REDACTED

[Submitting Counsel on Signature Page]

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:

San Francisco Unified School District v. JUUL Labs, Inc., et al.

Case No. 3:19-cv-08177-WHO

Case No. 19-md-02913-WHO

PLAINTIFF'S MOTION IN LIMINE

Judge: Hon. William H. Orrick
Date: October 24, 2022
Time: 2:00 PM
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RULES

Plaintiff respectfully submits the following in limine motions to admit specific evidence (*Section I*) and to exclude matters that are inadmissible, irrelevant, or unduly prejudicial, whether introduced through evidence or argument (*Section II*). To be admissible under Fed. R. Evid. 402, evidence must be relevant, meaning that it "has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. These limitations apply to attorney argument just as they do to evidence. *See, e.g., Nat'l Prods., Inc. v. Arkon Resc., Inc.*, No. 18-2936, 2019 WL 12536044, at *8 (C.D. Cal. March 25, 2019) (granting motion in limine to preclude "evidence or argument" where "[t]he probative value, if any, of Defendant's argument and line of reasoning for introducing such evidence is outweighed by the potential for jury confusion, including jury confusion about what is required to [establish the plaintiff's claim]."); see also, e.g., *Draper v. Rosario*, 836 F.3d 1072, 1083 (9th Cir. 2016) (noting the impropriety in civil cases of attorney argument "relying on evidence outside the record").

I. PLAINTIFF'S *MOTIONS IN LIMINE* TO ADMIT EVIDENCE

A. THE COURT SHOULD ADMIT NOTES TAKEN BY JLI BOARD MEMBER AND INVESTOR ZACHARY FRANKEL AT A JULY 2017 MEETING WITH ALTRIA EXECUTIVES HOWARD WILLARD AND BILLY GIFFORD

The notes reflect party-opponent statements and therefore are not hearsay and should be admitted for all purposes. (Exhibit 1). Alternatively, the notes are admissible as present sense impressions exempt from the hearsay rule.

1. Background

On July 28, 2017, there was a meeting between representatives of JLI and Altria. Riaz Valani, Isaac Pritzker, and Zachary Frankel attended for JLI. (Exhibit 2, Frankel Dep. at 478:12-22). Altria attendees were Howard Willard and Billy Gifford. *Id.* While there were countless other meetings over the many months of confidential, back-channel negotiations between Altria and JLI's investors, this one was different: someone took notes.

Frankel recorded (in his words, "jotted down," Ex. 2) what Altria told JLI's investors. His "notes are disjointed" and employ shorthand, atypical punctuation, and occasional capitalization, reflecting that they were a real-time recording of Altria's statements. (Ex. 2, Frankel Dep. at 589:18-590:12) ("[*id.* at 591:3-6 ("[."). The notes reflect that and that Altria encouraged JLI to " " (Ex. 2). Mr. Frankel emailed his notes to Tyler Goldman, Isaac Pritzker, Valani, and Nicholas Pritzker. (Ex. 1).

2. Altria Executives' statements are Altria party-opponent statements.

Willard and Gifford's statements to Frankel and others at the meeting are non-hearsay statements by a party opponent. Statements "offered against an opposing party" and "made by the party's agent or employee on a matter within the scope of that relationship" are not hearsay. Fed. R. Evid. 801(d)(2). Willard and Gifford—then Altria's COO and senior VP of strategy respectively, and both future CEOs—made the statements described in Frankel's notes in their authorized and representative capacity on behalf of Altria for the purpose of accomplishing its investment into JLI. (Exhibit 3, Gifford Dep. at 23:19-25, 68:19-23) (describing Willard as the for Altria and self). Statements made by agents or employees negotiating a contract on behalf of a corporate defendant are statements of an opposing party. *See Bullard v. Wastequip Mfg. Co. LLC*, No. 14-1309, 2015 WL 12766467, at *2 n. 18 (C.D. Cal. April 14, 2015) (statements by two employees of corporation negotiating employment contract).

In *in limine* briefing for the *B.B.* trial, Defendants argued that the notes cannot be understood to reflect Altria statements, citing *In re Cirrus Logic Sec. Litig.*, 946 F. Supp. 1446, 1469 (N.D. Cal. 1996). But in *Cirrus*, the analyst whose notes were at issue "testified that his notes contain his interpretations and analyses of conversations." *Id.* at 1469. Here, in contrast, Frankel testified that he ." (Ex. 2 Frankel Dep. at 487:13-15). In particular,

Frankel confirmed that [redacted] *Id.* at 579:5-6, 588:16-17. Further, Isaac Pritzker and Valani, who were present at the meeting, never disputed the accuracy of Frankel's notes. (Ex. 1).

3. Frankel's notes are JLI party-opponent statements.

Frankel's statements are admissible against JLI as a party-opponent admission. Frankel was a JLI board member and proxy for Valani. (Ex. 2, Frankel Dep. at 43:9-20 ("[redacted])); *id.* at 51:21-53:2 ([redacted]); *id.* at 69:25-72:8 ([redacted]). He circulated his notes to keep the JLI board and investors abreast of the progress of the Altria venture. *Id.* at 567:21-568:1 ([redacted]"); *id.* at 568:11-15 ("[redacted]."); *id.* at 570:12-16 ("[redacted]").

4. Frankel's notes are admissible against Altria and the Individual Defendants as statements of a co-conspirator.

Frankel's notes are admissible against the non-JLI Defendants as a statement by a co-conspirator in furtherance of the conspiracy. A statement is admissible if it "was made by the party's co-conspirator during and in furtherance of the conspiracy" and meets the other requirements of Fed. R. Evid. 801(d)(2). The proponent need not prove an illegal conspiracy for evidence to be admissible: the rule "applies to statements made during the course and in furtherance of any enterprise, whether legal or illegal, in which the declarant and the defendant jointly participated." *United States v. Layton*, 855 F.2d 1388, 1400 (9th Cir. 1988); *see also, e.g.*, *United States v. Chen*, 548 F. sup. 3d 904, 906-07 (N.D. Cal. 2021) ("[T]he question is merely whether there was proof of a sufficient concert of action to show the individuals to have been engaged in a joint venture.") (citation and alteration omitted).

Here, Altria and the Individual Defendants (for one of whom Frankel was a proxy) engaged in a joint venture to maximize the sales of JUUL. (*See, e.g.*, Exhibit 4, Willard Ltr. (by [redacted]")); (Exhibit 5, ALGAT0004031644 (Altria communication regarding [redacted])); *see also* Pl. S.J. Opp'n at 8-11, 33-40. Frankel's notes reporting on the meeting were made in furtherance of the venture. *See, e.g.*, *Chen*, 548 F. Supp. 3d at 908 ("Statements can further a conspiracy in a number of ways."); *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991) (listing examples, including "statements made to keep co-conspirators abreast of an ongoing conspiracy's activities").

In *B.B.* briefing, Altria contended that Frankel's notes are hearsay because they are "inherently untrustworthy," citing *Winslow v. Gen. Motors Corp.*, 2003 WL 25676481 (E.D. Ark. March 20, 2003). In *Winslow*, a handwritten note reflected someone's words; the author "could not recall who may have expressed these words but suggested it might have been" one of three GM employees. *Id.* at *3. Not only was there no "evidence of the source" of the statement, but even accepting the "suggestion" that it was one of three GM employees, the failure to identify the specific individual meant the court could not determine within the scope of the person's duties. *Id.* Here, in contrast, we know the statements came from either Willard or Gifford, either of whom, as a lead negotiator, acted within the scope of their agency.

5. <u>Even if hearsay, Frankel's notes are admissible as a present sense impression.</u>

An exception to the rule against hearsay is for statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). In applying the exception, courts "consider spontaneity or contemporaneity as an indicium of reliability." *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1036 (N.D. Cal. 2006) (citations omitted). Frankel described the notes in his email as [redacted]" (Ex. 1). Although Frankel claimed [redacted], (Ex. 2, Frankel Dep. at 483:5-13) their "disjointed" nature and use of shorthand implies that there was no reflection or editing. *See*

id. (notes were taken in bullet points, with several capitalization errors and numerous uses of shorthand abbreviations); *see also, e.g.*, *Tracinda Corp. v. DaimlerChrysler AG*, 362 F. Supp. 2d 487, 502 (D. Del. 2005) (notes admissible because "while [the note-taker] was not asked to be a stenographer for the meeting, he contemporaneously recorded what transpired"); *Steffens v. Regus Grp., PLC*, 2013 WL 4499112, at *18 (S.D. Cal. August 19, 2013) ("notes from a conversation or meeting *may* satisfy the present sense impression exception."). In *B.B.* briefing, Defendants relied on *Duncan v. Woodford*, 2003 WL 27388812 at *7 (C.D. Cal. December 24, 2003), where a memo-to-file was written a full day after a conversation. Here, all indications are that the notes were taken during the meeting itself, so the notes were "nearly contemporaneous with the incident described and made with little chance for reflection." *Boyd*, 458 F. Supp. 2d at 1036 (citation omitted).

6. Alternatively, Frankel's notes can be admitted for a non-hearsay purpose.

Frankel's notes, even if inadmissible for some purposes, are admissible to show, for example, that the meeting occurred, what JLI and the Individual Defendants took away from the meeting, and the motivation behind their subsequent actions.

B. THE COURT SHOULD ADMIT EVIDENCE RELATED TO PHILIP MORRIS INTERNATIONAL WITH RESPECT TO JLI'S YOUTH PREVENTION EFFORTS AND MR. CROSTHWAITE'S ASSUMPTION OF THE ROLE OF CEO

During the summer of 2019, Altria Group, Inc. ("Altria") and Juul Labs Inc.'s ("JLI's") now-CEO K.C. Crosthwaite were engaged in merger discussions with Philip Morris International ("PMI"). [redacted] This evidence goes directly to the knowledge and intent of both Altria and JLI, as well as Altria's ability to influence and assist JLI. Plaintiff should be permitted to use this evidence at trial.

1. Altria's potential merger with PMI shows Altria's influence over JLI.

Through its discussions with PMI, Altria demonstrated its influence over JLI and [redacted]. This evidence is relevant to all of Plaintiff's claims.

In 2019, Altria was engaged in merger discussions with PMI [redacted]. (Exhibit 6, 30(b)(6) Dep. of Brian Blaylock at 247:6-21, 250:15-25 ([redacted])). Those conversations [redacted]. In the context of these discussions, Altria recognized that [redacted]" (Exhibit 7, Generic Expert Report of Dr. Judith Prochaska (citing ALGAT0005381712)).

[redacted]. (Exhibit 8, ALGAT0004048755). [redacted]. (Exhibit 9, ALGAT0003292500) ([redacted]).

[redacted] (Exhibit 10, ALGAT0003291714).

During this time, [redacted] (Ex. 6, 30(b)(6) Blaylock Dep., 248:7-249:17). [redacted]

[redacted] (Exhibit 11, ALGAT0003901387). [redacted] *Id.* [redacted] (Exhibit 12, 5185259183 at 7, 10-11).

2. PMI provided advice to Altria and Mr. Crosthwaite about JLI's youth problem.

While negotiations were ongoing between Altria and PMI, [redacted]

For example, [redacted] (Exhibit 13, ALGAT0005381535). [redacted] *Id.* [redacted] "(Exhibit 14, ALGAT0003898169). [redacted]

[redacted] *Id.* [redacted] (Exhibit 15, ALGAT0003288497) [redacted]). [redacted] (Exhibit 16, 8031771005). Further [redacted] (Exhibit 17, 8031755117 (emphasis added)).

The evidence highlighted above shows that in 2019, [redacted] For these reasons, the Court should permit evidence of Philip Morris International with [redacted]

3. Alternatively, the PMI evidence can be admitted for a non-hearsay purpose.

The PMI evidence, even if it were hearsay without an exception, should still be admitted for the limited purpose of showing Altria's notice, knowledge, and intent.

C. THE COURT SHOULD ADMIT THE REPORT PREPARED BY THE ENTITY THAT CONDUCTED ALTRIA'S REGULATORY DUE DILIGENCE, GREENLEAF HEALTH

The Greenleaf Report (attached as Exhibit 18, Blaylock Ex. 2406) reflects party-opponent statements and therefore is not hearsay and should be admitted for all purposes. Alternatively, the report is admissible to show Altria's notice, knowledge, and intent.

1. Background

In Fall 2018, Altria [redacted] Greenleaf Health Inc., [redacted]. (*See, e.g.*, Exhibit 19, Blaylock (30(b)(6)) at 64:7-20 (identifying the people in responsible for investing the risk posed by youth vaping during due diligence as "T.J. Edlich, Rob Buell, and Greenleaf"), 82:6-9 ("Greenleaf was a third-party regulatory consulting firm that we brought in to help us engage in due diligence")). Greenleaf was "[redacted] *Id.* at 142:3-145:16, 145:21-146:4; *see also* Exhibit 20, GREENLEAF_00001794 (Executed agreement between Greenleaf and Altria stating Altria [redacted]). Altria's documents confirm that it [redacted]. (*See, e.g.*, Exhibit 21 ALGAT0004995455 ([redacted]"); (Exhibit 22, ALGAT0003648730 (stating that [redacted])); (Exhibit 23, 5185726030 ([redacted]). Greenleaf [redacted]. (Exhibit 24, ALGAT0003776808 ([redacted])); (Exhibit 25, ALGAT0004585353 ([redacted]). [redacted]. (Exhibit 18, Blaylock Ex. 2406). [redacted]

[redacted] *Id.*

2. The Greenleaf Report is an Altria party-opponent statement.

The Greenleaf Report is not hearsay because it represents statements by a party opponent. Statements "offered against an opposing party" and either "made by a person whom the party authorized to make a statement on the subject" or "made by the party's agent or employee on a matter within the scope of that relationship" are not hearsay. Fed. R. Evid. 801(d)(2).

"Multiple courts, including the Ninth Circuit, have concluded that a consultant was a company's agent under FRE 801(d)(2), such that the consultant's statements were admissible as statements of a party-opponent." *Fed. Trade Commn. v. Qualcomm Inc.*, 17-CV-00220-LHK, 2018 WL 6576029, at *2 (N.D. Cal. Dec. 13, 2018) (consultant report admitted under FRE 801(d)(2) when it was "created for [the defendant] and at [the defendant's] direction"). For example, the Ninth Circuit held that when an outside consultant prepared a report "at the request" of the defendant, including reviewing documents and going with the defendants' employees on trips to gather information, and then circulated that report to the Defendant, "there can be little question that [the consultant] was 'authorized' by [the defendant] to make" the relevant statements. *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1306 (9th Cir. 1983); *see also Beck v. Haik*, 377 F.3d 624, 638–40 (6th Cir. 2004) (holding that a consultant's statements that "dealt directly with the subject matter" of the consultancy and were "expressed during the course of that relationship" were admissible under FRE 801(d)(2)), *overruled on other grounds*, *Adkins v. Wolever*, 554 F.3d 650, 651 (6th Cir. 2009); *Walden v. Seaworld Parks & Entm't, Inc.*, 2012 WL 4050176, at *2 (E.D. Va. May 31, 2012) (concluding that a consultant "specifically retained . . . to provide the defendant with a report detailing those issues and proposing corrective actions" was an agent under FRE 801(d)(2)); *V5 Techs., LLC v. Switch, Ltd.*,

217CV02349KJDVCF, 2021 WL 5283952, at *1 (D. Nev. Nov. 10, 2021) (when a party hired "a consulting company to issue a report concerning the challenges facing its business" and granted the consultant access to the relevant data, "the consultant's report is a statement that is not hearsay"). Greenleaf was hired by Altria to [redacted], and prepare a report. *See* Section A, *supra*. [redacted]. *Id.* [redacted]. *Id.* The Greenleaf Report represents the very work Altria hired Greenleaf to perform. It was authorized by Altria and is precisely within the scope of its relationship with Altria. *Id.* Under Rule 801(d)(2), the report is not hearsay.

3. Alternatively, the Greenleaf Report can be admitted for a non-hearsay purpose.

The Greenleaf Report, even if it were hearsay without an exception, should still be admitted for the limited purpose of showing Altria's notice, knowledge, and intent. [redacted], but did so anyway.

II. PLAINTIFF'S *MOTIONS IN LIMINE* TO EXCLUDE EVIDENCE AND ARGUMENT

A. THE COURT SHOULD BAR TESTIMONY, OTHER EVIDENCE, OR ARGUMENT STATING OR SUGGESTING THAT SFUSD WOULD NOT SPEND ALL OF, OR ANY OF, A POTENTIAL DAMAGES AWARD TO ADDRESS THE VAPING EPIDEMIC IN ITS SCHOOLS

Testimony, other evidence, or argument stating or suggesting that SFUSD would not spend all of, or any of, a potential damages award should be excluded under Rule 403 because the unfair prejudice caused by such evidence substantially outweighs its probative value, and there is an equally substantial risk of misleading the jury, confusing the issues, and wasting time.[1] There is no direct evidence that SFUSD would choose not to address its massive vaping problem, even if awarded the funds to do so. Instead, Defendants intend to make an entirely speculative argument

[1] To be clear, SFUSD is not contesting Defendants' right to address the **feasibility** of the improvements that Plaintiffs' experts—primarily Michael Dorn—have proposed to address the vaping epidemic. The motion is directed solely to the assertion that even if SFUSD is awarded the funds and has no other barriers to making the suggested improvements, SFUSD will choose not to address the vaping problem, or not to address it fully.

based on past SFUSD Board actions that have nothing to do with vaping. Defendants intend to introduce evidence—subject to a separate motion below (*Section* II-C)—that past actions by SFUSD's Board somehow shed light on how a potential damages award would be spent. These actions include renaming several schools and then reversing that decision, a recall election that removed several members of the Board, and litigation over a mural at one of SFUSD's schools. None of these issues have anything to do with vaping, JUUL, or student safety. Plus, the success of the recall election demonstrates that it would not even be the same people making Board decisions going forward.

Such argument invites the jury to speculate about how a damages award might be spent, and it would undoubtedly create a side-show about what happened with those prior incidents and how they relate—or do not—to the current vaping epidemic. Such a side-show would be prejudicial to SFUSD, waste time, confuse the issues, and mislead the jury, while offering little to no probative value. *See* Rule 403.

Arguments about how SFUSD would spend a potential damages award would likely confuse the jury into believing that SFUSD has some kind of obligation to spend a damages award in a particular manner. Compensatory damages "are measured by the harm the defendant has caused the plaintiff." *Bayer v. Nieman Marcus Grp., Inc.*, 861 F.3d 853, 972 (9th Cir. 2017). Their purpose is to "make good or replace the loss caused by the injury." *Id.* Thus, the award of damages itself evens the scales. At that point, the party receiving the award has no legal obligation to use the money in any particular manner. Again, there is no legitimate evidence that SFUSD would do anything other than use a potential damages award to address the vaping crisis in its schools. But in raising the issue of how the money would be spent, Defendants are trying to raise a legally immaterial issue. Because SFUSD is not required to spend any damages award in a particular manner, the jury should not be invited to speculate on what would happen. Again, such evidence and argument is unfairly prejudicial, wastes time, and risks misleading the jury and confusing the issues. *See* Rule 403.

B. THE COURT SHOULD BAR IMPROPER LEGAL TESTIMONY BY PROFESSOR EDWARD ROCK

The Court alone instructs the jury on the law, not expert witnesses. Expert witness Professor Edward B. Rock has submitted an expert report with opinions on legal control as a matter of Delaware corporate law that violates this principle, and he should be precluded from offering them. Worse, his opinions are disconnected from the applicable legal standard, making them "not only superfluous but mischievous." *Nationwide Transport Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059 (9th Cir. 2008).

The relevant question for the jury when evaluating Plaintiffs' Racketeering Influenced and Corrupt Organizations ("RICO") claim is whether Altria, as a factual matter, had some part in directing JLI's affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). In his report, Professor Rock strays from permissible opinions on corporate governance and corporate norms to the meaning of control under Delaware corporate law and the legal interpretation of contracts between JLI and Altria. *See Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1045 (D. Ariz. 2005) (permitting law professors to testify about corporate norms, but not how the law applies to the facts of the case). This foray into legal analysis will confuse the jury and should not be permitted.[2]

It is well-established that "that expert testimony by lawyers, law professors, and others concerning legal issues is improper." *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). "An expert witness cannot give an opinion as to h[is] legal conclusion, i.e., an opinion on an ultimate issue of law. . . . [I]nstructing the jury as to the applicable law is the distinct and exclusive province of the court." *Nationwide Transport Fin. v.*

[2] Barring improper testimony by an expert is an appropriate subject for a motion *in limine*. *See In re JUUL Labs, Inc., Mktg. Sales Practices and Products Liab. Litig.*, 19-MD-02913-WHO, 2022 WL 2343268, at *57 (N.D. Cal. June 28, 2022) (A defense expert "will not be excluded on these arguments at this juncture. Plaintiffs may, of course, renew their argument at summary judgment or in limine"); *see also Wiley v. Unum Life Ins. Co. of Am.*, 3:19-CV-02756-WHO, 2022 WL 1500552, at *1 (N.D. Cal. May 12, 2022) (Orrick, J.) (granting in part MIL to limit testimony of an expert); *Lindsey v. Costco Wholesale Corp.*, 15-CV-03006-WHO, 2016 WL 5815286, at *1 (N.D. Cal. Oct. 5, 2016) (Orrick, J.) (same); *Gomez v. Fachko*, 19-CV-05266-LHK, 2021 WL 5178821, at *4 (N.D. Cal. Nov. 8, 2021) (same); *San Francisco Baykeeper v. City of Sunnyvale*, 5:20-CV-00824-EJD, 2022 WL 4133299, at *1 (N.D. Cal. Sept. 12, 2022) (same); *Whiting v. City of San Jose*, 21-CV-05248-VKD, 2022 WL 4348467, at *3 (N.D. Cal. Sept. 19, 2022) (granting MIL to limit testimony of an expert).

Cass Info. Sys., Inc., 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004).

Similarly, "[u]nless a contract is deemed ambiguous or there is a term of the contract that requires an expert's explanation, it is improper for an expert to interpret or construe a contract in his opinion." *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 17CV205-MMA (MDD), 2020 WL 2553181, at *5 (S.D. Cal. May 20, 2020) (citing *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999)). Such matters of law are "inappropriate subjects for expert testimony." *Aguilar v. Int'l Longshoremen's Union Loc. No.* 10, 966 F.2d 443, 447 (9th Cir. 1992) (citing *Marx v. Diners Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977) (expert testimony consisting of legal conclusions about existence of contract or meaning of its terms is not admissible)). Professor Rock violated both rules in his report and deposition.

Professor Rock offers impermissible legal opinions on the definition of control under Delaware corporate law. Professor Rock is a law professor at New York University School of Law. (Exhibit 27, Government Entity Bellwether Case Specific Expert Report of Professor Edward B. Rock [hereinafter "Rock Rpt."] at 1). Counsel for Altria asked Professor Rock to "[p]rovide an overview of the governance and management structure created by the Delaware General Corporation Law," "[d]escribe the transactional structure created by the agreements governing Altria's investment in JLI," and "[d]etermine whether that transactional structure gives Altria control over JLI." (Ex. 27, Rock Rpt. at 7). To complete this assignment, Professor Rock reviewed the contracts between JLI and Altria, as well as deposition transcripts from members of JLI's Board of Directors. (Exhibit 28, Rock Dep. at 140:16-141:19, 143:17-144:8 (confirming he did not review any depositions of Altria employees or members of Altria's Board of Directors)). Professor Rock concluded that [redacted] (Ex. 27, Rock Rpt. at 8). Professor Rock made it clear that he was opining on control under Delaware corporate law and caselaw, rather than applying any business expertise. (Ex. 28, Rock Dep. at 67:23-69:5) (Q: "[redacted]

[redacted]

[redacted]

[redacted]

[redacted]”).[3]

Specifically, this Court should bar Professor Rock from offering three legal opinions. *First*, that the [redacted] as a matter of Delaware corporate law. *Id.* at 12, 19 ([redacted] (emphasis in original)). *Second*, that because [redacted] it [redacted] *Id.* at 25-27. And third, that “[redacted] *Id.* at 10; (Ex. 28, Rock Dep. at 161:19-23 (“[redacted]

[redacted]

[redacted]

[redacted]”). These are improper and unhelpful legal opinions. “‘The question of interpretation of [a] contract is for the jury and the question of legal effect is for the judge. In neither case do [courts] permit expert testimony.’” *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 17CV205-MMA (MDD), 2020 WL 2553181, at *6 (S.D. Cal. May 20, 2020) (quoting *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969)).

These opinions are also misleading because Professor Rock is under the mistaken impression that the relevant question under *Reves* is “whether the RICO defendant controlled the corporation” *as a matter of Delaware corporate law*. (Ex. 28, Rock Dep. at 168:4-16; *id.* at 174:15-175:25 (“[redacted]

[3] *See also id.* at 73:22-74:18 (Q: “And what is the basis for your opinion that prior to entering into the agreement Altria did not own or exercise control over JUUL?” A: “Under Delaware corporate law . . . . there are no cases binding controlling shareholders that I know of where there is not such a preexisting relationship. And so as a matter of the principles of Delaware corporate law and the policies underling those principles, it’s inconceivable to me that Altria could be considered a controller, controller, of JLI prior to December 2018.”); *id.* at 148:18-149:4 (“This transaction does not result in JLI -- in Altria gaining control over JLI. Because if it had, then the fiduciary duties of the directors under the *Revlon* line of cases would have required the directors to seek the highest value reasonably available. And Mr. Lewkow gave the advice that this was not a *Revlon* transaction. It was subject to the business judgment rule.”).

[redacted]”)). But that is not the question the jury must answer. *See In re JUUL Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 594 (N.D. Cal. 2020) (To conduct the affairs of an enterprise, a defendant “must have some part in directing those affairs.”) (quoting *Reves*, 507 U.S. at 179). For example, while “RICO liability is not limited to those with a formal position in the enterprise,” *Reves*, 507 U.S. at 179, Professor Rock stated he [redacted]. (Ex. 28, Rock Dep. at 158:7-160:17). Focusing the jury on a legal question of control under Delaware corporate law invades the provision of this Court in instructing the jury on the relevant legal test for RICO liability and is only likely to cause confusion. *BP Products N.A., Inc. v. Grand Petroleum, Inc.*, 4:20-CV-0901-YGR, 2021 WL 4482138, at *1 (N.D. Cal. September 30, 2021) (“Lawyers may be hired to assist counsel of record with legal briefing, but legal opinions have no place in a jury trial and usurp the role of the judge and jury.”).

C. THE COURT SHOULD BAR EVIDENCE AND ARGUMENT REGARDING EVENTS THAT MAY HAVE AFFECTED PUBLIC PERCEPTIONS OF SFUSD

Defendants intend to introduce evidence or argument regarding the following topics:

1. **School naming controversy**: In January 2021, the SFUSD School Board voted to rename 44 schools in the district in an attempt to remove the names of individuals who were linked to historical racism or oppression. The decision was heavily criticized and ultimately rescinded.[4]

2. **Recall of board members**: In February 2022, San Francisco voters ousted three Board members from their positions, including the Board president. The recall vote stemmed from frustration with the Board’s failure to re-open schools and other issues, including the school naming controversy listed above.

3. **Mural fight**: In 2022, SFUSD spent a significant amount of money ($525,000) on legal fees in an effort to remove a controversial mural from George Washington High School. The money came from a voter-approved

[4] A full list of the names the board decided to remove is available on the board’s minutes from September 9, 2020 at https://docs.google.com/*document*/d/12mIdaWPboYgYEhVn_VgiCu6MACYSHuIJW783YpkkxEk/edit.

bond for facilities upgrades, and the Board has been accused of misusing the funds.

Evidence or argument regarding these events should be excluded as the public's perception of SFUSD is irrelevant, may cause bias against Plaintiff, and would distract from central issues of the trial. Likewise, this type of evidence constitutes character evidence that is inadmissible under Rule 404(b)(1).

Here, these events primarily involve Board decisions on contentious topics where the resulting public commentary and criticism underscore their inflammatory nature.[5] This Court should not permit Defendants to play on the emotions of the jury by weaponizing controversies unrelated to any material fact at issue. *See* Rules 401, 402, 403. Even if these topics had any relevance—which they do not—there is a significant danger that the admission of such evidence would create "unfair prejudice" to Plaintiff, would "confus[e] the issues" and would "mislead[] the jury." Rule 403; *see Smith for J.L. v. Los Angeles Unified Sch. Dist.*, 2018 WL 6136812, at *10 (C.D. Cal. January 16, 2018), *order clarified* 2018 WL 6137133 (C.D. Cal. February 13, 2018)(excluding newspaper articles about a school concerning the cancellation of "an award-winning choir program and musical performed on campus about a 20-year drought called 'Urinetown'" as irrelevant, likely to be more prejudicial than probative, and hearsay); *see also In re Homestore.com, Inc.*, 2011 WL 291176, at *14 (C.D. Cal. January 25, 2011) (granting motion *in limine* to exclude evidence of unrelated corporate scandals); *Rivera Martinez v. GEO Grp.*, No. ED CV 18-1125-SP, 2020 WL 2496064, at *10 (C.D. Cal. Jan. 23, 2020) (holding media articles unrelated to claims are inadmissible because they do not meet the basic relevance requirements of Rule 401 and are largely inadmissible hearsay). Further, to the extent these Board actions involve political issues and the political leanings of individual Board members, "such evidence has no apparent relevance and may be unduly inflammatory." *Low v. Trump Univ., LLC*, 2016 WL 6732110, at *4 (S.D. Cal. November 15, 2016) (excluding evidence or argument concerning witnesses' political affiliation, voting preferences, and political contributions); *see also James v.*

[5] *See, e.g.*, "The San Francisco School District's Renaming Debacle Has Been a Historic Travesty", by Joe Eskanazi, January 28, 2021, Mission Local, available at https://missionlocal.org/2021/01/the-san-francisco-school-districts-renaming-debacle-has-been-a-historic-travesty/.

S. California Edison Co., 1995 WL 902672, at *2 (S.D. Cal. June 2, 1995) (granting motion to exclude evidence of political contributions).

D. THE COURT SHOULD BAR EVIDENCE REGARDING UNSPENT TOBACCO GRANT FUNDS OR A FAILURE TO APPLY FOR ADDITIONAL GRANTS

SFUSD moves this Court for an order preventing Defendants from introducing testimony, other evidence, or argument stating or suggesting that SFUSD failed to spend all available tobacco grant funding, or that SFUSD failed to apply for additional grants that theoretically could have been spent on vaping-related expenditures. Such evidence should be excluded as a waste of time that would confuse the issues and mislead the jury. The unfair prejudice from such evidence also substantially outweighs any probative value. Rule 403.

Defendants intend to argue that SFUSD has more money than it needs. Nothing could be further from the truth. To make that argument, Defendants will introduce evidence concerning tobacco grant funds that SFUSD was unable to spend in certain years.[6] But that evidence does not support Defendants' argument and will only confuse the jury and waste time.

First, SFUSD witnesses and Plaintiff's experts have made clear that SFUSD is desperate for additional resources to combat the vaping crisis Defendants caused. (*See* Exhibit. 29, Lingrell Dep. at 169:5-172:21 (discussing need for additional staff and video cameras and restrictions placed on grant funds)); (Exhibit 30, Dorn Rpt. at 52-53, 91-96). Indeed, SFUSD is facing a $125 million budget deficit. (Exhibit 31, 2022-23 Budget Press Release). And central office programs, such as SFUSD's tobacco prevention programs, are the first to be cut to address the budget deficit. (Exhibit 32, Wallace Dep. at 65:4-66:10).

Second, if Defendants are permitted to make misleading arguments about grant funds supposedly misspent or not applied for, SFUSD will have to spend significant trial time unpacking the details of the grants that it does and does not receive, as well as the application process. SFUSD would have to guide the jury through a complicated regulatory framework to explain the restrictions on how grant funds are spent, expenditure reporting requirements, timing of disbursements, and limitations on reassigning funds once they are encumbered for a certain

[6] *See* ECF No. 3405 (Altria Defendants' Motion for Summary Judgment) at 9-10; ECF No. 3384 (Non-Management Director Defendants' Motion for Summary Judgment) at 10, 19.

purpose. (*See* Ex. 29, Lingrell Dep. at 70:11-72:11 (listing several vaping-related issues at SFUSD not covered by grants)); (Exhibit 33, Pak 10/7/21 Dep. at 114:7-115:11 (explaining student peer educator stipends are no longer an allowable expense under tobacco grants)). In addition, regarding a California Department of Justice grant Defendants contend SFUSD could have applied for, SFUSD was a sub-grantee with the San Francisco Department of Health, so SFUSD did not need to separately apply for the grant. (Exhibit 34, Pak 10/15/22 Dep. at 366:3-23). But that, too, will require additional testimony and other evidence to overcome the suggestion that SFUSD left money on the table. Allowing this evidence would lead to a lengthy presentation that sheds no light on the Defendants' role in the SFUSD vaping epidemic, which is the central issue in this case.

For all of these reasons, the Court should prohibit any evidence or argument about unspent tobacco grant funds or grants that SFUSD did not apply for, under Rule 403. Such evidence would waste time, mislead the jury, and confuse the issues, and its probative value is substantially outweighed by the risk of unfair prejudice. *See* Rule 403.

E. THE COURT SHOULD BAR EVIDENCE OF SFUSD'S ALLEGED COMPARATIVE NEGLIGENCE

Plaintiffs move the Court for an order preventing Defendants from introducing testimony, other evidence, or argument stating or suggesting that SFUSD was negligent and thereby caused or contributed to cause the youth vaping epidemic at its schools.

1. California's educational malpractice doctrine bars Defendants' comparative negligence claim.

The educational malpractice doctrine bars claims against schools regarding the academic affairs of those schools. *See Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 825 (1976); *Kashmiri v. Regents of Univ. of California*, 156 Cal. App. 4th 809, 825 (2007) ("The doctrine of educational malpractice exists to avoid judicial interference with academic affairs."); *see also Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 995 (N.D. Cal. 2020) ("Courts across the country have uniformly refused, based on public policy considerations, 'to enter the classroom to determine claims based upon educational malpractice.'"). In *Peter W.*, after considering "the role imposed upon the public schools by law and the limitations imposed upon them by thkeir

publicly-supported budgets," and the "consequences to the community of imposing on them a duty to exercise care with resulting liability for breach," the court held that SFUSD had no "duty" to the plaintiff. *Peter W.*, 60 Cal. App. 3d at 861. Subsequent California decisions have affirmed this holding because of "the lack of a workable rule of care against which a school district's conduct may be measured," and the public policy concerns caused by the "incalculable burden which would be imposed on the public school systems." *Saroya*, 503 F. Supp. 3d at 995 (citing *Banks v. Dominican Coll.*, 35 Cal. App. 4th 1545, 1551 (1995)).

To determine whether the claim is one for educational malpractice, courts consider whether the claim will require examining the district's discretionary decisions, day-to-day operations, or implementation of policies at schools. *Kashmiri*, 156 Cal. App. 4th at 826 (allowing claim against school when it did **not** involve disciplinary discretion or other educational malpractice claim); *see also Bridget McCarthy v. Loyola Marymount Univ.*, No. 220CV04668SBJEMX, 2021 WL 268242, at *3 (C.D. Cal. January 8, 2021) (noting that when school did not act within its own discretion, claim was not barred by educational malpractice doctrine); *Houston By & Through Houston v. Mile High Adventist Acad.*, 872 F. Supp. 829, 833–34 (D. Colo. 1994) (holding that negligence claims based on duties to protect students, institute discipline, follow policies and procedures, and supervise parents and teachers amount to claims of educational malpractice); *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121 (Iowa 2001) (barring educational malpractice claims because of the "deference given to the educational system to carry out its internal operations"); *Lucero v. Curators of Univ. of Missouri*, 400 S.W.3d 1, 9 (Mo. Ct. App. 2013) (holding that courts "should not embroil themselves in overseeing the day-to-day operations of schools").

Here, allowing a comparative negligence claim against SFUSD would require the Court or jury to evaluate the day-to-day operations of schools—a prospect courts have broadly rejected and held to be against public policy. This is especially true for any claim based on SFUSD's alleged failure to educate students, teachers, staff, or parents on the perils of youth vaping.[7]

[7] *See* ECF 35, JLI Amended Answer at 125 (SFUSD "negligently supervised its student population and failed to take timely action to educate students, teachers, and parents and failed to devise strategies, programs, or action plans to prevent, reduce, and eliminate underage usage of ENDS products."); ECF 34,

Saroya, 503 F. Supp. 3d at 995-96 (claim barred when it requires judgment about pedagogical methods or the quality of school's classes, instructors, curriculum, textbooks, or learning aids); *Vogel v. Maimonides Acad. of W. Conn., Inc.*, 58 Conn.App. 624, 754 A.2d 824, 828 (2000) ("If the duty alleged to have been breached is the duty to educate effectively, the claim is one of educational malpractice."); *Andre v. Pace Univ.*, 170 Misc.2d 893, 655 N.Y.S.2d 777, 779 (N.Y.App.Div.1996) ("Where the court is asked to evaluate the course of instruction or the soundness of the method of teaching that has been adopted by an educational institution, the claim is one of educational malpractice.").

Because there is no workable standard of care that applies to SFUSD's efforts to combat the youth vaping crisis that Defendants caused, SFUSD cannot be held liable for comparative negligence under California precedents regarding "educational malpractice." This Court, therefore, should exclude any such evidence or argument under those precedents, as well as Rules 401 and 403. Any such evidence or argument would be irrelevant, would be unfairly prejudicial, would waste time, would confuse the issues, and would mislead the jury. *See* Rules 401, 403.

2. <u>Defendants have no expert to opine on SFUSD's standard of care.</u>

Even if the law permitted a finding that SFUSD violated some standard of care, Defendants have wholly failed to provide one. Defendants have adduced no expert testimony to demonstrate the applicable standard of care, SFUSD's duty of care, or SFUSD's breach of that duty. This failure provides an additional reason to exclude any evidence or argument regarding SFUSD's comparative fault.

Where claims against school districts do not offend the educational malpractice doctrine, such claims often require consideration of how the district exercised its **professional** judgment. And that analysis requires expert testimony. *See Saroya*, 503 F. Supp. 3d at 995 (only allowing intervention into school's academic affairs when party is able to demonstrate that school did not exercise **professional** judgment); *Unigard Ins. Group v. O'Flaherty & Belgum*, 38 Cal. App. 4th

ODD Amended Answer at 131 (same); ECF 36, Bowen Amended Answer at 80 (same); ECF 37, Monsees Amended Answer at 134 (same); ECF 33, Altria Amended Answer at 383 ("[P]laintiffs' [sic] education programs failed to sufficiently convey to students the potential risks associated with vaping or dissuade students from engaging in underage vaping, and may have unintentionally suggested to some students that using vapor products was rebellious and therefore cool or socially acceptable within their peer groups.").

1229, 1239 (1995) (expert testimony is required in professional negligence actions unless it is a matter of common sense). Defendants' comparative negligence claim requires expert testimony because SFUSD's professional judgment would be at issue.

The standard of care for a school district is outside the jury's understanding and requires expert testimony. To determine whether an issue requires expert testimony, courts look to the complexity of the issue, the jury's need for further information or instruction, and whether the expert's opinion would assist the jury—i.e., whether the jury can decide the issue without further testimony. *Belford v. Farmers Ins. Grp. of Companies*, 45 F. App'x 734, 737 (9th Cir. 2002) (applying California law). Other factors include whether the party is engaged in a "complicated activity" that involves "a multitude of subsidiary questions," about which "the average laymen has neither training or experience" to determine standards prescribed by law or common in the industry. *See Miller v. Los Angeles Cnty. Flood Control Dist.*, 8 Cal. 3d 689, 702–03 (1973); *I.H. by & through Litz v. Lutheran Home at Topton*, No. 04-CV-3890, 2007 WL 9807492, at *4 (E.D. Pa. February 28, 2007), *aff'd sub nom. I.H. ex rel. Litz v. Cnty. of Lehigh*, 610 F.3d 797 (3d Cir. 2010) (requiring expert testimony when, *inter alia*, the entity was subject to federal and state regulations and complex social factors that were beyond the average layperson's knowledge).

Courts in California and elsewhere have recognized the need for expert testimony to establish a school district's standard of care. *See Cleveland v. Taft Union High Sch. Dist.*, 76 Cal. App. 5th 776, 792–93 (2022) (instructing jury to determine level of skill and care required of school district "based only on the testimony of the expert witnesses" in action regarding school's negligence.); *Varner v. D.C.*, 891 A.2d 260, 267 (D.C. 2006) (affirming trial court's ruling that "questions as to the appropriateness and sufficiency of academic discipline should not be left to a lay jury to decide without expert testimony").

Defendants need expert testimony because a school district's standard of care is not within the jury's common knowledge. Along with educational concerns, a school district also must balance federal and state regulations, discipline, supervision, security, and protection along with respecting the rights of school students and personnel. And while many jurors have the experience of being students themselves, the large majority will have no experience in the running of a school district

or management of its personnel. *See A.M.J. v. Royalton Pub. Sch.*, No. CIV 05-2541 PAM/RLE, 2006 WL 3626979, at *3 (D. Minn. December 12, 2006) (requiring expert testimony to establish standard of care for school administrators' exercise of professional judgment in harassment case, as even though jurors will likely be current or former students, "this experience does not necessarily provide them with knowledge on the correct exercise of professional judgment in matters of school administration").

Similarly, Defendants cannot rely on lay opinion to establish any beach of SFUSD's standard of care. *See Saelzler v. Advanced Grp. 400*, 25 Cal. 4th 763, 778 (2001) ("[I]t would be grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were 'inadequate,' particularly in light of the fact that the decision would always be rendered in a case where the security had, in fact, proved inadequate ... ."") (citing *Nola M. v. Univ. of S. Cal.*, 16 Cal. App. 4th 421, 429 (1993) (requiring expert testimony to establish breach in case regarding security of school campus)).

Because Defendants cannot establish a standard of care, due to a lack of expert testimony, the jury would have no basis to hold SFUSD comparatively negligent, even if the Court concludes that the educational malpractice doctrine does not apply. As such, the Court should forbid any evidence of SFUSD's alleged comparative negligence under the precedents cited above and Rules 401 and 403. Any such evidence or argument would be irrelevant, would be unfairly prejudicial, would waste time, would confuse the issues, and would mislead the jury. *See* Rules 401, 403.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's *in limine* motions.

Dated: October 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send notification of the filing to all counsel of record.

By: /s/ *Sarah R. London*
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