and they are related to a study that no facts indicate any Non-Management Director even knew about. The only allegation in the SAC even arguably related to this topic is that an Altria executive wrote a letter about mint to the FDA and thereafter sent a copy of this public letter to Mr. Pritzker and Mr. Valani. ¶ 646.[15]

Unable to identify a single action allegedly taken by Mr. Pritzker and Mr. Valani, Plaintiffs claim (at 12) that *JLI* sent a letter to the FDA concerning the mint flavor "at the direction" of Mr. Pritzker and Mr. Valani, but the document that the SAC cites in support of its conclusory allegation does not even mention a letter, the FDA, or mint. *See* SAC ¶ 927 n.926. Nothing else in the SAC supports the claim that any Non-Management Director "directed" JLI to send a letter to the FDA about mint.

Similarly, the handful of allegations of concrete actions by the Non-Management Directors contradict the SAC's claims that they were promoting youth marketing and engaging in "sham" youth prevention activities or a "cover-up scheme." Plaintiffs argue (at 13, 28) that Mr. Pritzker and Mr. Valani edited press releases about youth prevention activities and "approved" an op-ed stating that JLI did not want to sell to youth. The cited allegations do not describe actionable or fraudulent conduct and contradict Plaintiffs' allegations that these Non-Management Directors sought to sell JUUL products to underage users. Nowhere in the SAC do Plaintiffs identify a single action the Non-Management Directors took suggesting that they intended JLI's youth prevention efforts to be a sham. The same is true of allegations regarding the Non-Management Directors' involvement in the "Make the Switch" campaign. *See supra* Part I.A.1.

[15] The Court already rejected as a basis for liability the recycled allegation that Mr. Pritzker and Mr. Valani invested in JLI in a funding round in order "to further" the "goal" of preserving the mint flavor. SAC ¶ 183.

Plaintiffs' argument that Mr. Valani directed a "misinformation" strategy (Opp. at 12–13, 28) relies on the allegation (SAC ¶¶ 414, 936) that Mr. Valani urged management to "debunk" studies linking e-cigarette use in teens to increased likelihood of trying combustible cigarettes. This allegation distorts the document on which it relies, JLI00147328, in which Mr. Valani wrote that he agreed with Mr. Monsees' question (in a prior email) whether the "data here not actually suggesting causation, only correlation?" *Id.* Raising legitimate questions about the interpretation of data does not violate consumer protection law, RICO, or any legal duty. The same email demonstrates that Mr. Valani supported raising the age for tobacco use and adding executive positions focused on combatting youth access. This further undermines the claim that he supported selling to youth.

II. THE COURT SHOULD DISMISS THE RICO CLAIMS WITH PREJUDICE

A. The SAC Does Not Plausibly Allege that the Non-Management Directors Conducted the Affairs of an Enterprise or Knowingly Participated in a Scheme to Defraud

Plaintiffs concede (at 25) that they have not identified a single specific false statement made by any Non-Management Director. Plaintiffs further concede (at 25–26) that they have not pointed to a single Board vote made in furtherance of wrongdoing by the Company. This should end the inquiry, and, in the Court's previous Order, it did. Still lacking any false statement by the Non-Management Directors and any "Board vote or other *action*" controlled by them, Order at 53, Plaintiffs now argue they do not need either, because the Non-Management Directors controlled JLI through their alleged control of the Board.

Plaintiffs' argument (at 28–29) that they need not allege the directors were "conducting the affairs of an enterprise distinct from JLI," and that it is enough to show that the Non-Management Directors "controlled JLI," reveals that Plaintiffs' "final say" theory remains at the heart of their RICO claims. Plaintiffs' argument proves too much, because *every* board of directors would be subject to that condition. It cannot be the case that plaintiffs can drag board members into a RICO case simply by alleging a company committed some business fraud, naming the company as the enterprise and then alleging that the board controlled the company or participated in conducting the company's affairs. The Court has already rejected Plaintiffs' "final say" theory as

"insufficient as a hook for conduct of" an alleged RICO Enterprise, and it should do the same here. Order at 50; *see also id.* at 52–53.

Plaintiffs reiterate the same conclusions this Court already found wanting, including the unsupported allegation that the Non-Management directors "rejected" an approach of targeting existing smokers and that the "debate was resolved in favor of selling to teens . . . [a]lthough JLI's highly sanitized Board minutes do not reflect whether this debate was put to a vote." Opp. at 29 (citing SAC ¶¶ 380-382). *See* Order at 53 (reference to the "'Board's decision' in October 2015 to resolve the alleged internal JLI debate . . . to specifically target teens (allegedly supported by Huh and unnamed others)" is insufficient to state a RICO claim against any Non-Management Director.

The SAC, like its predecessor, fails to plausibly allege that each Non-Management Director knowingly participated in or conducted a scheme to defraud. Plaintiffs' argument (at 29–30) that "participating in meetings" in which marketing – or even concerns about youth marketing – was discussed is enough to state a RICO claim flies in the face of this Court's holding. *See* Order at 54 (the Non-Management Directors "can be held liable only if they personally participated, authorized, or directed specific fraudulent acts or under RICO conducted or directed specific acts of the distinct Enterprise separate and apart from routine business conducted by the Directors as a consequence of their positions on the Board"). Plaintiffs must allege either personal participation in specific fraudulent acts, or plausibly allege that the Non-Management Directors conducted specific acts that were "separate and apart from routine business" of Board members. *See River City Markets, Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1463 (9th Cir. 1992) (holding that a "routine business arrangement" does not give rise to RICO liability); *Shaw v. Nissan N. Am., Inc.*, 220 F. Supp. 3d 1046, 1054 (C.D. Cal. 2016) ("Courts have overwhelmingly rejected attempts to characterize routine commercial relationships as RICO enterprises.").

Plaintiffs rely (at 29–30) on an unpublished District of Arizona case, *Cellco Partnership v. Hope*. But this case is distinguishable, because the individual defendants there were alleged to have met to discuss "setting up . . . 'silo' companies" (in order to deceive the plaintiff company) and the "concealment of [those companies] from" the plaintiff. 2012 WL 260032, at *9 (D. Ariz.

Jan. 30, 2012), *on reconsideration in part*, 2012 WL 715309 (D. Ariz. Mar. 6, 2012). The individuals also discussed developing "cloaking software," and one of them tested the software to "deflect [the plaintiff's] auditors." *Id.* at *8. The Court dismissed the claims against another individual defendant for lack of facts showing his awareness of the fraud.

In this case, the SAC lacks any analogous allegation of fraud or concealment by any Non-Management Director, much less an overtly fraudulent act like testing software aimed at hiding misconduct. While Plaintiffs have alleged that the Non-Management Directors attended JLI Board meetings where marketing was discussed, they have failed to allege that these meetings were used, as in *Cellco*, to take fraudulent action or adopt fraudulent policies. Indeed, there is no plausible allegation that the Board ever discussed fraud or approved any improper action. Because Plaintiffs have not alleged a plausible factual basis for a claim that any Non-Management Director conducted the affairs of a RICO enterprise or knowingly participated in a scheme to defraud, the Court should dismiss the RICO claims with prejudice.

B. Plaintiffs Do Not State a Cognizable RICO Enterprise

The Court previously held that Plaintiffs had "not plausibly alleged the existence of a distinct Enterprise, separate and apart from the general business of JLI." Order at 45–46. Rather than allege an enterprise distinct from the routine operations of JLI, Plaintiffs reshuffle the RICO players in hopes of making something out of nothing, now alleging that "JLI" itself "was the vehicle" or "enterprise" that the RICO Defendants used for their "fraudulent schemes." Opp. at 18. This does not help, because the SAC still plausibly alleges only that the Non-Management Directors "conducted the 'regular business' of the corporate entity or business in their own interests" as board members. Order at 40. Plaintiffs emphasize (at 18) that "the law recognizes a distinction between legitimate business activity and the operation of a fraudulent scheme," but their allegations describe only the Non-Management Directors' participation in JLI's ordinary business dealings. Plaintiffs' failure to allege a plausible RICO enterprise is an additional and independent ground for dismissing the RICO claim.

Gardner v. Starkist Co. is instructive. There, the plaintiffs alleged that the enterprise "concocted a scheme" to "fraudulently market, advertise, and label StarKist tuna products as

sustainably sourced and dolphin-safe in order to deceive consumers and retailers." 418 F. Supp. 3d 443, 460 (N.D. Cal. 2019). Plaintiffs said that "this was done so that the enterprise could sell StarKist tuna products throughout the United States, increase their revenues, and minimize their costs." *Id.* at 460–61. But "[s]imply characterizing routine commercial dealing as a RICO enterprise [was] not enough." *Id.* at 461. So too here. *See also In re Jamster Mktg. Litig.*, 2009 WL 1456632, at *5 (S.D. Cal. May 22, 2009) (explaining plaintiffs could not "meet their particularized pleading burden by artfully inserting modifiers such as 'unauthorized charges' or 'fraudulently collecting monies,'" because "[w]ithout the adjectives . . . the allegations allege conduct consistent with ordinary business conduct and an ordinary business purpose").

With no accompanying explanation, Plaintiffs cite (at 18) *Menzies v. Seyfarth Shaw LLP* to support their conception of a RICO enterprise. But the RICO enterprise there was predicated on "interactions" that "extend beyond those typical of normal commercial relationships." 197 F. Supp. 3d 1076, 1094 (N.D. Ill. 2016). For example, the court explained that the defendants "marched Plaintiff through a series of scripted steps to create tax shelters" to include "a series of loans, unsecured structured notes from" a bank, and the "creation and use of trusts and other devices" that the IRS characterized as "elements of an abusive tax shelter with 'the primary purpose' to disguise the ownership of the stock." *Id.* at 1084–91. In stark contrast to *Menzies*, Plaintiffs here fail to allege anything more than routine commercial dealings.

Second, Plaintiffs do not adequately plead the existence of an enterprise "separate and apart" from the alleged "pattern of [racketeering] activity in which it engages," *Doan v. Singh*, 617 F. App'x 684, 686 (9th Cir. 2015).[16] Throughout the SAC, Plaintiffs blur any distinction between JLI (the Enterprise) and the alleged fraudulent activity. For example, Plaintiffs allege that "*JUUL*

[16] The Plaintiffs assert that "Distinctness is no longer an issue" since they "now allege a corporate, rather than association-in-fact" enterprise. Opp. 16. Plaintiffs are referring to the requirement that to establish liability under § 1962(c), "one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005). But even if Plaintiffs sufficiently meet that requirement, it does not absolve them of the necessity to separately allege a RICO enterprise that is "separate and apart" from the alleged racketeering activity. *See Doan*, 617 F. App'x at 686.

created and implemented a scheme to create a market for e-cigarettes . . . through a pervasive pattern of false and misleading statements and omissions." SAC ¶ 828. In the Introduction, Plaintiffs assert that "[t]here is no doubt about it—JLI" along with the other Defendants "created this public health crisis." *Id.* ¶ 9.[17] If JLI *itself* perpetrated the allegedly fraudulent schemes, as the SAC alleges, then Plaintiffs cannot satisfy the requirement that a RICO enterprise remain "separate and apart" from the alleged racketeering activity. *See Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 939 n.7 (N.D. Cal. 2012) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart."). Plaintiffs removed JLI as a RICO Defendant or "person" (CAC ¶ 705) in order to circumvent the requirement that an enterprise "must still be conceptually 'distinct' from the RICO persons identified as conducting the RICO enterprise." *North Star Gas Co. v. Pacific Gas and Electric Co.*, 2016 WL 5358590, at *19 (N.D. Cal. Sept. 29, 2016) (citation omitted). But this inconsistency – that for certain causes of action, JLI is a Defendant,[18] whereas for RICO, it is merely a passive vehicle – underscores the flaws in Plaintiffs' conceptualization of the RICO enterprise and highlights that Plaintiffs cannot plausibly allege that the Non-Management Defendants did anything other than ordinary business activity.

Finally, Plaintiffs fail to plead facts supporting a plausible inference that any Non-

[17] This case is thus different from *DeFalco v. Bernas*, 244 F.3d 286 (2d Cir. 2001). Plaintiffs rely on *DeFalco* for the proposition that a legal entity can have legitimate functions yet still operate as a RICO enterprise due to its fraudulent schemes. *See* Opp. 19. In *DeFalco*, the court was able to reach the conclusion that "the Town of Delaware, [the RICO enterprise], was the 'passive instrument or victim of [ ] racketeering activity.'" 244 F.3d at 307. The Town of Delaware was merely the vehicle by which the RICO defendants utilized to "grant or den[y] approval for aspects of the plaintiffs' development." *Id.* at 309. The Town of Delaware took no nefarious actions; rather, it was individual defendants like the Planning Board Chairman who commandeered his legitimate city position for illegitimate purposes. *See id.* at 295. Here, Plaintiffs allege that *JLI* orchestrated "this disastrous epidemic." SAC ¶ 9. Furthermore, unlike in this case, the alleged racketeering activity in *DeFalco* could not be characterized as the "regular business" of a corporate entity. In *DeFalco*, the defendants used their Town positions for extortion, repeatedly threatening economic loss unless plaintiffs followed their "suggestions." *DeFalco*, 244 F.3d at 314.

[18] For example, under the cause of action for violation of California's Unfair Competition Law, Plaintiffs bring this claim "against JLI," in addition to all other Defendants. SAC ¶ 784.

Management Director conspired to violate RICO. *See* 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire or violate any of the [other RICO] provisions."). As discussed, *see supra* Part II.A., Plaintiffs offer only conclusory allegations that the Non-Management Directors engaged in actions resembling an "agreement," *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 774 (9th Cir. 2002), to violate RICO. Plaintiffs' only retort is that "no formalized agreement is required." Opp. at 41. But without any Board vote, let alone a single statement uttered by any Non-Management Director suggesting agreement to commit racketeering, Plaintiffs lack *any* agreement – formal, informal, or plausibly "inferred." *Oki Semiconductor*, 298 F.3d at 775.

III. THE COURT SHOULD DISMISS THE CALIFORNIA UCL AND UNJUST ENRICHMENT CLAIMS WITH PREJUDICE

A. Plaintiffs Fail to State UCL Claims Against the Non-Management Directors

This Court provided Plaintiffs with a clear roadmap for alleging UCL claims against the Non-Management Directors: To "plausibly allege UCL conduct," Plaintiffs needed either (1) "specific allegations" of "specific acts" of wrongdoing by the "Executive Committee," or (2) "specific acts" of wrongdoing by the JLI Board, coupled with plausible allegations that the Non-Management Directors "direct[ed] or control[led]" those "specific acts." Order at 94.[19] Yet as with the CAC, the SAC contains "no allegation of a Board vote or other [Board] *action* identified" that is related to any alleged UCL violation by JLI. Order at 92 (emphasis in original); *see supra* Part I; Mot. at 4–14. And "there are no factual allegations of specific *conduct* of youth-targeting committed by, at the direction of, or even with the specific knowledge of the Other Director Defendants during" the short "Executive Committee" period. Order at 93 (emphasis in original); *see supra* Part I; Mot. at 4–14. Because Plaintiffs did not – and cannot – plausibly

[19] Plaintiffs criticize the Non-Management Directors (at 41 n.19) for hewing to the roadmap that the Court articulated after extensive briefing, and Plaintiffs cite *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 816 (9th Cir. 1996) as a purported example of relevant case law that the Non-Management Directors do not discuss. But *Yost* involved the Lanham Act, *not* the UCL.

allege the specific acts or conduct necessary to sustain UCL claims against the Non-Management Directors, the Court should dismiss those claims with prejudice.[20]

The Court also should dismiss the UCL claims with prejudice for failure to plead the factual predicates for restitution, which is the only UCL remedy that Plaintiffs seek from the Non-Management Directors.[21] Restitution under the UCL "requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other." *Phillips v. Apple Inc.*, 725 F. App'x 496, 498 (9th Cir. 2018) (quoting *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 895 (Cal. 2011)). The SAC fails to allege that any Non-Management Director has "acquired" any "money or property," either directly or indirectly, that has been "lost by a plaintiff." *See*, *e.g.*, *id.* at 499 ("Absent any allegation that Apple directly or indirectly received the money plaintiffs paid their wireless carriers for excess data usage, they are not entitled to restitution, and the district court properly dismissed their UCL and FAL claims.").

Plaintiffs argue incorrectly (at 42) that the Court rejected the argument that funds allegedly received by the Non-Management Directors from Altria's minority investment in JLI cannot support restitution.[22] To the contrary,[23] the Court recognized that a decision permitting restitution

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[20] The Court should ignore Plaintiffs' conclusory assertion (at 42) – contradicted by their own factual allegations and the documents on which they rely – that the Non-Management Directors "fraudulently marketed the product and participated in the targeting of youth as a means of positioning JLI for acquisition and the ultimately made millions or billions of dollars as a culmination of those efforts."

[21] Plaintiffs insist (at 42) that "there is no basis to dismiss the [UCL] claim with prejudice," because "discovery is ongoing." But this Court already dismissed the claim once and allowed Plaintiffs to amend. That was the same course taken in two cases cited by Plaintiffs. *See Yasukochi v. Bank of Am., N.A.*, 2016 WL 4508220, at *7 (S.D. Cal. Apr. 27, 2016) (giving plaintiffs an opportunity to file an amended complaint within 14 days); *Phillips v. Apple Inc.*, 2016 WL 5846992, at *11 (N.D. Cal. Oct. 6, 2016) (granting leave to amend), *aff'd*, 725 F. App'x 496 (9th Cir. 2018). Despite the benefit of millions of pages of documents, Plaintiffs *still* fail to plead the factual prerequisites for restitution from the Non-Management Directors. Thus, dismissal with prejudice is the appropriate course. *See*, *e.g.*, *Matter of Martin*, 2019 WL 3555088, at *1 (N.D. Cal. Aug. 5, 2019) (Orrick, J.) (dismissing complaint with prejudice because plaintiff had already had an opportunity to amend).

[22] Plaintiffs focus on the Court's discussion of "indirect purchasers." *See* Opp. at 42 (quoting Order at 97). This is a red herring. The Non-Management Directors have never argued that restitution under the UCL requires direct payment.

[23] This issue was briefed in the Non-Management Director Defendants' Motion to Dismiss

from the Non-Management Directors based on such allegations would be unprecedented. Order at 98–99. Indeed, because any funds that the Non-Management Directors allegedly acquired based on that facially legitimate transaction were never held by Plaintiffs in the first place, they cannot be "restor[ed]" to plaintiffs. *Kwikset*, 246 P.3d at 895; *see also Apple*, 725 F. App'x at 498; *Madrid v. Perot Sys. Corp*., 30 Cal. Rptr. 3d 210, 221 (Cal. App. 2005) (rejecting the position that the plaintiff "could recover money [the defendant] received from third parties," as "restitution [in the UCL context] means the return of money to those persons from whom it was taken or who had an ownership interest in it").[24] Under Ninth Circuit and California law, any funds received from Altria cannot be the basis for a restitution order.

Plaintiffs also incorrectly suggest (at 42) that the Court held it would not grant a motion to dismiss the UCL claims on restitution grounds. To the contrary, the Court expressed "serious concerns whether restitution could be appropriate against" the Non-Management Directors, regardless of whether plaintiffs pleaded the factual prerequisites for restitution, but stated that it would confront that issue only "if plaintiffs are able to amend to state UCL claims against" the Non-Management Directors. Order at 99. To state such a claim, Plaintiffs must plead a claim for restitution. They have not done so.

B. Plaintiffs Fail to State Unjust Enrichment Claims Against the Non-Management Directors

Unjust enrichment under California law is "synonymous with 'restitution.'" *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 762 (9th Cir. 2015). Thus, for the same reasons that Plaintiffs fail to state a claim for UCL restitution, *see supra* Part III.A, Plaintiffs fail to state unjust

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Class Action Complaint, at 23, ECF No. 748; Non-Management Director Defendants' Reply in Supp. of Mot. to Dismiss Class Action Complaint, at 17 n.7, ECF No. 872.

[24] In *Cabebe v. Nissan of N. Am., Inc.*, 2018 WL 5617732 (N.D. Cal. Oct. 26, 2018), this Court stated that it agreed with the decision in *Shersher v. Superior Court of Los Angeles County*, 65 Cal. Rptr. 3d 634 (2007), which held that the UCL "requires only that the plaintiff must once *have had an ownership interest* in the money or property *acquired by the defendant* through unlawful means." *Id.* at 641 (emphasis added). When discussing UCL restitution in its Order, the Court cited *Cabebe*. *See* Order at 97.

enrichment claims.[25]

Plaintiffs' assertion (at 43) that the Non-Management Directors somehow misled the Court about the Ninth Circuit's holding in *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023 (9th Cir. 2016) is not well taken. In that case, the Ninth Circuit noted that "California case law appears unsettled on the availability of" unjust enrichment as an independent "cause of action," but that "this Circuit has construed the common law to allow an unjust enrichment cause of action through quasi-contract." *Id.* at 1038. To allege a claim, the court explained that "a plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff's expense." *Id.* That is the standard for restitution, which Plaintiffs cannot meet. *See Astiana*, 783 F.3d at 762 (explaining that "unjust enrichment and restitution" "describe the theory underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request" and that "[t]he *return of that benefit* is the remedy typically sought in a quasi-contract cause of action" (emphasis added) (internal quotation marks omitted)); *Ghirardo v. Antonioli*, 924 P.2d 996, 1003 (Cal. 1996) ("Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. A person is enriched if he receives a benefit at another's expense." (internal citation omitted)).

IV. THE COURT SHOULD DISMISS THE GOVERNMENT ENTITY PLAINTIFFS' PUBLIC NUISANCE, NEGLIGENCE, AND CONSUMER PROTECTION CLAIMS WITH PREJUDICE

The Government Entity Complaints fail for the same reasons as the SAC. *See supra* Part I. The SAC and amended Government Entity Complaints are functionally identical and suffer from the same defects that remain unremedied after the Court's order on dismissal. Government Entity Plaintiffs point to allegations that the Board "discussed" or "reviewed" marketing, TVC ¶¶ 382, 384-387, 394, that Mr. Valani redlined a press release, *id.* ¶ 425, and that Dr. Huh discussed his "Vision for the company" at a Board meeting, *id.* ¶ 410. Plaintiffs also make the particularly thin

[25] In a footnote, plaintiffs suggest – without any support – that "nonrestitutionary disgorgement" might be available via unjust enrichment. Opp. at 43 n.20. The Non-Management Directors are not aware of any authority that would allow the Court to grant a *nonrestitutionary* remedy on a theory that is "*synonymous with* '*restitution*.'" *Astiana*, 783 F.3d at 762 (emphasis added).

claim that Mr. Pritzker managed "JLI's influencers," Opp. at 45, but they cite for support only that Mr. Pritzker was copied on an email from a bass player in his fifties – not anyone connected to youth or teens. TVC ¶ 422. These conclusory allegations describe no wrongdoing and cannot support liability against any Non-Management Director.

V. THE COURT SHOULD DISMISS THE NON-CALIFORNIA ACTIONS AGAINST MR. PRITZKER AND MR. VALANI AND THE NON-FLORIDA ACTIONS AGAINST DR. HUH FOR LACK OF PERSONAL JURISDICTION

Plaintiffs seek to limit this Court's ruling on personal jurisdiction to the bellwether plaintiffs. But they offer no reason to impose that artificial limit. Plaintiffs chose to supersede the pleadings in all prior individual actions. *See Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015) (when plaintiffs "elect to file a 'master complaint'" – as they have done here – they "supersede prior individual pleadings" and "the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings"). All those actions – not just those brought by the class representatives and the bellwether government entity plaintiffs – will "resume their separate identities," *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 592 (6th Cir. 2013), when they return to their original fora for trial, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998). The Non-Management Directors accordingly moved to dismiss them all here.

In their Opposition, Plaintiffs point to no facts showing any Non-Management Director participated – much less was the primary participant – in alleged wrongdoing. The Government Entity Complaints, like the SAC whose allegations they mirror, lack any such facts. Accordingly, Plaintiffs cannot carry their burden of making a prima facie case for jurisdiction over the Non-Management Directors.[26]

CONCLUSION

For these reasons, the Court should dismiss all claims against the Non-Management Directors with prejudice. The Court additionally should dismiss without leave to amend the non-

[26] Plaintiffs' argument for pendent personal jurisdiction fails because Plaintiffs' RICO claims fail. *See supra,* Part II.

California actions against Mr. Pritzker and Mr. Valani and the non-Florida actions against Dr. Huh.

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Respectfully Submitted,

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