[*Submitting Counsel on Signature Page*]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	Case No. 19-md-02913-WHO **DEFENDANTS' NOTICE OF MOTION AND MOTIONS *IN LIMINE***
This Document Relates to: *San Francisco Unified School District v. Juul Labs, Inc., et al.* Case No. 19-cv-08177-WHO	

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on a day to be determined by the Court, in Courtroom 2 of this Court, located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California, Defendant Juul Labs, Inc. ("JLI") and Defendants Altria Group, Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC (collectively, "Altria"), James Monsees, Adam Bowen, and the Non-Management Directors[1] will and hereby do move the Court to enter an order *in limine* limiting evidence or argument regarding the topics specified in the following motions and their accompanying Table of Contents.

The Motion is based on this Notice of Motion and the following Motions *in Limine*.

Dated: October 3, 2022 Respectfully Submitted,

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[1] "Non-Management Directors" or "NMD" refers to Messrs. Nicholas Pritzker, Hoyoung Huh, and Riaz Valani. The parties have stipulated that for purposes of trial in the SFUSD case, the five named Altria Defendants will be treated as a single defendant. (Dkt. No. 3468.). "Altria" refers to these defendants collectively. "AGI" refers to Altria Group, Inc. and "PM USA" refers to Philip Morris USA Inc.

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INTRODUCTION

Defendants Juul Labs Inc. ("JLI"), Non-Managing Directors, Adam Bowen, James Monsees and Altria move in limine to exclude prejudicial material with little relevance to the claims of San Francisco Unified School District ("SFUSD"). SFUSD is a school district, and its claims turn on asserted harms caused by addiction of students and their use of JUUL products at schools in the district. The district's claims do not turn on other purported health effects caused by JUUL products, or the issues addressed by FDA's short-lived, non-final decision to deny marketing authorization for JUUL products—a decision that the FDA itself has stayed and is reviewing. Nor are they related to events in other far-flung locales, or the use of non-JUUL products, like THC.

SFUSD has nevertheless refused to stipulate to excluding these and other irrelevant and unduly prejudicial matters—including school shootings that are neither tied to SFUSD or to JUUL products. And SFUSD has also indicated that it will likely try much of its case using hearsay evidence, including testimony from witnesses who purportedly received information from unidentified students or teachers, often third-hand. See Defs' MIL No. 2, *supra*. This strategy is impermissible: SFUSD's claims should be tried using evidence relevant to the "conduct directed toward the [plaintiff]," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-23 (2003), and SFUSD cannot rely either on hearsay or evidence that will "appeal[] to the jury's sympathies, arouse[] its sense of horror, [or] provoke[] its instinct to punish," *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990). Defendants' motions in limine should be granted.

LEGAL STANDARDS

The Federal Rules of Evidence impose standards governing the admission of evidence. Evidence must be "relevant," meaning it must make "a fact . . . of consequence" "more or less probable than it would be without the evidence." Fed. R. Evid. 401. "Irrelevant evidence is not admissible." Fed. R. Evid. 402. Additionally, even relevant evidence may be excluded if whatever probative value that it has is "substantially outweighed by a danger of," among other things, "unfair prejudice, confusing the issues, misleading the jury, undue delay, [and] wasting time." Fed. R. Evid. 403. Finally, hearsay is "not admissible" unless the Federal Rules or congressional statute provide otherwise. Fed. R. Evid. 802.

MOTIONS IN LIMINE

I. MOTION IN LIMINE NO. 1: FDA'S STAYED INTERIM DENIAL OF JUUL'S PMTA

The Court should exclude references to the FDA's Marketing Denial Order ("MDO"), which is not a final agency action, is stayed and subject to further review, and is inadmissible under Federal Rules 402 and 403. On June 23, 2022, FDA issued an MDO denying JLI's Premarket Tobacco Product Applications ("PMTAs") for several products (5- and 3-percent Juulpods in Virginia Tobacco and Menthol flavors). The MDO on its face denied approval for JLI's products for narrow reasons related to the toxicological data JLI had submitted with its PMTAs; for example, the agency stated that JLI had not submitted [redacted], Ex. 1, (MDO) at 3. But the MDO was short-lived: JLI quickly filed an emergency motion for an administrative stay in the United States Court of Appeals for the D.C. Circuit, which that court granted. *See Juul Labs, Inc. v. FDA*, D.C. Cir. No. 22-1123 (June 27, 2022). JLI then filed a motion for a more permanent stay pending appeal, arguing among other things that JLI *had* provided the data that FDA wanted after all—JLI's PMTAs had included 6,000 pages of that data, [redacted] *See* D.C. Cir. No. 22-1123, Dkt. No. 1952202 at 3.

Confronted with JLI's briefing, FDA relented. In a July 5, 2022 letter to JLI, FDA agreed to stay its own order, and explained: "in the course of reviewing the briefing materials in *JUUL v. FDA*, No. 22-1123 (D.C. Cir.), [FDA] determined that there are scientific issues unique to the JUUL application that warrant additional review." Ex. 2. The MDO thus is not final and rests on an analysis that, by FDA's own admission, is not yet complete. As this brief history makes clear, the FDA's MDO and any references to the order would be unduly prejudicial if admitted at trial.

First, the MDO is not relevant to SFUSD's claims in this case. *See* Fed. R. Evid. 402 ("Irrelevant evidence is not admissible"). SFUSD's Complaint does not rely on purported [redacted] or PMTA-related data issues as a basis for its claims. Nor do those narrow scientific issues have any clear relation to its negligence and public nuisance claims. Courts often hold that

agency investigations or actions are not admissible where they do not have relevance to superficially-related civil claims, *see*, *e.g.*, *Talley v. Burt*, 2019 WL 5842857, at *8 (W.D. Pa. Nov. 7, 2019) (rejecting argument that DOJ investigation was relevant to "deliberative indifference to inmate mental health" and holding it "not relevant in this case"); *Newman ex rel. Newman v. McNeil Consumer Healthcare*, No. 10 C 1541, 2013 WL 4460011, at *17–18 (N.D. Ill. Mar. 29, 2013) (FDA letters were hearsay and "irrelevant"), and the same should hold true here.

SFUSD may argue that the MDO is somehow relevant to its assertions that, *e.g.*, there were "harmful and toxic ingredients contained in Defendants' products," Compl. ¶ 902(k), but the MDO is not evidence that JUUL products were toxic. FDA made no such determination. The MDO does not say any such thing (it merely alleges insufficiencies with the PMTA). The "Technical Project Lead Report" ("TPL") FDA provided in conjunction with the MDO, the agency candidly acknowledged that "[redacted]." Ex. 3 at 13. In a press release provided contemporaneous with the MDO and TPL, FDA admitted that it "has not received clinical information to suggest an immediate hazard associated with the use of the JUUL device or JUULpods."[2] The bottom line is that FDA has admitted that the MDO is suspect, has stayed it, and has confirmed that JLI's PMTAs are still under review. Ex. 2. In addition, as discussed below, *see* MIL No. 20, non-addiction health conditions (even if they could be caused by JUUL) are not relevant to SFUSD's actual causes of action. Speculative assertions regarding toxicity do not make the MDO relevant to SFUSD's claims. All of this confirms that the MDO does not belong in a trial over SFUSD's claims.

Second, the MDO should also be excluded under Rule 403 even if it did have some passing relevance. Admitting evidence of agency investigatory actions can "unfairly prejudice the jury by giving the appearance that the ultimate issues to be decided by it have already been decided by another entity," *Moore v. Principi*, 2002 WL 31767802, at *8 (N.D. Ill. Dec. 10, 2002), for example,

[2] *See* "FDA Denies Authorization to Market JUUL Products," June 23, 2022, available at https://www.fda.gov/news-events/press-announcements/fda-denies-authorization-market-juul-products.

"[a] jury could wrongly conclude from the fact that the DOJ was investigating certain Defendants that those Defendants had committed a crime even though they have not been charged or convicted of any crime," *In re Polyurethane Foam Antitrust Litig. Direct Purchaser Class*, 2015 WL 12747961, at *11 (N.D. Ohio Mar. 6, 2015); *see also Talley*, 2019 WL 5842857, at *8 ("[E]ven if the DOJ memoranda were relevant, the probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, and undue delay pursuant to Fed. R. Evid. 403."). These prejudice concerns are squarely applicable to FDA's unfinished analysis of JUUL products in this case, which if introduced to the jury could invite them to believe that there *were* toxic chemicals in JLI's products, even though FDA has concluded no such thing.

Admitting the MDO, moreover, would also result in enormous "wast[ed] time." Fed. R. Evid. 403. If SFUSD is permitted to reference or discuss the MDO, even though Defendants could not fully cure the resulting prejudice, they would still have to attempt to stop the bleeding by clarifying the record and explaining in detail that the MDO is still under review, has been stayed, and why. That diversion will waste time better spent on discussing what this case is actually about: SFUSD's claims. The Court should decline to permit that diversion, and exclude the still-under-review MDO.

II. MOTION IN LIMINE NO. 2: HEARSAY CONCERNING STUDENTS' ALLEGED VAPOR USE AND THE IMPACT OF VAPOR USE AT SCHOOLS

The Court should preclude Plaintiff from offering hearsay evidence concerning alleged JUUL use by students in SFUSD schools and the alleged harms from such use. Plaintiff's deponents have repeatedly testified as to what they were "told" by or "heard" from students or personnel about JUUL use in SFUSD schools and alleged harms from such use—often without even identifying the specific source of the information.[3] Erica Lingrell, for example, testified that student use of JUUL

[3] *E.g.*, Ex. 4, (8/19/2021 Lingrell Dep.) at 47:13–17 ("Q. And how did you identify that JUUL was a problem in particular? A. We were hearing it from students. We were seeing it across the United States. We were hearing it from our wellness staff."); *id.* at 130:11–17 ("Q. You just testified that kids had started using again 'probably because of Juul.' What do you based that on? A. Just anecdotal -- anecdotal data from what I was seeing and hearing from other school staff, and also our community partners, and also TUPE coordinators across California."); Ex. 5, (12/21/2021 Pak Dep.) at 15:22–16:2 ("Q. Are you aware of any specific minor who has reported to you that they were misled by Juul and the effects of JUUL products? A. The students have they told me that some of their friends don't even know there's nicotine in

products have consumed the time and attention of SFUSD teachers, Ex. 4, (8/19/2021 Lingrell Dep) at 70:20–23, but admitted that her basis for that statement was only second-hand reports received from others who she could not identify; *id.* at 72:21-73:5 ("Q. You mentioned you heard from several teachers about students that have left class for an extended period of time to use JUUL products . . . . What are those teachers' names? A. What are their names? Q. Yeah. Who are they? A. I don't remember. They're people I've talked to over the years.").

These statements are hearsay and should be excluded under Rules 801 and 803. *See, e.g.*, *Contreras Fam. Tr. v. U.S. ex rel. Dep't of Agric. Farm Serv. Agency*, 205 F. App'x 580, 582 (9th Cir. 2006) ("The trustee's statements repeating things he had been told are hearsay and hence inadmissible."); *E.E.O.C. v. Evans Fruit Co.*, 2013 WL 4498747, at *3 (E.D. Wash. Aug. 21, 2013) ("[T]estimony from the claimants about what . . . someone else told them is objectionable as hearsay because it repeats the out-of-court statement."). Indeed, many of SFUSD's witnesses have relied on hearsay two or three levels deep, offering their view of whether SFUSD is experiencing a youth vaping epidemic on the basis of what unknown others told others who in turn told them. *See*, *e.g.*, Ex. 6, (10/7/2021 Pak Dep.) at 34:12–17 ("So in my conversations with school social workers, they're, like, oh, I have parents -- because their kids are still talking to them -- for the 5th graders -- when they're in middle school, high schoolers, they're just with their friends and things like that."). Such double and triple hearsay is plainly inadmissible. *See Sinegal v. Martin Marietta Materials, Inc.*, 2020 WL 2106694, at *3 (S.D. Tex. Apr. 9, 2020) (observing that triple hearsay "is about as reliable as a broken clock"); *Fed. Trade Comm'n v. CCC Holdings, Inc.*, 2009 WL 10631282, at *1 (D. D.C. Jan. 30, 2009) (noting that double hearsay "inherently lacks sufficient indicia of

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them and that they enjoy the flavors."); Ex. 6, (10/7/2021 Pak Dep.) at 77:5–14 ("Q. Is the District aware of any individual student who has reported to the District . . . that the student is addicted to nicotine? A. . . . So the staff were telling us yes, they have reported that they have contact with students who do report that they are addicted. They can't stop using. They want to know more about how they can stop using, and, uhm, also our student leaders have told us that as well.") ; *id.* at 182:16–22 ("Q. . . . [D]oes the District have any factual basis, besides e-cigarette use, for alleging that defendants' e-cigarette products have addicted a new generation to nicotine? A. Our students have told us how they have seen more of their friends using. How they notice their friends are habitual and addicted users."); Ex. 7, (12/16/2021 Nelson Dep.) at 67:12–15 ("Q. How did you develop the view that JUUL was more attractive and popular? A. Our students talking to teachers who would talk to me about it."); Ex. 8, (9/16/2021 Matthews Dep.) at 74:3–15 (testifying that his "investigation" that the JUUL product was dangerous consisted of "talk[ing] directly to people").

reliability"); *Zachary v. Potter*, 2006 WL 2864471, at *5 n. 6 (D. Haw. Oct. 4, 2006) (describing double hearsay as "particularly unreliable" and excluding it).[4]

Nor is there any potential cure for this hearsay problem: cases are clear that hearsay is generally unreliable and untrustworthy. *See Williamson v. United States*, 512 U.S. 594, 598 (1994) ("The hearsay rule . . . is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener."); *Chambers v. Mississippi*, 410 U.S. 284, 288 (1973) (noting that hearsay is generally untrustworthy and lacks traditional indicia of reliability); *United States v. Lozado*, 776 F.3d 1119, 1121 (10th Cir. 2015) ("Hearsay is generally inadmissible as evidence because it is considered unreliable."). Here, the witnesses offering this testimony, did not personally observe or perceive the specific JUUL use or alleged harms that they purport to describe, confirming that their testimony based on only the second or third-hand impressions of others implicates exactly the concerns the hearsay rules are designed to guard against and so should be excluded at trial.

III. MOTION IN LIMINE NO. 3: CERTAIN MARKETING NOT DISTRIBUTED IN SAN FRANCISCO

The Court should exclude references to certain limited marketing materials that were physically located away from San Francisco and are, therefore, irrelevant to SFUSD's claims.[5] This

[4] SFUSD's expert reports also extensively rely on hearsay anecdotes. But although evidence referenced in expert reports need not always be admissible, the evidence that experts rely on must be of "the kind that experts in the particular field would reasonably rely on." *Caldwell v. City of San Francisco*, 2021 WL 1391464, at *5 (N.D. Cal. Apr. 13, 2021). Moreover, "[e]xperts cannot insert non-existent facts into the record through their expert reports," and "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as a basis of his testimony." *Id.* To the extent that they are otherwise permitted to testify, SFUSD's experts are required to relate their opinions to the jury without relaying or becoming "mere conduits for otherwise inadmissible evidence." *Id.*

[5] The scope of this motion is targeted and limited to physical items and activities that were located outside San Francisco. It does not extend to marketing materials with diffuse or uncertain circulation, such as social media or online advertising or advertising in nationally distributed magazines, some of which Defendants sought to exclude in the B.B. case. All defendants respectfully preserve the arguments relating to those social media and online advertising campaigns for the purposes of appellate review, but focus this motion only on physical marketing not located in San Francisco.

includes (i) physical signs and billboards that were located in New York City or other locations geographically remote from SFUSD; (ii) the June 2015 New York City launch party and other in-person sampling and marketing events hosted in locations geographically remote from SFUSD; and (iii) advertising activities in retail locations geographically remote from SFUSD. Physical signs and marketing events that were not located in San Francisco have no probative value and would only waste time, confuse the issues, and unfairly prejudice the jury against the Defendants. *See* Fed. R. Evid. 402, 403.

Although Plaintiff SFUSD is a school district located entirely within San Francisco, it intends to emphasize at trial certain JLI marketing activities that did not occur in San Francisco or even in California. For instance, although SFUSD's complaint repeatedly references JLI's use of billboard advertising, *see* SFUSD Am. Compl. ¶¶ 8, 319, 744, it only specifically identifies ***one billboard campaign that ran in New York City*** for 28 days in June and July 2015, *see id.* ¶¶ 320–21; Ex. 9, (9/20/2021 Chandler Generic Report) at 23. Many of Plaintiff's experts discuss the same New York City billboards, *see, e.g.*, *id.* at 23–24; Ex. 10, (9/20/2021 Cutler Generic Report) at 103-4; its exhibit list includes numerous images of the billboards, *see, e.g.*, Pl.'s Ex. 810–13; and it has designated testimony discussing the billboards from multiple fact witnesses. *See, e.g.*, Exs. 11-12 (6/17/2022 Handelsman Dep) at 182:7-14; 183:11-13; (10/12/2021 Monsees Dep) at 114:16-17, 114:25-115:1. Plaintiff does nothing to connect this short-lived billboard campaign a coast away to SFUSD or its claims. Nor does Plaintiff establish that *any* billboard campaign actually ran in or around SFUSD. Evidence regarding billboard campaigns run in other states and cities, like New York City, is both a waste of jury time (including because Defendants will have to explain that there is no tie to this case), and unduly prejudicial given the lack of relevance, and should be excluded.

Similarly, Plaintiff's complaint, witnesses, and exhibits discuss "live social events" that JLI hosted for its products in Florida, New York, and Nevada, as well as sampling events that occurred outside of San Francisco. SFUSD Am. Compl. ¶¶ 362, 365, 366. Marketing events that did not occur in San Francisco, or even in California, are not relevant to this matter and will waste time and

confuse the jury.[6] In particular, evidence concerning JLI's June 4, 2015 New York City launch party, should be excluded. Plaintiff's experts, including John Chandler, discuss the New York City launch party and its attendees at length. However, Mr. Chandler admitted that he didn't identify any attendees connected to SFUSD. *See* Ex. 13, (5/22/2022 Chandler Dep.) at 160:21–23 (". . . I do not have any evidence that someone from a bellwether district attended the launch party."), 161:1-22 (acknowledging that he did not "have any direct evidence" of attendee contacts with anyone from the bellwether districts and did "not mention that explicitly" in his report).[7] Admitting marketing activities that occurred wholly outside SFUSD's geographic boundaries and that have not been shown to have impacted SFUSD will confuse and unduly prejudice the jury. In addition, if this evidence comes in at trial, Defendants will be forced to expend valuable trial time explaining why none of this evidence is pertinent to SFUSD. To avoid wasting time on this issue, evidence concerning marketing that physically occurred outside of SFUSD should be excluded now.

This evidence should also be excluded because JLI cannot be punished under California law for actions that took place elsewhere: "[S]tatutes can have no extraterritorial effect." 73 Am. Jur. 2d Stat. § 243; *see Bigelow v. Virginia*, 421 U.S. 809, 822–23 (1975) (one state cannot regulate activity in another state); *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) (applying the "presumption against extraterritorial application" to an Unfair Competition Law claim). Thus, while a state may police conduct within its own borders, it "is not permitted ... to extend its unfair competition law to other states." *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013). SFUSD may invoke California law to address conduct relevant to its injuries—but constitutional principles as well as sheer prejudice and the Federal Rules of Evidence underscore that it may not turn this proceeding into a trial about marketing in other places in the country.

[6] Although the complaint also notes that some events occurred in California, it does not specifically identify any that occurred in or around San Francisco. SFUSD Am. Compl. ¶ 362. Evidence of any San Francisco-located events is not the subject of this motion.

[7] Plaintiff also currently lists Camesheann Wakefield—a launch party attendee and resident of New York City at the time—as a live fact witnesses on its witness list. Testimony from Ms. Wakefield, who has no connection to SFUSD or its students, has little to no probative value and should not be permitted.

IV. MOTION IN LIMINE NO. 4: VAPING-RELATED INCIDENTS NOT RELATED TO SFUSD OR SAN FRANCISCO

Evidence of or references to vaping incidents that occurred outside of the San Francisco Bay Area and have no relation to SFUSD's claims should be excluded. This includes, but is not limited to, reports and negative press concerning purported incidents of nicotine poisoning and vaping devices exploding. This evidence has no bearing on the claims asserted or harm purportedly suffered by SFUSD, has no probative value, and would only confuse the issues and unfairly prejudice the jury. *See* Fed. R. Evid. 402, 403.

The gravamen of SFUSD's claims here is that JLI and others have purportedly caused a youth vaping crisis that has resulted in harm and property damage to SFUSD's schools—all of which are indisputably located in the San Francisco area. SFUSD Am. Compl. ¶¶ 714–32. But in his January 28, 2022 report (as amended August 19, 2022), SFUSD's expert witness Michael Dorn cites to a number of purported vaping-related incidents that occurred outside of the San Francisco Bay Area—in most cases, thousands of miles away. *See* Ex. 14, (8/19/2022 Dorn Report) at 12–14; *id.* n.6–16. For example, Dorn cites an article reporting high school students being hospitalized in Indiana after vaping THC (which is not even an ingredient in JUUL products) at school, the evacuation of certain Pennsylvania schools due to e-cigarette malfunctions, and to a report that e-cigarette devices have exploded in backpacks and in classrooms in Massachusetts. *See, e.g.*, *id.* n.14, 11, 12. Such thousands-of-miles away incidents that may have involved only other products have only a distant or speculative connection to SFUSD's claims.

Thus, any attempt by SFUSD to inject evidence related to vaping incidents that took place outside of the San Francisco area would be a side-show and a waste of trial time. *See* Fed. R. Evid. 402, 403; *Mathew Enter., Inc. v. Chrysler Grp. LLC.*, 2016 WL 11432038, at *7 (N.D. Cal. Sept. 21, 2016) (excluding evidence where that would result in "mini-trials" and that would provide "little probative value and would be a waste of time").

SFUSD cannot seek to hold Defendants liable for purported occurrences that took place thousands of miles away. Defendants respectfully request that all evidence of or references to

purported vaping-related incidents that occurred outside of the San Francisco Bay Area, and press accounts regarding the same, be excluded under Rules 402 and 403.

V. MOTION IN LIMINE NO. 5: EVIDENCE AND MEDIA COVERAGE CHARACTERIZING JLI AS THE CAUSE OF SAN FRANCISCO'S 2019 ENDS BAN AND JLI'S LOBBYING RELATED TO SAN FRANCISCO'S 2019 "PROPOSITION C"

The Court should also exclude, under Rules 402 and 403, certain evidence related to San Francisco's 2019 ENDS ban, as well as JLI's short-lived political and lobbying activities and media coverage regarding San Francisco's "Proposition C," a ballot initiative that would have affected the sale of ENDS products in San Francisco.

On June 28, 2019, the Mayor of San Francisco approved an ordinance passed by the Board of Supervisors, "prohibit[ing] the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing." *See* Ordinance No. 122-19. As commentators quickly observed, the ordinance effectively banned all ENDS sales in the city, including sales of JUUL, as no ENDS products had yet received FDA approval at the time.[8] Thereafter, however, San Francisco voters considered "Proposition C," a ballot initiative that would have replaced the ENDS-ban and permitted ENDS sales subject to regulation. JLI briefly supported and helped fund this ballot initiative before announcing in September 2019 that it would cease lobbying for it.[9] Shortly thereafter, San Francisco voters declined to approve the ballot initiative, and the City's ENDS ban went into effect in January 2020. JLI's products have not been sold within SFUSD since that time, as the FDA continues to deliberate on JLI's application for regulatory approval.

These events are notable because the opposition to Proposition C "framed Proposition C as a tobacco industry ploy to undo San Francisco's e-cigarette regulations, particularly the prohibition

[8] *See*, *e.g.*, https://www.npr.org/sections/health-shots/2019/06/25/735714009/san-francisco-poised-to-ban-sales-of-e-cigarettes.

[9] *See*, *e.g.*, https://www.cbsnews.com/sanfrancisco/news/juul-to-cease-support-for-prop-c-measure-to-overturn-san-francisco-e-cigarette-ban/.

on selling flavored tobacco products" which had been in place since 2017, and both the opposition and media coverage portrayed JLI negatively with respect to both the ENDS ban and Proposition C.[10] It is this kind of evidence—evidence suggesting that JLI was not properly on the market prior to the ban, blaming JLI for the ENDs ban, and attributing improper motives to JLI's support of Proposition C, such as a desire to reverse San Francisco's flavor ban or make its products more accessible to youth—that Plaintiff should not be allowed to introduce.

The Court should exclude this evidence. It is not relevant because Proposition C had no impact as it never resulted in any change to any City ordinance, and it risks substantial prejudice and misleading the jury. *First*, Proposition C is not relevant to SFUSD's claims. The proposition was never passed and so had no impact (positive or negative) on ENDS use in the city. The ENDS ban also applied to many products (not just JUUL) and is not itself evidence of any bad conduct by JLI. To the extent that SFUSD seeks to prove that JLI caused youth ENDS use, then SFUSD should present evidence to support that argument, not tangential speculation about a city ordinance. Jurors are bound to be confused on this point, however, if Plaintiff is permitted to conflate JLI and JLI's conduct and the ENDS ban.

Second, the ballot initiative existed for only a few months in 2019, long after SFUSD claims that JLI had created a youth-vaping epidemic and there is no clear relationship between JLI's brief (and unsuccessful) support of the unsuccessful initiative and purported problems in SFUSD's schools, particularly given that Proposition C never passed. *See*, *e.g.*, *Major Brands, Inc. v. Mast-Jagermeister US, Inc.*, 2021 WL 2634665, at *3 (E.D. Mo. June 25, 2021) ("agree[ing]" that lobbying "evidence is irrelevant"); *U.S. v. Whittemore*, 2013 WL 1944887, at *1 (D. Nev. May 9, 2013) (excluding evidence of 2010 *Citizens United* decision, where "heart of the action" concerned activities in 2007). Courts have recognized that political activities and contributions, like those at issue here, "may be unduly inflammatory." *Low v. Trump Univ., LLC*, 2016 WL 6647793, at *4 (S.D. Cal. Nov. 10, 2016). This is particularly true when they are characterized negatively, as occurred in the media with the ENDS ban and JLI's support for Proposition C. Indeed, in the *B.B.*

[10] *See, e.g.*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7893333/.

case, the Court excluded evidence of JLI's officers' testimony before Congress after being briefed on similar prejudice concerns. *See* Dkt. 3170 at 4.

Finally, the reasons for exclusion here are also heightened because of the *Noerr-Pennington* doctrine, which holds that petitioning and lobbying activity is protected by the First Amendment. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-70 (1965). Because the ballot initiative is a distraction not relevant to any element of any claim, evidence characterizing the initiative, JLI's reasons for supporting it, or the potential effect of the initiative is confusing, a waste of time, and should not be admitted. Fed. R. Evid. 402, 403. Indeed, SFUSD's likely motivation for introducing evidence characterizing JLI's support for Proposition C is to paint JLI as the impetus for the City's ENDS ban (of *all* ENDS products) or as a bad actor who wished to repeal all of the City's ENDS regulation, including of flavored products. This is false, and the legislation proposed via Proposition C proves it, but explaining that would be a distracting side-show that is unnecessary when the evidence at issue is so clearly inadmissible under Rules 402 and 403.

VI. MOTION IN LIMINE NO. 6: FLAVORS NOT SOLD IN SAN FRANCISCO

The Court should exclude evidence regarding limited-release flavors because Plaintiff has failed to present any evidence that those flavors were used by any SFUSD student. Fed. R. Evid. 104, 402, 403. Before San Francisco banned flavors in mid-2018, JLI broadly distributed eight flavors, which JLI concedes were sold in San Francisco: Virginia Tobacco, Classic Tobacco, Classic Menthol, Cool Mint, Mango, Fruit Medley, Crème Brulee, and Cool Cucumber. Ex. 15. Nonetheless, Plaintiff has sought to introduce evidence of other flavors that JLI sold in extremely limited quantities before the August 2016 Deeming Rule went into effect. Those flavors were sold in small quantities to specialty vape stores to preserve JLI's ability to possibly expand its line-up of flavors in the future, which ultimately did not happen. Presenting evidence about those flavors will confuse the jury, inviting jurors to believe that those placeholder flavors were available on a similar scale to other flavors or may have been used by SFUSD students, even though Plaintiff has presented no evidence that these placeholder flavors were even available for purchase in San Francisco, let alone that they were sold at scale (because they were not).

Evidence regarding flavors beyond the core eight is irrelevant and should be excluded under Rule 402. *See, e.g.*, *All Alaskan Seafoods, Inc. v. Tyco Electronics. Corp*., 83 F. App'x 948, 951 (9th Cir. 2003). To the extent there is any marginal relevance from evidence regarding JLI's placeholder flavors, the probative value of such evidence is substantially outweighed by the risk that it will create juror confusion or unfair prejudice and that it will waste time. *U.S. v. Espinoza-Baza*, 647 F.3d 1182, 1189 (9th Cir. 2011). Plaintiff improperly seeks to inflame the jury with flavor names that Plaintiff will characterize as "kid-friendly" such as "Peanut and Jam" or "Unicorn Milk." To dispel the confusion this creates, Defendants would be forced to spend substantial time on side issues, introducing evidence to show why placeholder flavor sales were needed in advance of the Deeming Rule to preserve JLI's options, how few units of such flavors were sold, and how JLI planned to rename flavors if it ever decided to sell them as anything other than placeholders. Avoiding this sideshow will not hamstring Plaintiff because the thrust of Plaintiff's challenge regarding JLI's flavors involves mint, menthol, and fruit flavors that are included among the eight core flavors that were widely distributed. Evidence of limited-release flavors should therefore be excluded under Rule 403. *Mathew Enterprise, Inc. v. Chrysler Grp. LLC.*, 2016 WL 11432038, at *7 (N.D. Cal. Sept. 21, 2016) (excluding evidence where that would result in "mini-trials" and that would provide "little probative value and would be a waste of time").

VII. MOTION IN LIMINE NO. 7: EVIDENCE AND ARGUMENT REGARDING NICOTINE DISCLOSURES ON LABELS/PACKAGING (EXPRESS PREEMPTION)

The Court has already determined that "labeling claims—both based on the presence or absence of false and misleading disclosures about nicotine addiction and failure to warn theories—[a]re preempted to the extent that they implicated the nicotine addiction warning specifically approved and required by the FDA," and that "labeling claims based on nicotine addiction are preempted." *In re JUUL Labs, Inc.*, 497 F. Supp. 3d 552, 589 (N.D. Cal. 2020) (citing *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178, 1189 (N.D. Cal. 2018)). Despite these clear rulings, SFUSD alleges that JLI failed to warn of the addictive potential of JUUL products, *e.g.*, that "JLI . . . concealed the actual amount of nicotine consumed *via* JUUL pods." Compl. ¶ 217. MDL Plaintiffs have previously suggested that hypothetical warnings that JLI (purportedly) should have provided

should be presented to the jury, such as "The nicotine in JUUL quickly creates an addiction that makes it very tough to quit." Ex. 16. The Court's government entity motion to dismiss opinion makes clear that its express preemption rulings apply in this case, *In re JUUL Labs, Inc.*, 497 F. Supp. 3d at 589, and the Court should exclude evidence or argument that JLI failed to provide appropriate nicotine addiction warnings or should have applied other hypothetical warnings where, as here, JLI complied with the FDA's requirements.

Importantly, the MIL ruling on packaging and labeling in the *B.B.* case does not apply here. In contrast to *B.B.*, SFUSD is not bringing products liability claims for personal injuries, meaning that the savings clause in the TCA's preemption provision does not apply. *See* 21 U.S.C. 387p(b) ("No provision of this subchapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State."). In the *B.B.* case, which involved products liability claims, JLI asked the Court to exclude warning and labeling issues only on *implied* preemption grounds (rather than express preemption). *See* Dkt. No. 2950, at 2. Here, on the other hand, where none of the claims involve personal injuries, the Court's prior ruling concerning express preemption applies. *See In re JUUL Labs, Inc.*, 497 F. Supp. 3d at 589; *Colgate*, 345 F. Supp. 3d at 1189 ("[T]he FDA, through its authority under the TCA has prescribed the precise language and placement of warning labels on covered tobacco products such as ENDS under 21 C.F.R. §§ 1143.3(a)(1)(2). . . . . under the TCA's preemption provision, states and political subdivisions of states may not enact labeling requirements or warnings contrary or in addition to those prescribed under 21 C.F.R. §§ 1143.3(a)(1)(2)."). SFUSD cannot invoke the savings clause to defeat preemption and, therefore, should not be permitted to introduce evidence or argument that JLI's labeling and packaging allegedly failed to include appropriate nicotine warnings.

VIII. MOTION IN LIMINE NO. 8: EVIDENCE REGARDING YOUTH THC USAGE

During his deposition, Plaintiff's expert Michael Dorn offered that he considers JLI responsible for increased use of the drug THC, a psychoactive compound found in marijuana, among schoolchildren. Ex. 14, (8/24/2022 Dorn Dep.) at 283:19-285:22. Dorn did not disclose this opinion in his 107-page report, does not cite any actual evidence to back up his claim, and did not follow

any reliable methodology to arrive at his conclusion.[11] *Id*. at 304:18-305:23 (admitting that despite having interviewed scores of school officials, he cannot name a single one who provided evidence or even anecdotes supporting his claimed connection between JLI and THC). Still, it was Dorn's unequivocal stance at his deposition that JLI "bear[s] responsibility" for what he perceives to be a rise in student THC use because "they have created a device that allows students to use THC and other drugs in discrete ways that are difficult to detect." *Id*. at 288:2-12. This opinion and any other evidence regarding youth THC usage should be excluded under Rules 402 and 403.

Setting aside the lack of reliability, evidence and testimony about THC are irrelevant to SFUSD's claims. *See* Fed. R. Evid. 402. In its 940-paragraph complaint, SFUSD does not mention THC, let alone allege facts establishing liability connected to youth THC use. For instance, SFUSD does not allege that student THC use has increased, that JLI somehow contributed to that increase, or that the increase harmed SFUSD. The lack of THC-based claims makes sense because, as Dorn acknowledges, JLI has never manufactured any THC products or designed any devices for the purpose of allowing users to vape THC. Ex. 14, (8/24/2022 Dorn Dep.) at 304:18-305:6. Any THC products acquired and used by SFUSD students were manufactured and sold by third-parties entirely unconnected with JLI and who are not Defendants in this action.

Additionally, any minimal relevance Plaintiff argues Dorn's assertions may have is entirely overshadowed by the undue prejudice that this unsubstantiated testimony will create. Illegal drugs are a charged topic and courts recognize that drug-related evidence can be "unduly prejudicial," can "confuse the issues," and can "result in undue delay and wasted time." *Zhang v. A-Z Realty & Inv. Corp*., 2021 WL 6883425, at *4 (C.D. Cal. Sept. 28, 2021); *see also Kunz v. DeFelice*, 538 F.3d 667, 677 (7th Cir. 2008); *Nesbitt v. Sears, Roebuck & Co.*, 415 F. Supp. 2d 530, 540 (E.D. Pa. 2005) ("even if marginally relevant, evidence concerning plaintiff's previous use of marijuana and alcohol would unfairly prejudice the jury against plaintiff"). Where evidence regarding illegal drugs is not central to the case, courts exclude it because of the extreme prejudice it causes. *See, e.g., Arthur v.*

[11] His *ipse dixit* opinion is thus unreliable and should be excluded on its own terms. *See* Dkt. No. 3462 (Motion to Exclude Dorn).

Gallagher Bassett Servs., Inc., 2010 WL 11596468, at *5 (C.D. Cal. June 1, 2010). Here, Dorn's assertion that JLI contributed to the increased use of a substance that was for at least some of the relevant time period entirely illegal in California, and which is still illegal for minors, will unfairly portray the Defendants as promoters of illicit drugs. Unsupported expert testimony and argument that JLI caused increased THC use amongst youth in violation of the law and to the detriment of youth health—neither of which is an allegation or a basis for liability here—will confuse the issues in the case and should be excluded.

IX. MOTION IN LIMINE NO. 9: EDUCATION AND YOUTH PREVENTION PROGRAMS IN OTHER SCHOOL DISTRICTS

Evidence of or references to (i) congressional testimony by teenagers or parents purporting to discuss in-school activities by JLI, and (ii) JLI's Education and Youth Prevention Program ("EYP Program") interactions with students should be excluded. Under Federal Rules of Evidence 402 and 403, this evidence has no relevance to SFUSD's claims, and diverting the trial with evidence about it would be unduly prejudicial to JLI.

As in the *B.B*. case, congressional testimony by parents and students claiming exposure to JUUL products or JUUL programs in schools outside of SFUSD should be excluded here. *See* Dkt. No. 3170 at 4. The testimony of potential plaintiffs, parents, or others who have no connection to SFUSD about their interactions with JLI is irrelevant and would confuse the issues *in this case*, creating undue prejudice to the Defendants. In addition, congressional testimony by individuals who are not witnesses in this case and who lack any connection to it is also inadmissible hearsay.[12] Courts have regularly excluded congressional testimony in similar circumstances, *see*, *e.g.*, *In re General Motors LLC.*, 2015 WL 8578945, at *4–5 (S.D.N.Y. Dec. 9, 2015) (excluding hearsay congressional testimony of persons not officers of GM), and the same should hold true in this one.

The Court should also exclude all evidence related to the EYP Program's interactions with students because none of those interactions occurred in SFUSD and they are, therefore, irrelevant to this case. The EYP Program was limited in scope and had no connection whatsoever to SFUSD.

[12] Out-of-court statements by nonparties offered for the truth of the matter asserted are hearsay, Fed. R. Evid. 801, and are generally "not admissible." Fed. R. Evid. 802.

There is no evidence, and SFUSD does not allege, that any SFUSD school ever piloted or used the EYP Program, that any SFUSD school received funding through the EYP Program, or that anyone associated with the EYP Program had contact with students at any SFUSD school. The complaint references the EYP Program's "extensive work with schools" and alleges that JLI "paid schools for access to their students," SFUSD Am. Compl. ¶¶ 488, 489, but SFUSD makes no allegations with respect to SFUSD schools specifically. Indeed, as part of the EYP Program, JLI employees or representatives only interacted with students on four occasions: twice to conduct focus groups, and twice after accepting invitations from school principals or administrators to participate in school anti-vaping events. None of these interactions involved an SFUSD school. *See* Ex. 17, (7/31/2021 Henderson Dep.) at 359:3–25; Ex. 18, (2/11/2021 Henderson Dep.) at 631:16–632:13; Ex. 19, (2/18/2021 Harter Dep.) at 282:7–283:15. Further, none of the interactions involved any of the RICO defendants, so the evidence is entirely irrelevant to SFUSD's RICO claim.

Evidence regarding these focus groups and events involving ***other schools outside of SFUSD*** should also be barred from trial because it will create confusion, undue prejudice, and will waste time on irrelevant "mini-trials." The only reason to introduce school programming involving students from other school districts would be to suggest that similar conduct actually occurred in this school district or that the conduct impacted SFUSD; there is no evidence to support either point in this case.[13] Notably, the fact that this Plaintiff is not an individual, like in *B.B.*, but a school district renders this evidence significantly more confusing and prejudicial because it will confuse the jury into thinking that JLI's EYP student interaction had some connection to SFUSD schools, when they did not. Even if SFUSD can conjure up some tangential relationship between these limited, foreign-to-it programs and SFUSD's claims, the probative value of the evidence would be well outweighed by prejudice and other problems addressed by Rule 403, including the fact that JLI

[13] Evidence regarding JLI's "Moving Beyond Curriculum" should also be excluded, for the same reasons. This anti-vaping curriculum, which was developed by JLI for use by educators in schools, was only used in a single school district in Arizona. *See* Ex. 18, (2/11/2021 Henderson Dep.) at 618:6–9; Ex. 20, (2/19/2021 Harter Dep.) at 633:25–634:6. SFUSD cites a payment JLI made to the Police Activities League of Richmond, California to encourage participation in the program, *see* SFUSD Am. Compl. ¶ 492, but does not allege any relationship between that payment and SFUSD or any other school.

will have to waste time explaining the lack of connection between the programming and SFUSD. *Mathew Enterprise, Inc. v. Chrysler Grp. LLC.*, 2016 WL 11432038, at *7 (N.D. Cal. Sept. 21, 2016) (excluding evidence where that would result in "mini-trials" and that would provide "little probative value and would be a waste of time"); *Estate of Le Baron, Sr. v. Rohm & Haas Co.*, 506 F.2d 1261, 1263 (9th Cir. 1974) (affirming exclusion of evidence with "questionable probative value" where admission "would have resulted in extensive cross-examination and substantial countering evidence" that would "obliterat[e] the basic issues of the case and confus[e] the jury"). Irrelevant and unduly prejudicial evidence concerning other school districts should be barred.

X. MOTION IN LIMINE NO. 10: ONLINE AGE-VERIFICATION PROCESSES AND PURCHASES BY UNDERAGE PERSONS

The Court should exclude evidence or argument related to JLI's online age verification processes, including allegations that JLI's online age verification was insufficient to prevent youth access. Plaintiff has produced no evidence (expert or fact) to show that SFUSD students purchased JUUL products online, and there is nothing that connects SFUSD's claims either directly or indirectly to online purchases or JLI's age verification systems. The evidence therefore is not relevant under Fed. R. Evid. 402.

Plaintiff's complaint alleges JLI used "intentionally permissive age verification practices." SFUSD Compl. ¶ 463; *see also id*. at ¶¶459-457. Not only is there no evidence to support this sweeping claim, Plaintiff has not marshalled any evidence connecting JLI's online age verification system to youth use of JUUL in SFUSD, period. And Plaintiff's experts do not even attempt to fill the gap. The closest that any of Plaintiff's experts come to connecting JLI's online age verification processes to SFUSD is one passing comment by Dr. Ribisl that "JUUL's weak age verification efforts at … their online JUUL.com site allowed underage youth to gain access to their products." Ex. 21, (4/28/2022 Ribisl SFUSD Report) at 5. But Dr. Ribisl's conclusory statement without more does not justify spending significant trial time on a complicated technological process that changed significantly over time. *See* Ex. 22, (11/15/2021 Jarae Report) at 3-5. If Plaintiff is permitted to argue JLI's online age verification system was insufficient, the complex and evolving nature of JLI's

online age verification system would be put at issue, requiring lengthy exploration and explanation, all for little probative value.

Likewise, allowing Plaintiff to attack those systems would only confuse the issues, inviting jurors to hold JLI liable for conduct that did not actually impact the Plaintiff in this case—thus any probative value would be clearly outweighed by prejudice to JLI. Fed. R. Evid. 403; *see also, e.g., Speer v. County of San Bernardino*, 2021 WL 5969521, at *5 (C.D. Cal. Aug. 9, 2021) (excluding evidence relating to other plaintiffs' claims, where those claims were "unrelated to the events at issue . . . and unduly prejudicial"). In *B.B.*, although Defendant's motion *in limine* to exclude evidence regarding JLI's online age verification was denied, the Court warned that "only limited evidence may be allowed, otherwise the Rule 403 concerns regarding jury confusion and waste of time spent on issues with marginal relevance come into play." Dkt. 3170 at 4. In that case, Plaintiff B.B. at least had some connection to JLI's online age verification system because she had attempted to create an account on JLI's website. Ex. 23, (4/16/2021 B.B. Dep.) at 90:7–9. Here, on the other hand, there is no evidence at all related to SFUSD students purchasing JUUL products online (or creating accounts in an attempt to do so). Accordingly, there is no need to explain JLI's complex and changing age verification systems at all, and so evidence of those systems should be excluded entirely.

XI. MOTION IN LIMINE NO. 11: JUUL ADVERTISEMENTS AND COUPONS FOR JUUL DISSEMINATED BY ALTRIA

In 2019, Altria disseminated advertisements and coupons for JLI. Plaintiff has not identified a single student in its district who received or viewed an advertisement or coupon from Altria.[14]

[14] *See, e.g.*, Ex. 24, (5/27/2021 Pak Dep.) at 123:23-129:1 (30(b)(6) witness testifying that SFUSD lacks "any knowledge" that "the Altria defendants did anything that increased vapor use at the schools within the district"); Ex. 25, (9/3/2021 Blanchard Dep.)) at 151:16-20; Ex. 26, (8/31/2021 Lee Dep.) at 132:13-16. *See also* Ex. 7, (12/16/2021 Nelson Dep.) at 229:22-230:4, 230:14-16 ("Q. So to the best of your knowledge, are you aware of any SFUSD students receiving emails from Altria about JUUL products? A. I'm not aware of that. Q. Are you aware about any students receiving mailings from Altria about JUUL products? A. I'm not aware of that. . . . . Q. Are you aware of students visiting Altria's website? A. No, I don't."); Ex. 27, (9/28/2021 Wallace Dep.) at 146:25-147:10 ("Q. During your time with the school district are you aware of students receiving emails, mailings or texts from Altria about JUUL products? A. No. Q. Are you aware of students in

Nor would one expect students to have received or viewed those advertisements, since Altria disseminated them only by sending them to age-verified adult smokers listed in Altria's database or inserting them in packages of certain brands of Philip Morris USA cigarettes.[15]

The Court therefore should preclude Plaintiff from offering or relying upon these advertisements at trial. Evidence of these advertisements is irrelevant to this Plaintiff's claims. Fed. R. Evid. 401, 402; *see also, e.g.*, *Grant v. Allstate Ins. Co.*, 2010 WL 11519538, at *1 (C.D. Cal. July 16, 2010) (excluding evidence of acts unrelated to the specific plaintiffs' claims). In addition, even if the advertisements had some marginal relevance, that relevance would be outweighed by the risk of undue prejudice to Altria and confusion to the jury because it would incorrectly suggest that these materials impacted SFUSD and/or were received by students. Fed. R. Evid. 403; *see also, e.g.*, *Speer v. County of San Bernardino*, 2021 WL 5969521, at *5 (C.D. Cal. Aug. 9, 2021) (excluding evidence "unrelated to the events at issue . . . and unduly prejudicial").

Moreover, allowing Plaintiff to offer such evidence would force Altria to respond with its own evidence, resulting in mini-trials on irrelevant questions that only waste time and confuse the issues. *See, e.g.*, *Mathew Enterprise, Inc. v. Chrysler Grp. LLC.*, 2016 WL 11432038, at *7 (N.D. Cal. Sept. 21, 2016) (excluding evidence where that would result in "mini-trials" and that would provide "little probative value and would be a waste of time"); *Estate of Le Baron, Sr. v. Rohm & Haas Co.*, 506 F.2d 1261, 1263 (9th Cir. 1974) (affirming exclusion of evidence with "questionable probative value" where admission "would have resulted in extensive cross-examination and substantial countering evidence" that would "obliterat[e] the basic issues of the case and confus[e] the jury").

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the school district receiving emails, mailings or texts from Philip Morris about JUUL products? A. No. Q. Are you aware of students in the school district visiting Altria's website? A. No.").

[15] *See, e.g.*, Ex. 28, (11/1/2021 A. Shihadeh Dep.) at 350:18-21 ("Q. And have you seen any evidence that the Altria Defendants disseminated 'make the switch' advertisements to anyone other than adults? A. No, I have not."); Ex. 29, (3/2/2021 Longest Dep.) at 186:21-187:25 ([redacted]); *id.* at 342:25-345:14 ("[redacted]").

XII. MOTION IN LIMINE NO. 12: ALTRIA'S RETAIL AND DISTRIBUTION SERVICES

In 2019, Altria provided certain distribution services to JLI, and, from 2019 to early 2020, provided limited retail services. But there is no evidence connecting these services to Plaintiff's alleged injuries. Plaintiff has not identified *any* evidence that any student obtained JUUL at a store serviced by Altria, let alone that any student purchased JUUL and used JUUL at school because of Altria's distribution services (and not some other reason), or that Altria's distribution caused Plaintiff's alleged harm.[16] The record in fact refutes that theory. It is undisputed that these services were provided only at locations that required age verification and other youth access controls.[17] In addition, although Plaintiff claims that the availability of flavors drove underage vapor use, Altria did not provide *any* JUUL-related services until months *after* San Francisco banned the sale of non-tobacco-flavored vapor products, including mint and menthol pods. *See* San Francisco Health Code, *Article 19Q: Prohibiting The Sale Of Flavored Tobacco Product*. Altria therefore provided no services in San Francisco related to or that had any impact on the sale of non-tobacco-flavored JUUL products. And Plaintiff's own expert, Dr. Cutler, testified that he assumed minors would have purchased mint flavored JUUL, and not the tobacco flavored JUUL available at the time of Altria's retail and distribution services. Ex. 30, (11/3/2021 Cutler Dep.) at 372:16-24.

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[16] *See, e.g.*, Ex. 7, (12/16/2021 Nelson Dep.) at 230:10-13 ("Q. Are you aware of students purchasing JUUL products from a store that receives services from Altria? A. No, I'm not aware of that.") (Ex. 18); (9/28/2021 Wallace Dep.) at 148:16-:18 ("Q. Are you aware of Altria providing any services to retailer stores in the school district? A. No."); Ex. 31, (9/21/2021 Swett Dep.) at 99:22-25 ("Q. Are you aware of students in the school district purchasing JUUL products from a store that received services from Altria? A. No."); Ex. 8, (9/16/2021 Matthews Dep.) at 155:12-15 ("Q. Do you know whether any of your students ever purchased JUUL products from retail stores where Altria provided retail services? A. I am not sure."); Ex. 25, (9/3/2021 Blanchard Dep.) at 152:12-15 ("Q. And are you aware of Altria providing any services to retail stores in your School District? A. No."); Ex. 26, (8/31/2021 Lee Dep.) at 132:17-20 ("Q. Are you aware of SFUSD students purchasing Juul products from a store that received services from Altria? A. Not aware.").

[17] *See, e.g.*, Cal. Penal Code § 308(A)(1)(a) (allowing criminal or civil action and fines against persons or corporations selling tobacco products to anyone under 21); Cal. Bus. & Prof. Code § 22958(a) (allowing civil penalties against persons and businesses that sell, give, or furnish tobacco or instruments designed to ingest tobacco anyone under 21 years; authorizing license suspension or revocation); *id*. § 22956 (requiring retailers to check identification of tobacco purchasers); *id*. § 22972 (detailing license requirements for tobacco retailers); *id*. § 22980 (authorizing inspections).

Accordingly, evidence concerning the limited retail and distribution services that Altria provided is irrelevant to this Plaintiff's claims and should be precluded. Fed. R. Evid. 401, 402. And even if Plaintiff could show some marginal relevance, it is clear that relevance would be outweighed by the risk of undue prejudice to Altria and confusion to the jury. Plaintiff's reasons for offering evidence of Altria's services—to inflame and mislead the fact-finder about Altria's impact on Plaintiff—are entirely improper. *See, e.g., United States v. Hitt.*, 981 F.2d 422, 424 (9th Cir. 1992) ("Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury."); *see also, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) (suggesting trial court erred by refusing to exclude "nationwide scheme" evidence and noting defendant "was being condemned for its nationwide policies rather than for conduct directed toward the [plaintiffs]."). Moreover, allowing Plaintiff to offer this evidence would result in "mini-trials" and that would provide "little probative value and would be a waste of time." *Mathew Enterprise*, 2016 WL 11432038, at *7. This is further reason the Court should preclude Plaintiff from offering this evidence.

XIII. MOTION IN LIMINE NO. 13: ARGUMENTS THAT INVESTMENT PROVIDES CONTROL OR CREATES LIABILITY FOR INVESTOR

Plaintiff has frequently pointed to Altria's purchase of a 35% interest in JLI in December 2018 during this case. Altria does not seek to preclude the jury from knowing that this investment took place. Plaintiff, however, should be precluded from arguing or in any way suggesting that Altria acquired control over JLI or became liable for JLI's actions or products by investing in JLI. Such arguments would be factually incorrect and misstate the law, would unduly prejudice Altria, and would confuse the jury. *See* Fed. R. Evid. 401-403.

Altria purchased only a minority interest in JLI and has never had any voting rights.[18] A minority interest does not provide the shareholder with any control over the corporation, nor does it assume responsibility for that corporation's liabilities. *Dole Food Co. v. Patrickson*, 538 U.S. 468,

[18] On December 20, 2018, AGI purchased a 35% interest in JLI. *See* Altria Group, Inc., Form 10-K Annual Report at 1 (Ex. 32).

474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *In re Gupta Corp. Securities Litigation*, 900 F. Supp. 1217, 1243 (N.D. Cal. 1994) (defendant's "position as a minority shareholder . . . with an agent on the board does not establish control person liability"); *O'Sullivan v. Trident Microsystems*, Inc., 1994 WL 124453, *18 (N.D. Cal. Jan. 31, 1994) (the fact that a defendant owned 9.5% of a defendant's stock and had a representative on the board were insufficient to state a claim for control person liability). Plaintiff also can provide no evidence that Altria obtained control over JLI or assumed JLI's liabilities by virtue of purchasing its 35% minority interest. Instead, the record demonstrates the opposite—that JLI was at all times a separate company and that Altria did not have control over JLI. *See e.g.*, Ex. 33, (7/14/2021 N. Pritzker Dep.) at 559:18-20 ("[W]e reached a structure where there was no control or ability to get control."); *id.* at 652:15-24 ("I would say that I never would have supported a deal where they had control."); Ex. 34, (7/7/2021 Bowen Dep.). at 483:15-484:1 ("[W]e did not want to do, for instance, a deal where Altria took majority—a majority position in the company and control of the company, nor did we want a—there to be really a path for them to some day obtain control."); Ex. 35, (10/25/2021 Drumwright Dep.) at 359:23-360:3 ("Q. And without making any assumptions, do you know if Altria can require JUUL to take any action? A. I know that it's a minority stake and so they don't control"); Ex. 36, (10/27/2021 Eissenberg Dep.) at 332:19-24 (Q. [w]hich was as a minority shareholder with no voting rights, it has no actual authority to tell JLI how to run its business. Isn't that right? A. I think that is correct."). Accordingly, the Court should foreclose Plaintiff from representing or suggesting in any way that Altria has control over or is liable for JLI as the result of Altria's minority investment in JLI.

XIV. MOTION IN LIMINE NO. 14: OPINIONS THAT VAPOR USE CONTRIBUTED TO SCHOOL SHOOTING DEATHS OR INJURIES

The Court should foreclose Plaintiff and Plaintiff's experts from offering evidence or argument that attempt to link Defendants or JUUL use to deaths or injuries in school shootings. Plaintiff's expert Michael Dorn states that vapor-related actions may have contributed to additional casualties in the tragic school shooting at Marjory-Stoneman Douglas High School in Broward County, Florida in February 2018. Ex. 37, (8/19/2022 Dorn Report) at 15-16. According

to Mr. Dorn, in the aftermath of that tragedy, "questions were raised about whether or not the practice of locking student restrooms could have been a contributing factor in the wounding and deaths of some of the victims." *Id*. at 15. Mr. Dorn doubled down on this opinion at his deposition, claiming "to be clear there is a relationship between E-cigarette use at Marjory Stoneman Douglas High School in Broward County and the 34 people that were shot in the . . . shooting with 17 fatalities." Ex. 14, (8/24/22 Dorn Dep.) at 76:24-77:4; *see also, e.g.*, *id.* at 77:17-78:18 (similar).

Mr. Dorn's opinions, and any other evidence concerning this issue or school shootings more generally, are irrelevant and extraordinarily prejudicial. As an initial matter, the event that Mr. Dorn describes took place at a school in Florida, not San Francisco. Regardless of location, there is no allegation in this case, let alone evidence, that locking bathrooms in response to vapor use led to anything that in any way resembles the tragic events that took place at Marjory-Stoneman Douglas High School in 2018. The only purpose Plaintiff might have for offering evidence on this point would be an improper one—to inflame the jury and unduly prejudice Defendants by attempting to connect JUUL use to an emotionally charged, reprehensible, and tragic issue. Accordingly, the Court should exclude this testimony under Rule 403 as well. *See, e.g.*, *In re Bard IVC Filters Prod. Liab. Litig*., 2018 WL 1876896, at *3 (D. Ariz. Apr. 18, 2018) (excluding evidence of deaths caused by previous version of product because deaths were only marginally relevant), *aff'd*, 816 F. App'x 218 (9th Cir. 2020); *Speer*, 2021 WL 5969521, at *5 (excluding evidence "unrelated to the events at issue . . . and unduly prejudicial").

XV. MOTION IN LIMINE NO. 15: MR. MONSEES' CONSTITUTIONALLY-PROTECTED CONGRESSIONAL TESTIMONY

The Court should exclude evidence related to Mr. Monsees' 2019 testimony before Congress, as it is protected under the Noerr-Pennington doctrine.

SFUSD intends to argue that Mr. Monsees' July 25, 2019 Congressional testimony misled both Congress and the public, and served as a predicate racketeering act underlining SFUSD's civil RICO claims. *See* Appendix to Plaintiff's Consolidated Opposition to Defendants' Motions for Summary Judgment, Dkt. No. 3447 at A-6 (listing Mr. Monsees' statement to Congress as one "example[] of mail and wire fraud" underlying SFUSD's RICO claims).

But this testimony—and any other petitioning or lobbying activity by any Defendant—is protected by the First Amendment to the U.S. Constitution. *See Eeastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc*., 365 U.S. 127, 138 (1960); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–70 (1965). Binding precedent provides that statements directed to and designed to influence Congress, just like Mr. Monsees' statements here, are shielded from RICO liability. *See, e.g.*, *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929, 942 n.6 (9th Cir. 2006). This rule governs even if the statements—unlike those at issue here—were an "outright lie[]." *See, e.g.*, *Kottle v. Nw. Kidney Ctrs*., 146 F.3d 1056, 1060 (9th Cir. 1998).

Though the Noerr-Pennington doctrine is a rule of liability, courts have excluded evidence of lobbying efforts where the purpose of the evidence would be to impose liability upon the act of lobbying itself. *See generally Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n.*, 938 F.2d 846, 854 (8th Cir. 1991) (affirming exclusion of evidence of activity protected under Noerr-Pennington); *Weit v. Cont'l Illinois Bank & Tr. Co. of Chicago*, 641 F.2d 457, 466–67 (7th Cir. 1981) (same under Rule 403); *U.S. Football League v. National Football League*, 634 F. Supp. 1155, 1171 (S.D.N.Y. 1986) (same); *City of Cleveland v. Cleveland Elec. Illuminating Co*., 734 F.2d 1157, 1163 (6th Cir. 1984) (similar). As one court remarked, a "plaintiff must be foreclosed from undertaking a course of examination which is specifically . . . designed to trigger the admission of [] constitutionally protected activity." *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1277 (N.D. Ohio 1980).

Waiting to consider Noerr-Pennington and First Amendment protections applicable to Mr. Monsees' testimony until "post-trial," as this Court suggested it would do with respect to the B.B. trial (Dkt. No. 3170), where Mr. Monsees was not a trial defendant, would severely prejudice Mr. Monsees here. If jurors are presented with evidence of Mr. Monsees' congressional testimony—which, as a matter of law, cannot serve as the basis for Plaintiff's RICO claims or satisfy the requisite "predicate act" element—there is a substantial risk of confusing the jury and causing unfair prejudice to Mr. Monsees. *See DataTreasury Corp. v. Wells Fargo & Co.*, 2010 WL 11538713, at *15 (E.D. Tex. Feb. 26, 2010) (excluding evidence of defendants' lobbying activities because any probative value of those activities was "substantially outweighed by the danger of unfair prejudice,"

"[d]iscussion … would likely open the door" to other protected conduct, and would be a "waste of time").

XVI. MOTION IN LIMINE NO. 16: EXPERT TESTIMONY CONTAINING PEJORATIVE LANGUAGE, FACTUAL NARRATIVES, OR NEW OPINIONS

The Court should preclude SFUSD's experts from (i) using pejorative language about the Non-Management Directors, or (ii) offering a factual narrative of events. Such testimony is plainly improper: It is unhelpful, irrelevant, and prejudicial, and invades the jury's role. The Court should also preclude these experts from offering new opinions not expressed in their reports, a foundational principle of expert testimony.

This Court ruled in the *B.B.* trial that "all experts should refrain from using unduly prejudicial or pejorative terminology." Order on Motions to Exclude (Dkt. No. 3270) at 60 n.44. The Court should rule the same way here. Under Rule 702, experts cannot present their personal views of a defendant's behavior or character to the jury. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) ("[P]ersonal opinion testimony is inadmissible as a matter of law under Rule 702." (citation omitted)); *Santa Clarita Valley Water Agency v. Whittaker Corp.*, 2021 WL 6107023, at *3 (C.D. Cal. Nov. 12, 2021) (precluding expert from "inject[ing] his personal opinions into this case, including his views about the 'right thing to do'").

Specifically, the Court should preclude SFUSD expert Dr. Minette E. Drumwright from testifying that Mr. Pritzker and Mr. Valani saw the potential investment by Altria as an opportunity to "cash in on their investments," Ex. 38, (9/20/21 Drumwright Report) at 10, or "cash in and make big money," *id.* at 144; *see* Ex. 39, (5/2/22 Drumwright Report) at 55; Ex. 40, (6/1/22 Drumwright Dep.) at 229:2-11. Drumwright's views on how defendants subjectively "understood" the transaction or "perceived" Altria are prejudicial and improper. Ex. 39, (5/2/22 Drumwright Report) at 29. Similarly, the Court should preclude Drumwright from comparing Mr. Pritzker and Mr. Valani to the directors of Enron, Ex. 39, (5/2/22 Drumwright Report) at 57-58. This testimony is unnecessarily prejudicial, untethered to any expertise, and violates Rules 702 and 403.

The Court should also prohibit Plaintiffs' experts from providing improper narrative evidence. Attempts to place an expert gloss on factual events are cumulative, misleading, and a

waste of time under Rule 403. *See Fujifilm Corp. v. Motorola Mobility LLC.*, 2015 WL 757575, at *27 (N.D. Cal. Feb. 20, 2015) (Orrick, J.) (explaining that experts cannot "simply rehash[] otherwise admissible evidence about which [they have] no personal knowledge" (citation and quotation marks omitted)). For example, many of Plaintiff's experts, including Dr. Drumwright and Professor Chandler, characterize documents and events, including meetings between the Defendants, without applying any expert analysis. *See, e.g.*, Ex. 39, (5/2/2022 Drumwright Report), at 62-63 (characterizing a dinner Altria hosted for JLI Board members "at a Napa Valley winery" as "enhanc[ing]" Altria's "referent power"); *see also* Chandler Report (Sept. 20, 2021), at 68 (purporting to review "the available evidence" and concluding that user-generated content was "imbedded in [JUUL's] corporate DNA"). Such testimony is plainly improper. *AYA Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 2020 WL 2553181, at *6 (S.D. Cal. May 20, 2020), *aff'd*, 9 F.4th 1102 (9th Cir. 2021) (experts cannot invade the jury's province by "constructing a factual narrative based upon record evidence"); *Banga v. Kanios*, 2020 WL 9037179, at *3 (N.D. Cal. Dec. 9, 2020) (holding that "factual findings gleaned from [expert's] review of the paper record both will not assist the fact finder and improperly invade the jury's fact-finding task").

Finally, the Court should preclude experts from testifying as to any opinions not expressed in their reports. *See Garcia v. County of Riverside*, 2019 WL 4282903, at *10 (C.D. Cal. June 7, 2019) (describing the rule that an expert "cannot testify as to topics and opinions that he did not address in his report" as "axiomatic," "blackletter law"); *Wadler v. Bio-Rad Laboratories, Inc.*, 2016 WL 6070530, at *4 (N.D. Cal. Oct. 17, 2016). For instance, SFUSD's experts who provide opinions on abatement strategies and costs—David M. Cutler, Michael Dorn, Bonnie Halpern-Felsher, and Robert D. Rollo—should not be allowed to offer testimony concerning historical or future damages (e.g., the cost of repairing damaged school property or of diverted teacher time). Their reports do not address historical damages, only abatement,[19] and if the Court allows them to testify before the jury at all (and it should not, *see* MIL #17), their testimony should be limited to abatement.

[19] *See* Ex. 41, (1/28/2022 Cutler Report) at 2 (estimating the "specific costs" of abating the alleged epidemic); Ex. 10, (9/20/2021 Cutler Report) at 33 (discussing costs associated with "[redacted]"); Ex. 37, (8/19/2022 Dorn Report) at 8, 90 ("evaluat[ing] . . . intervention strategies . . . to enable SFUSD to effectively prevent and address student use of e-cigarettes"); Ex.

XVII. MOTION IN LIMINE NO. 17: EXPERT TESTIMONY REGARDING ABATEMENT PLANS AND ALLEGED DAMAGES

The Court should preclude SFUSD's experts from testifying before the jury about alleged damages to SFUSD because those experts neither analyzed nor quantified damages. The Court also should preclude SFUSD's experts from testifying before the jury about their abatement opinions and the costs thereof because evaluating, adopting, and costing an abatement plan is reserved for the Court. Allowing the jury to hear abatement testimony would waste time, distract the jury from the questions before it, and prejudice the defendants. SFUSD cannot recast abatement testimony as a measure of "future damages" for its RICO and negligence claims. Abatement and damages serve different purposes and none of SFUSD's experts' abatement opinions purports to estimate any damages that have been or will be incurred by SFUSD.

First, the Court should preclude SFUSD's experts from testifying about alleged damage to SFUSD property. None of SFUSD's experts' reports addresses property damage. In opposing summary judgment, the only source SFUSD cites to support its allegation of property damage is a set of notes of site-assessments performed by the staff of one of its experts, Michael Dorn. *See* SFUSD's Opp. to Defendants' Mot. for Summary Judgment at 82 (citing Opp. Exs. 215, 216, 217, 219). But neither Mr. Dorn's expert report nor any other expert report discusses these notes or any alleged property damage. Because an expert "cannot testify as to topics and opinions" — here, property damage — "that he did not address in his report," the Court should preclude SFUSD's experts, including Dorn, from testifying about property damage. *Garcia*, 2019 WL 4282903, at *10; *see also Wadler*, 2016 WL 6070530, at *4.

Such testimony would be improper for the additional reason that SFUSD's experts provide no analysis or quantification of that damage. While Mr. Dorn's staff took notes indicating that unnamed SFUSD employees identified minor property damage at an SFUSD school, including a boarded up bathroom door and a small hole cut in a fence, neither his report nor the notes analyzes what caused the alleged damage or tries to connect it to JUUL products, and Mr. Dorn does not

42, (1/28/2022 Rollo Report) at 1 ([redacted]).

quantify any alleged financial loss. *See* SFUSD Opp. to Defendants' Mot. for Summary Judgment at 82 (citing Opp. Exs. 215, 216, 217, 219). Because SFUSD's experts do not analyze alleged property damage, any testimony they offered would be improper, because it would not be based on the "expert's scientific, technical, or other specialized knowledge." Fed. R. Evid. 702(a). SFUSD experts cannot serve as glorified fact witnesses, testifying based on what others told their staff. *See Fujifilm Corp.*, 2015 WL 757575, at *27 (Orrick, J.) (experts cannot "simply rehash[] . . . evidence about which [they have] no personal knowledge" (citation omitted)).

Second, the Court should preclude SFUSD's experts from testifying before the jury about their opinions concerning abatement and its costs. Public nuisance is an equitable claim, and abatement is an equitable remedy. *Orange Cnty Water Dist. v. Unocal Corp.*, 2016 WL 11201024, at *5 (C.D. Cal. Nov. 3, 2016) ("Abatement is rooted in equitable, injunctive relief."). Because the jury lacks power to award abatement, *see People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1102 (1997) (referring to "the superior court's equitable power to abate a public nuisance"), expert testimony regarding abatement and its costs should not be presented to the jury, *see, e.g.*, *Illinois Tool Works, Inc. v. MOC Prods Co., Inc.*, 946 F. Supp. 2d 1042, 1044 (C.D. Cal. 2012) ("As MOC's equitable defenses will be decided exclusively by the Court, the Court will exclude evidence from the jury that raises purely equitable considerations."). In addition to being a waste of time, evidence of equitable considerations "could needlessly confuse the jury and tempt them to decide [legal] claims on the basis of equitable factors. Presenting the jury with such evidence may contaminate their factual findings on legal issues . . . ." *Id.* at 1046.

SFUSD tries to avoid its failure of proof on RICO and negligence by recasting expert opinion about abatement as analysis of future damages. But the two are distinct: Future damages are "money awarded to an injured party for an injury's residual or projected effects," and measure the cost of anticipated harm. Black's Law Dictionary, *Damages* (11th ed. 2019). By contrast, abatement is "[t]he act" — or cost — "of eliminating or nullifying" a condition, and measure the cost of remedial measures, even if the actual amount of harm suffered is far less. *Id.*, *Abatement*. SFUSD admits this. SFUSD Opp. to Defendants' Mot. for Summary Judgment at 103 ("Future damages and abatement are distinct concepts subject to different standards").

SFUSD's experts' reports reflect this distinction. Dorn, Cutler, and Rollo all submitted reports opining on the measures needed to abate an "epidemic" (*i.e.*, a public nuisance) of youth vaping.[20] None of Plaintiff's experts opined on damages to compensate SFUSD for harms it has suffered or will suffer as a result of alleged negligence, or RICO damages to compensate SFUSD for alleged injuries to its property. *See* NMD Mot. for Summary Judgment, § III. Nor did any of the experts provide an estimate of damages or to describe their scope. *Id.*

In opposing summary judgment, SFUSD cited cases in support of its argument that abatement costs can be recovered as future damages. But in those cases, the abatement at issue involved repairing physical property that had been damaged. *Walnut Creek Manor, LLC v. Mayhew Ctr, LLC.*, 2010 WL 653561, at *4 (N.D. Cal. Feb. 22, 2010) (costs of repairing "the contaminated soil on WCM property"); *Santa Clarita Water Agency. v. Whittaker Corp.*, 2021 WL 2549066, at *1, 14-16 (C.D. Cal. Apr. 5, 2021) (costs of purifying "contaminants in the groundwater beneath the Whitaker site"). Here, the abatement opinions do not measure the cost of repairing alleged physical damage to SFUSD's fence and bathroom door, they estimate the costs of installing hundreds of surveillance cameras, vape detectors, and locked doors to allegedly aid in detecting, investigating, and reducing youth vaping. Abatement testimony is therefore irrelevant to SFUSD's RICO and negligence claims, and the Court should not allow the jury to hear it.

XVIII. MOTION IN LIMINE NO. 18: DIVIDENDS RECEIVED FROM THE ALTRIA TRANSACTION

This Court granted JLI and Altria's Motion in Limine No. 7 in the B.B. case (Dkt. 2950, at 17-19) in part, excluding evidence about the personal net worth or spending patterns of any individual. The Individual Defendants move, pursuant to Rules 401, 402, and 403 to preclude SFUSD from introducing evidence relating to the amounts of money the Individual Defendants

[20] *See* Ex. 41, (1/28/2022 Cutler Report) at 2 (estimating the "specific costs" needed for "the abatement" of the "youth epidemic"); Ex. 10, (9/20/2021 Cutler Report) at 33 (discussing costs associated with "abat[ing] the epidemic of youth vaping"); Ex. 37, (8/19/2022 Dorn Report) at 8, 90 ("evaluat[ing] . . . intervention strategies . . . to enable SFUSD to effectively prevent and address student use of e-cigarettes"); *id.* at 29 (discussing "the public nuisance in the District"); Ex. 42, (1/28/2022 Rollo Report) at 1 ("[redacted]").

received as a result of Altria's investment in JLI.[21] This evidence is irrelevant to any issue at trial and serves no purpose other than to prejudice the jury.

A. Evidence of Money Received From the Altria Investment Is Irrelevant.

SFUSD's evidence regarding dividend payments the Individual Defendants or any non-party witness[22] received from Altria's investment in JLI has no bearing on whether they: 1) conducted an enterprise through a pattern of racketeering activity, *see* 18 U.S.C. § 1962(c) (elements of RICO), 2) caused a public nuisance; or 3) negligently caused harm. SFUSD "alleges that the RICO Defendants' pattern of racketeering activity involved mail or wire fraud." Opp. at 53. But intent to personally gain money is not an element of mail or wire fraud. Rather, "wire fraud requires the Government to prove the defendant had a 'specific intent to defraud,' *not* an intent to personally gain from the fraud." *United States v. Dowie*, 411 F. App'x 21, 25 (9th Cir. 2010) (emphasis added); *see also United States v. Welch*, 327 F.3d 1081, 1106 (10th Cir. 2003) ("No appellate court to our knowledge has ever held an intent to achieve personal gain is an element of a traditional mail or wire fraud charge."); *United States v. Stockheimer*, 157 F.3d 1082, 1087 (7th Cir. 1998) ("An intent to defraud does not turn on personal gain."). Thus, what any individual *gained* from an alleged "scheme to defraud," Opp. at 53, is not an element of the charged scheme and the presentation of evidence concerning it is irrelevant to the Individual Defendants' liability. *See also Thomas v. Stenberg*, 206 Cal. App. 4th 654, 662 (2012) (no intent element for negligence). Such evidence is, therefore, inadmissible. Fed. R. Evid. 401-02.

SFUSD insinuates that the Individual Defendants were motivated to commit fraud by the prospects of "vast sums of money." Opp. at 70-71. But as the Ninth Circuit has explained, the flaw in this theory is that "almost everyone," rich or poor, "has a motive to get more money," and "most people, rich or poor, do not steal to get it." *United States v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999) (reversing conviction where government introduced evidence of defendant's financial

[21] The Individual Defendants did not previously move in limine on this issue because they were not Defendants in the BB action.

[22] SFUSD indicated a desire to introduce evidence of money that non-parties, such as Hank Handelsman, received from the Altria transaction. That should likewise be excluded.

situation to prove motive for crime); *see also United States v. Ewings*, 936 F.2d 903, 906 (7th Cir. 1991) ("The government maintains that the evidence established the defendant's motive because it showed that Ewings had an 'appetite' for money. But who doesn't?"). Whether individuals were interested in making money says nothing about whether they committed fraud towards that end. The amounts received from the Altria transaction are not relevant to any finding of liability.

B. Evidence of Money Received from the Altria Investment Prejudices the Jury.

Even if the Altria proceeds has any probative value, the danger of unfair prejudice substantially outweighs any such probative value. Fed. R. Evid. 403. This evidence serves primarily to bait the jury into finding liability based on an "emotional" or otherwise "improper basis," which Rule 403 bars. Fed. R. Evid. R. 403 advisory committee's notes to the 1972 proposed rule. For this reason, courts exclude evidence related to individuals' compensation received during the course or after an alleged crime—holding its probative value is low and outweighed by the significant risk of unfair prejudice. *See*, *e.g.*, *United States v. Holmes*, 2021 WL 2044470, at *5 (N.D. Cal. May 22, 2021) (rejecting Government's argument that "desire for wealth" was a factor "comprising Holmes's intent to perpetuate this broad-ranging fraud" because "evidence of her wealth and fame is not highly (or even moderately) probative of intent to defraud" and "the prejudicial effect of that evidence outweighs any probative value"). The Court should not permit SFUSD to invite the jury to find the Individual Defendants liable based on such improper emotional appeals, and should exclude such evidence under Rules 401, 402, and 403.

XIX. MOTION IN LIMINE NO. 19: NICHOLAS PRITZKER'S FAMILY TIES TO THE TOBACCO INDUSTRY

This Court has already held that SFUSD's expert "Halpern-Felsher should not testify concerning the Pritzker family's 'long-standing' relationship with the tobacco industry" if her testimony is based solely on the activity identified in the Non-Management Directors' motion: the Conwood sale. *In re Juul Labs, Inc. Mktg., Sales Pracs. & Prods. Liab. Litig.,* 2022 WL 1814440, at *27 (N.D. Cal. Jun. 2, 2022). The Court should extend this holding to cover Nicholas Pritzker's family connections to *any* tobacco company. The ties of Mr. Pritzker's extended family members

to a tobacco company have no probative value and would only waste time and unfairly prejudice the jury against Mr. Pritzker. *See* Fed. R. Evid. 402, 403.

Although none of Mr. Pritzker's family members are parties to this matter, SFUSD wants to argue that Mr. Pritzker "[redacted] Ex. 43, (9/20/2021 Halpern-Felsher Generic Report) at 283. During his deposition, Plaintiff's counsel asked Mr. Pritzker a series of questions about his [redacted]." Ex. 44, (7/13/2021 Pritzker Dep.) at 38:23-24. [redacted] *Id.* at 38:25-39:1. Mr. Pritzker had no idea whether the land was used in this manner or not. *Id.* at 39:3-6. There were also a series of questions for Mr. Pritzker about his cousins [redacted]. *Id.* at 39:7-40:3.

Mr. Pritzker is not his cousins, and none of the supposed "ties" of these extended family members sheds any light on whether Mr. Pritzker himself was involved in a RICO scheme, whether he acted negligently, or created a public nuisance. While SFSUD's experts want to opine that business activities by his cousins are somehow indicative of Mr. Pritzker's "[redacted]" have a "[redacted]," Ex. 43, (9/20/2021 Halpern-Felsher Genric Report) at 283-84, Mr. Pritzker had no involvement in any of these transactions. *See* Ex. 44, (7/13/2021 Pritzker Dep.) at 40:5-6 ([redacted]); *id.* at 39:3-6 ([redacted]). That does not make "a fact . . . of consequence" "more or less probable than it would be without the evidence," and it is therefore irrelevant to the claims in this matter. Fed. R. Evid. 401, 402.

Even if these "family ties" bore some marginal probative value, they would be substantially outweighed by a danger of unfair prejudice. Fed. R. Evid. 403. SFUSD's attempt to introduce this evidence or testimony is an attempt to induce the jury to conclude that Mr. Pritzker is guilty by virtue of his *family's* association with the tobacco industry, thereby serving "to inflame and unduly bias the jury." *Contour lp Holding, LLC*, 2021 WL 75666, at *3 (N.D. Cal. Jan. 8, 2021) (Orrick, J.).

XX. MOTION IN LIMINE NO. 20: EVIDENCE OF CHEMICALS IN JUUL OTHER THAN NICOTINE AND OF HEALTH CONDITIONS OTHER THAN ADDICTION

The Court should preclude evidence regarding any chemicals in JUUL products other than nicotine. The Court also should preclude evidence regarding any health conditions to which JUUL allegedly contributes other than addiction. And the Court should preclude evidence regarding any substances *not* in JUUL products, including THC. *See also* MIL IV and MIL VIII. SFUSD claims that Defendants created a public health crisis by addicting a generation of youth to nicotine, harming SFUSD. Evidence concerning other health conditions (including, but not limited to, pulmonary injuries, cardiovascular conditions, and seizures) and other chemicals is irrelevant and a waste of the jury's time, and risks confusing the jury and unduly prejudicing Defendants. *See In re: E.I. Du Pont De Nemours & Co. C-8 Pers. Inj. Litig.*, 2016 WL 3064124, at *8 (S.D. Ohio May 30, 2016) (excluding evidence regarding "other toxic chemicals" in polluted river water that did not "cause testicular cancer," the health condition there at issue).

Evidence regarding health conditions other than addiction is irrelevant to SFUSD's claims. "Personal injuries are not actionable under RICO," nor are they "compensable under RICO." *Oscar v. Univ. Students Co-Op Ass'n.*, 965 F.2d 783, 785, 787 (9th Cir. 1992), *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir.2005). Such evidence is irrelevant to SFUSD's public nuisance claims because the public nuisance SFUSD alleges is one of *addicted* youth, not youth suffering from other health conditions.[23] Such evidence also is irrelevant to SFUSD's negligence claims, as SFUSD is not a person and cannot suffer from these conditions.

Similarly, SFUSD has not claimed it somehow bears the cost of any such personal injuries. Neither SFUSD's 940-paragraph complaint nor its 127-page summary judgment opposition contains any allegation or evidence that JUUL products have actually caused health conditions other than addiction in any of its students (or anyone else), much less that SFUSD has been harmed by such

[23] The headings in SFUSD's complaint make this clear. SFUSD alleges that Defendants sought to "create a nicotine product that would maximize profits through addiction," successfully "designed a nicotine delivery device to create and sustain addiction," "implemented a marketing scheme to mislead users into believe that JUUL products contained less nicotine than they actually do," and "targeted the youth market," thereby "creating a youth e-cigarette epidemic." Am. Compl., Headings to §§ IV.B, IV.C, IV.D, IV.E, IV.G (capitalization normalized).

conditions. Such evidence about them is therefore irrelevant, a waste of time, and risks confusing the jury as to the real issues in this case. *See* Fed. R. Evid. 402, 403.

Finally, the Court should, in particular, exclude evidence related to e-cigarette or vaping associated lung injury ("EVALI"). Mr. Dorn references this condition in his expert report, commenting that "[a]ccording to the CDC, as of January 2020, the organization had received reports of 2,668 hospitalized . . . [EVALI] cases including some resulting in deaths." Ex. 37, (8/19/2022 Dorn Report) at 12. EVALI is not only irrelevant to SFUSD's case for the reasons described above, but is also entirely irrelevant to JUUL and, given the type of injury and press surrounding the condition, extremely prejudicial. The CDC investigated the cause of EVALI and concluded that the most likely cause is vitamin E acetate, an ingredient in some THC-containing e-cigarette products, which can "interfere with normal lung functioning" when inhaled.[24] JUULpods do not contain THC, and vitamin E acetate is not an ingredient or a byproduct or degradation of any ingredient. None of Plaintiff's experts, including Dorn, demonstrate any link between EVALI and JUUL, or provide any reliable evidence to connect JUUL to the types of vaping products that condition. In addition, references to EVALI would unfairly prejudice JLI at trial because EVALI was widely covered in the news and impacted public perceptions about the dangers of vaping. Because EVALI is irrelevant to SFUSD's actual claims and risks extreme undue prejudicial, the Court should exclude references to EVALI at trial.

XXI. MOTION IN LIMINE NO. 21: EVIDENCE REGARDING MR. MONSEES' RECORDING OF CONVERSATION WITH STANTON GLANTZ

During Mr. Monsees' October 21, 2021, deposition, Plaintiffs' counsel questioned Mr. Monsees extensively about a recording Mr. Monsees made of a conversation with Stanton Glantz (a UCSF professor) and others. The questioning focused not on the content of the conversation, but rather on the fact that it was recorded. Evidence of or references to the recording of that conversation should be excluded. This evidence has no relevance to SFUSD's claims, would be unduly

[24] CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, (2020), *available at* https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

prejudicial to Mr. Monsees, and risks being used as improper character evidence. *See* Fed. R. Evid. 402, 403, 404.

First, evidence regarding the recording is not relevant to any of SFUSD's claims. During Mr. Monsees' deposition, Plaintiff's examination focused on whether the individuals who took part in the recorded conversation consented to being recorded, whether making the recording violated California law or was morally questionable, and whether the recording led to Mr. Monsees' departure from JLI. *See* Ex. 12, (10/12/2021 Monsees Dep.) at 210:7–237:20. Those issues have no bearing on SFUSD's claims.

Second, evidence of the recording should be excluded under Rule 403. Even assuming this evidence has some limited relevance (and it does not), its introduction would be unfairly prejudicial to Mr. Monsees. *See United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992) ("Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury."). Any attempt to reference the recording that is intended to provoke an emotional response, such as any suggestion that Mr. Monsees engaged in morally questionable or illegal behavior, would be particularly prejudicial and improper character evidence under Rule 404.[25] Further, introduction of the recording also risks a mini-trial to educate the jury on the complexities of California privacy law. *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001) (risk of mini-trial justified exclusion of evidence under Rule 403).

Because evidence of the recording is irrelevant to SFUSD's claims, lacks probative value and carries a substantial risk of confusing the issues and prejudicing the defense, it should be excluded.

CONCLUSION

The Court should grant Defendants' motions in limine.

[25] There is no proper purpose for which SFUSD could offer this evidence under Rule 404.

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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. I also caused a copy of the under-seal documents to be served via electronic mail on all parties.

By: */s/ Renee D. Smith*

Renee D. Smith