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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

This Document Relates to:
All Class Actions

Case No.: 19-MD-02913-WHO

**ALTRIA'S MOTION FOR STAY PENDING
ALTRIA'S APPEAL FROM THE COURT'S
JUNE 28, 2022 CLASS CERTIFICATION
DECISION; MEMORANDUM OF POINTS
AND AUTHORITIES**

Judge: Hon. William H. Orrick
Date: January 20, 2023
Time: 1:00 pm
Ctrm: 2

1 **PLEASE TAKE NOTICE** that, on January 20, 2023 at 1:00 pm, in Courtroom 2 of this
2 Court, located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California, Defendants Altria
3 Group, Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution
4 Company, and Altria Enterprises LLC (“Altria”) will present their Motion for Stay Pending Altria’s
5 Appeal from the Court’s June 28, 2022 Class Certification Decision.
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INTRODUCTION

On October 24, 2022, the Ninth Circuit Court of Appeals granted Altria’s petition for immediate review of this Court’s June 28, 2022 class certification order pursuant to Federal Rule of Civil Procedure 23(f) (“Rule 23(f)"). Altria¹ respectfully requests that the Court stay all proceedings in the class actions pending against Altria in this Court until the Ninth Circuit completes review and issues its decision on the merits of class certification with respect to Altria.²

The requirements for a stay pending review are easily satisfied here. The Ninth Circuit’s decision to grant immediate review alone “demonstrates that serious legal questions are at issue,” *Romero v. Securus Technologies, Inc.*, 383 F. Supp. 3d 1069, 1074 (S.D. Cal. 2019), and shows that Altria has “a fair prospect of success” on the merits of the appeal, *Owino v. CoreCivic, Inc.*, 2021 WL 3186500, at *3 (S.D. Cal. 2021). Altria also would be severely and unnecessarily harmed if a stay is not entered. Plaintiffs propose that the parties complete expert discovery and engage in bifurcated summary judgment and *Daubert* proceedings, which Plaintiffs argue would first address certain yet to be identified issues that purportedly would be the same regardless of class certification. But class issues cannot reasonably be divorced from non-class issues, and Plaintiffs’ proposal would only produce inefficiency, confusion, litigation expenses, and wasted efforts that would be for naught if the Ninth Circuit reverses or amends this Court’s certification decision. Nor would a stay harm Plaintiffs. To the contrary, it would conserve their resources, allow the Court and the parties to focus at the trial level on bellwether personal injury and public entity cases, and avoid the widespread confusion that would result if Plaintiffs send class notice now only to have the claims against Altria decertified as soon as the notice process is complete. Furthermore, a stay would serve

¹ As used herein, “Altria” refers to Altria Group, Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC.

² The Ninth Circuit also granted petitions filed by JLI and by Defendants Pritzker, Valani, and Huh. Altria’s appeal is docketed in the Ninth Circuit as Case No. 22-16693, and the appeals by JLI and Pritzker, Valani, and Huh are separately docketed as Case Nos. 22-16695 and 22-16694, respectively. The appeals filed by JLI and Pritzker, Valani, and Huh appear to be stayed by the proposed class settlement reached between Plaintiffs and those Defendants. Accordingly, Altria’s motion seeks a stay only until the Ninth Circuit resolves Altria’s appeal.

the public's interest by ensuring the certification outcome here is correct and by conserving this Court's resources.

District courts routinely stay proceedings in class actions after review has been granted under Rule 23(f). *See, e.g., Brown v. Wal-Mart Stores, Inc.*, 2012 WL 5818300, at *1 (N.D. Cal. 2012) (staying case pending resolution of 23(f) petition and appeal); *Senne v. Kansas City Royals Baseball Corp.*, 2017 WL 5973487, at *1 (N.D. Cal. May 5, 2017) (same); *Gray v. Golden Gate Nat'l Recreational Area*, 2011 WL 6934433, at *1 (N.D. Cal. 2011) (same); *Owino*, 2021 WL 3186500, at *3 (granting motion to stay after Ninth Circuit granted Rule 23(f) petition to appeal); *Pena v. Taylor Farms Pac., Inc.*, 2015 WL 5103157, at *1 (E.D. Cal. Aug. 31, 2015) (same); *Romero*, 383 F. Supp. 3d at 1072 (same). Altria respectfully requests that this Court do so here and stay the class proceedings against Altria pending the Ninth Circuit's review of the claims certified against Altria in the June 28, 2022 order.

ARGUMENT

Courts consider four factors when determining whether to grant a stay pending a Rule 23(f) petition: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Wuest v. Comcast Cable Commc'ns Mgmt., LLC*, 2017 WL 5569819, at *1 (N.D. Cal. 2017) (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011)); *see also, e.g., Brown v. MHN Gov't Servs., Inc.*, 2014 WL 2472094, at *2 (N.D. Cal. 2014) (Orrick, J.) (granting stay); *Brown v. Wal-Mart Stores, Inc.*, 2012 WL 5818300, at *2 (N.D. Cal. 2012).³ These four factors are examined on a "flexible continuum" or "sliding scale" "so that a stronger showing of one element may offset a weaker showing of another." *Wuest*, 2017 WL 5569819, at *1; *Brown*, 2012 WL 5818300 at *2; *see also Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL 6082413, at *1 (N.D. Cal.

³ *See also, e.g., Senne*, 2017 WL 5973487, at *1 (applying standard to motion for stay pending appeal under Rule 23(f)); *Romero*, 383 F. Supp. 3d 1072 (same); *Pena*, 2015 WL 5103157, at *1 (same); *Gray*, 2011 WL 6934433, at *2 (same).

2016) (staying case pending final resolution of Rule 23(f) petition). All four factors support a stay here.

I. ALTRIA’S APPEAL RAISES “SERIOUS QUESTIONS” AND PRESENTS “A SUBSTANTIAL CASE ON THE MERITS”

“The Ninth Circuit has explained that the first factor, a ‘strong showing’ on the merits, does not require that a party seeking a stay must demonstrate that it is more likely than not to prevail on its appeal.” *Senne*, 2017 WL 5973487, at *3 (citing *Leiva-Perez*, 640 F.3d at 968); *see also Brown*, 2012 WL 5818300, at *2 (“[T]he movant need not demonstrate that it is more likely than not that it will win on the merits.”). Instead, a “minimum quantum of likely success necessary to justify a stay” exists where there is a “reasonable probability” of success, “a substantial case on the merits,” or “that serious questions are raised.” *Aronson v. Gannett Publ’g Servs.*, 2020 WL 8610851, at *2 (citation omitted); *see also, e.g., Belyea v. GreenSky, Inc.*, 2021 WL 3270987, at *2 (N.D. Cal. 2021) (petitioner “must at minimum show that its appeal presents a substantial case on the merits”) (citation and quotations omitted); *Romero*, 383 F. Supp. 3d at 1073 (similar).

The stay requested by Altria here satisfies this standard. Indeed, the Ninth Circuit’s decision to review Altria’s appeal from the Court’s certification decision under Rule 23(f) alone establishes that Altria’s appeal raises “serious questions” and presents a “substantial case on the merits” supporting a stay. *See, e.g., Romero*, 383 F. Supp. 3d at 1074 (recognizing that acceptance of Rule 23(f) petition “demonstrates that serious legal questions are at issue”) (citing *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005)); *Gray v. Golden Gate Nat’l Recreational Area*, 2011 WL 6934433, at *1 (N.D. Cal. 2011) (finding that pending Rule 23(f) petition raised “serious legal questions” sufficient to satisfy the requirement of likelihood of success on the merits for purposes of a motion to stay). Granting a Rule 23(f) petition is “the exception rather than the rule.” *Chamberlan*, 402 F.3d at 959 (9th Cir. 2005). The fact that the Ninth Circuit chose to do so here “demonstrates that serious legal questions are at issue,” *Romero*, 383 F. Supp. 3d at 1074, and shows that Altria has “a fair prospect of success” on the merits of the appeal, *see Owino*, 2021 WL 3186500, at *3. This factor overwhelmingly supports a stay.

II. ALTRIA WILL SUFFER SUBSTANTIAL, AND UNNECESSARY, HARDSHIP WITHOUT A STAY

The class certified by the Court against Altria—a *nationwide* class that includes *millions* of individuals around the country who purchased even a single JUUL product—is massive. If these sweeping claims proceed on a class-wide basis, the litigation costs would be significant. These costs alone establish sufficient hardship to support the stay sought here. “[I]f defendants are forced to incur the expense of litigation before their appeal is heard, the appeal will be moot, and their right to appeal would be meaningless.” *Gray*, 2011 WL 6934433 at *3 (citation omitted); *see also, e.g., Senne*, 2017 WL 5973487, at *3 (defendants would suffer “substantial harm” absent stay because they “devoted very substantial time and resources on the litigation, particularly with respect to the completion of discovery, dispositive motions and trial preparation on class claims”); *Pena*, 2015 WL 5103157, at *5 (litigation costs would produce irreparable harm because denying stay would lead to “possible further dispositive motion practice and trial preparation,” among other things, and because “class evidence is voluminous and complex, and may require expert testimony”). And courts have held that classes smaller than the ones at issue here would present costs sufficiently high to justify a stay pending Rule 23(f) review. *See, e.g., Brown*, 2012 WL 5818300 at *4 (finding expense of defending against class of 22,000 members justified stay).

These principles apply here. Without a stay, the parties would need to engage in costly discovery and trial preparation efforts. Plaintiffs, for example, propose that the parties complete expert discovery—including expert discovery specific to class issues by June 9, 2023—regardless of when the Ninth Circuit will rule. Plaintiffs also propose that the parties file summary judgment and *Daubert* motions on a bifurcated basis, as if class issues can be divorced from unspecified issues unrelated to the class, with briefing on the former beginning in March and a second round of briefing beginning in June. Not only would this needlessly multiply the amount of briefing, but these efforts would be for naught if the RICO claims against Altria are decertified.⁴

⁴ To the extent that the proposed schedule provides for summary judgment rulings before the class notice process is complete, it also would be improper because it would allow for one-way intervention. *See, e.g., Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) (noting that “the history of the development of Rule 23(c)(2) makes clear that the rule was adopted to prevent ‘one-

Moreover, before this case can proceed as a nationwide class action, the parties must complete the class notice process to ensure adequate notice is disseminated around the country. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (“[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”). Plaintiffs propose to give notice to class members about the contested claims against Altria at the same time that they provide class notice to members of the settlement class. This approach is improper for many reasons to be set out in Altria’s response to Plaintiffs’ motion for preliminary approval, which the parties have agreed is due January 6, 2023. *See* Stipulation and [Proposed] Order, ECF 3730 (Dec. 22, 2022). Among the problems with Plaintiffs’ proposed approach, if notice is given to class members about the claims against Altria now, the Court would have to go through a second time-consuming process to notify class members of decertification or any other changes ordered on appeal.

The resulting confusion to class members and inefficiencies strongly support a stay. *See, e.g., Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002) (district court must “notify the class members of the decertification of the class”); *Senne*, 2017 WL 5973487, at *3 (denying stay could lead to confusion if class notices are issued before the pending 23(f) petition has been resolved because it may “have to be modified or retracted”). The requested stay avoids these problems.

III. A STAY OF PROCEEDINGS WOULD NOT HARM PLAINTIFFS

Plaintiffs do not challenge Altria’s current conduct. Nor do Plaintiffs seek damages from Altria for JUUL purchases made after December 31, 2021. As a result, staying this action pending Altria’s Rule 23 appeal would not result in any further injury to class members. *See Brown*, 2012 WL 5818300, at *4 (delaying plaintiff’s ability to collect “damages for past harms” would not substantially injure the plaintiff); *Roe*, 2015 WL 1798926, at *4 (argument that stay would delay plaintiffs from “receiv[ing] the money to which they are entitled” does not preclude stay). Indeed, if anything, a stay would *benefit* plaintiffs by preventing them from expending resources on items

way intervention’—that is, the intervention of a plaintiff in a class action after an adjudication favoring the class had taken place[.]” but declining to intervene or opt-in if the ruling was not favorable to the class).

1 such as expert discovery, trial preparation, and class notice in a case that might be decertified on
2 appeal. *See supra* at 4-5.

3 The lack of prejudice to Plaintiffs is further confirmed by the relatively modest length of
4 time that proceedings would be delayed. Altria's opening brief is currently due February 1, 2023,
5 and briefing should be complete by late spring or early summer. While not entirely negligible, the
6 amount of time that the class proceedings would be stayed is not unreasonable and does not
7 outweigh the many reasons for granting this relief. Indeed, the stay requested here would not bring
8 this litigation to a halt or prevent the Court and parties from continuing to move toward resolving
9 the Plaintiffs' claims in an efficient, and expedient, manner. To the contrary, the Court and the
10 parties could focus their resources on personal injury and government entity cases, including the
11 bellwether cases already identified for early resolution.

12 **IV. A STAY IS IN THE PUBLIC INTEREST**

13 "[T]he public generally has an interest in accuracy of judicial proceedings and in efficient
14 use of government resources." *Aronson*, 2020 WL 8610851, at *3 (citing *Bristow v. Lycoming*
15 *Engines*, 2008 WL 2561105, at *3 (E.D. Cal. 2008)); *see also, e.g., Romero*, 383 F. Supp. 3d at
16 1077 (stay would "ensure the proper resolution of the important issues raised in this case by
17 preventing potentially wasteful work on the part of the court and the parties"); *Todd*, 2016 WL
18 6082413, at *2 ("stay would avoid the parties and the Court wasting resources on litigation that
19 might be changed on appeal"); *Gray*, 2011 WL 6934433 at *3 ("The public interest lies in proper
20 resolution of the important issues raised in this case, and issuance of a stay would avoid wasting
21 resources on a class action litigation which might be changed in scope on appeal.").

22 A stay here would serve these goals by mitigating the risk of wasted judicial resources. *See*
23 *supra* at 4-5. By contrast, proceeding with class-wide claims would result in a massive amount of
24 wasted resources if the certification order reversed on appeal. *See, e.g., Senne*, 2017 WL 5973487,
25 at *4 (denying stay pending 23(f) petition would "waste [] judicial resources" because "it might be
26 necessary to decide a second round of dispositive motions and conduct a second trial" if class is
27 decertified). Accordingly, staying the class action pending Altria's appeal would serve the public
28 interest and further confirms that the relief sought herein is appropriate.

CONCLUSION

For the foregoing reasons, the Court should enter a stay of proceedings pending resolution of Altria's appeal from the Court's June 28, 2022 class certification decision.

Dated: January 4, 2023

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CERTIFICATE OF SERVICE

I, John C. Massaro, hereby certify that on the 4th day of January, 2023, I electronically filed the foregoing **ALTRIA'S MOTION FOR STAY PENDING ALTRIA'S APPEAL FROM THE COURT'S JUNE 28, 2022 CLASS CERTIFICATION DECISION** with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notifications to all counsel of record.

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