

United States District Court
Northern District of California

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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

**ORDER ON SUBSTANTIVE MOTIONS
TO DISMISS**

Dkt. Nos.: 626, 627, 628, 629, 632, 645,
647, 649, 738, 740, 748, 750, 751, 752/778,
754, 771, 772, 773/779.

Currently before me is the “first wave” of motions to dismiss in this massive multidistrict litigation, attacking claims asserted in the Amended Consolidated Class Action Complaint (“CAC”), the Amended Master Complaint (Personal Injury) (“PIC”), and in seven of the Government Entity Complaints (“PECs” or “Three Village/TVC”). The main moving defendants are JUUL Labs, Inc. (“JLI”), the Altria group of defendants¹ (“Altria”), and the current and former JLI founders and directors (“Officer and Director Defendants”).² These sets of defendants are named in all three sets of operative complaints. Other defendants who are named only in the PIC are the Retailer defendants,³ the Distributor defendants,⁴ and the E-Liquid defendants.⁵ These

¹ Altria Group, Inc., Philip Morris USA, Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC, collectively “Altria.”

² James Monsees, Adam Bowen, Nicholas Pritzker, Hoyoung Huh, and Riaz Valani, collectively “Officer and Director Defendants,” and “Other Director Defendants” when referring solely to Huh, Pritzker, and Valani.

³ Chevron Corporation, Circle K. Stores Inc., Speedway LLC, 7-Eleven, Inc., Walmart, and Walgreens Boots Alliance, Inc., collectively “Retailers.”

⁴ McLane Company, Inc., Eby-Brown Company, LLC, and Core-Mark Holding Company, Inc., collectively “Distributors.”

⁵ Mother Murphy’s Labs, Inc., Alternative Ingredients, Inc., Tobacco Technology, Inc., and eLiquitech, Inc., collectively “E-Liquid Defendants.”

1 defendants have either joined or filed their own motions tracking the main moving defendants'
2 motions, and some have reserved rights to file motions to dismiss in the next round.

3 The aim of this first round of motions to dismiss is to address potentially cross-cutting
4 issues. The following motions have been filed and argued:

- 5 • JLI and the Retailer defendants' motions to dismiss or stay given the Food and Drug
6 Administration's primary jurisdiction over JLI's products;
- 7 • JLI and the Retailer defendants' motions to dismiss claims as preempted by federal law;
- 8 • Defendants' motions to dismiss the federal Racketeer Influenced and Corrupt
9 Organizations Act ("RICO") claims asserted in the CAC and PECs;
- 10 • Defendants' motions to dismiss the California law claims asserted in the CAC;⁶ and
- 11 • Defendants' motions to dismiss the public entity claims asserted in seven of the PECs.

12 In the main, plaintiffs' claims may proceed. We are at the pleading stage, where plaintiffs'
13 allegations are taken as true and reasonable inferences from those allegations are drawn in their
14 favor. In large part, plaintiffs' claims are plausibly supported and state claims upon which relief
15 can be granted. It would not be efficient to stay this case based on primary jurisdiction, given the
16 uncertainty of when and how the FDA might address any related issues, and until it does so,
17 preemption is not appropriate except regarding specific and narrow statements on product labels as
18 I previously determined in *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178 (N.D. Cal. 2018)
19 and *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 745 (N.D. Cal. 2019).

20 That said, I am granting some defendants' motions in a few respects, with leave to amend.
21 Allegations concerning the distinctiveness of the RICO enterprise from the general business of
22 JLI, and the role of Veratad in supporting the enterprise, are currently insufficient. More specific
23 allegations are needed for the RICO claims against Altria, and for all of the claims asserted against
24 directors Pritzker, Huh, and Valani. Plaintiffs will have 20 days from the date of this Order to
25 amend any of the claims dismissed.

26 _____
27 ⁶ The Other Director Defendants – Huh, Valani, and Pritzker – also move to dismiss various state
28 law claims. Other than with respect to the specific state law claims implicated by the PECs
challenged on this round of motions to dismiss, I do not reach whether plaintiffs have adequately
asserted their claims against any set of defendants under the laws of other states.

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BACKGROUND

I. CLASS COMPLAINT

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13 The Amended Consolidated Class Action Complaint is the operative pleading for the

14 consumer class action allegations in this case. Dkt. No. 679 (“CAC”). In the CAC, the plaintiffs

15 allege hundreds of pages facts regarding JLI’s and the Officer and Director Defendants’ intent to

16 create and market a “blockbuster sequel” to combustible cigarettes. Their product, the JUUL e-

17 cigarette device, was a new entry into the existing electronic nicotine delivery systems (“ENDS”)

18 market. According to plaintiffs, the product was intentionally designed to avoid the “stigma”

19 surrounding combustible cigarettes and capture not only existing combustible cigarette smokers

20 and smokeless tobacco users who were addicted to nicotine, but also vastly expand the market by

21 capturing and addicting individuals – specifically including youth users – who had not previously

22 used tobacco or ENDS products. JLI and the Officer and Director Defendants allegedly achieved

23 this by creating a highly addictive product that produced high “buzz” levels with lower throat

24 harshness and discomfort than prior tobacco or existing ENDS products. Eventually with the

25 assistance of Altria, JLI and the Officer and Director Defendants are alleged to have achieved not

26 only market dominance in the ENDS market but also to have expanded the pipeline of new

27 nicotine addicts through their three-pronged approach: (i) product design to maximize addiction;

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1 (ii) mass deception; and (iii) targeting of youth.

2 Based on these themes, the CAC asserts the following causes of action on behalf of the
3 “nationwide” class as well as the “California Subclass”: (1) Violation of the California Unfair
4 Competition Law (Cal. Bus. & Prof. Code § 17200, et seq.); (2) Violation of the California
5 Consumer Legal Remedies Act (Cal. Civ. Code § 1750, et seq.); (3) Violation of the California
6 False Advertising Law (Cal. Bus. & Prof. Code § 17500, et seq.); (4) Common Law Fraud; (5)
7 Breach of the Implied Warranty of Merchantability; and (6) Unjust Enrichment. The CAC also
8 states on behalf of the nationwide class: (7) Violations of the Racketeer Influenced and Corrupt
9 Organizations Act (“RICO”) (18 U.S.C. § 1962(c)); (8) Conspiracy to Violate RICO (18 U.S.C. §
10 1962(d)); and (9) Violation of the Magnuson-Moss Warranty Act (15 U.S.C. § 2301, et seq.).

11 The CAC also alleges specific violations of state law for subclasses of consumers in the
12 other 49 states and the District of Columbia arising under those jurisdictions’ consumer protection
13 statutes, as well as common law claims of fraud, breach of the warranty of merchantability, and
14 unjust enrichment. CAC ¶¶ 224-649.

15 **II. MASTER PERSONAL INJURY COMPLAINT**

16 The Amended Consolidated Master Complaint (Personal Injury) plus the Court-approved
17 Short Form Complaint are the operative pleadings for the personal injury cases. Dkt. Nos. 677
18 (PIC), 405 (SFC). The essential facts with respect to JLI, Altria, and the Officer and Director
19 Defendants’ conduct are materially similar to those alleged in the CAC. There are also additional
20 allegations regarding the “prominent role” the Distributor and Retailer Defendants played in the
21 “false and deceptive marketing campaign” and fraudulent scheme created by JLI and the Officer
22 and Director Defendants (and eventually Altria) to expand the market of nicotine-addicted
23 individuals through joint promotion campaigns targeting youth, failing to take adequate
24 precautions to prevent youth use, and selling products that “neither disclosed the products’
25 nicotine content, nor any of its risks.” PIC ¶¶ 5, 526-527, 532-534, 543, 557-601. Plaintiffs allege
26 that the E-Liquid Defendants manufactured and supplied “the ingredients and additives in E-
27 Liquids including the E-Liquid” in the JUUL products. *Id.* ¶¶ 31-35. The E-Liquid Defendants
28 and JLI allegedly “enticed” newcomers to nicotine with “kid-friendly” flavors without ensuring

1 that the additives were safe for inhalation. PIC ¶¶ 162-173, 196-225, 757.

2 Plaintiffs plead nineteen causes of action in the PIC: (1) Strict Liability – Design Defect,
3 PIC ¶¶ 755-775; (2) Strict Liability – Failure to Warn, ¶¶ 776-794; (3) Strict Liability –
4 Manufacturing Defect, ¶¶ 795-808; (4) Products Liability – Negligent Design, ¶¶ 809-828; (5)
5 Products Liability – Negligent Failure to Warn, ¶¶ 829-846; (6) Product Liability – Negligent
6 Manufacturing, ¶¶ 847-859; (7) Negligence and/or Gross Negligence, ¶¶ 860-881; (8) Negligent
7 Failure to Recall/Retrofit, ¶¶ 882-894; (9) Negligent Misrepresentation, ¶¶ 895-909; (10) Fraud, ¶¶
8 910-925; (11) Fraudulent Concealment, ¶¶ 926-945; (12) Conspiracy to Commit Fraud, ¶¶ 946-
9 987; (13) Unjust Enrichment, ¶¶ 988-998; (14) Violation of Unfair Trade Practices/ Consumer
10 Protection Law under identified state laws, ¶¶ 999-1012; (15) Breach of Express Warranty, ¶¶
11 1013-1030; (16) Breach of an Implied Warranty of Merchantability, ¶¶ 1031-1047; (17) Wrongful
12 Death, ¶¶ 1048-1054; (18) Survival Action, ¶¶ 1055-1061; and (19) Loss of Consortium, ¶¶ 1062-
13 1068.⁷

14 There are a number of additional defendants identified in the underlying personal injury
15 complaints and SFCs.⁸ Those defendants have not moved in this first round of motions to dismiss;
16 their defenses and right to move to dismiss are expressly preserved for determination at a later
17 date.

18 **III. GOVERNMENT ENTITY COMPLAINTS**

19 There are seven cases filed by government entities that, by agreement of the parties, are
20 being tested during this first round of motions to dismiss. Those cases are *County of Santa Cruz v.*
21 *JUUL Labs, Inc.*, No. 20-cv-02261 (N.D. Cal.) (“Santa Cruz”), and seven school districts
22 (collectively the “school districts”): *Central Bucks School District, Bucks County v. JUUL Labs,*
23 *Inc.*, No. 19-cv-08023 (N.D. Cal.) (“Central Bucks”); *The School Board of Escambia County,*

24 _____
25 ⁷ By stipulation, plaintiffs and the Retailer and Distributor Defendants agreed that the PIC and the
26 SFCs did not plead the following claims against the Retailer and Distributor Defendants: (i) Cause
27 of Action IV (Products Liability – Negligent Design); (ii) Cause of Action VI (Products Liability –
28 Negligent Manufacturing); and (iii) Cause of Action XII (Conspiracy to Commit Fraud). Dkt. No.
875.

⁸ As of the parties’ October 16, 2020 Case Management Statement, there were 82 defendants
named across the cases in the MDL. Dkt. No. 1055.

1 *Florida v. JUUL Labs, Inc.*, No. 20-cv-00459 (N.D. Cal.) (“Escambia”); *The Livermore Valley*
 2 *Joint Unified School District v. JUUL Labs, Inc.*, No. 19-cv-08176 (N.D. Cal.) (“Livermore
 3 Valley”); *The School Board of Broward County, Florida v. JUUL Labs, Inc.*, No. 19-cv-08289
 4 (N.D. Cal.) (“Broward”); *Three Village Central School District v. JUUL Labs, Inc.*, No. 19-cv-
 5 07028 (N.D. Cal.) (Three Village” or “TVC”); and *Tucson Unified School District v. JUUL Labs,*
 6 *Inc.*, No. 19-cv-07335 (N.D. Cal.) (“Tucson”) (collectively PECs).

7 The same or materially similar allegations are made in each of the operative complaints.
 8 JLI and other defendants generally refer to the factual allegations in the *Three Village Complaint*
 9 (TVC), in addition to challenging some of the bellwether claims under specific state laws relevant
 10 to specific entities. The government entities allege that “JLI, the Management Defendants, and
 11 Altria worked together to implement their shared goal of growing a new market in the image of
 12 the combustible cigarette market through a multipronged strategy to: (1) create a highly addictive
 13 product that users would not associate with cigarettes and that would appeal to the lucrative youth
 14 market; (2) deceive the public, and especially young people, into thinking the product was a fun
 15 and safe alternative to cigarettes that would help smokers quit; (3) actively attract young users
 16 through targeted marketing, and (4) use a variety of tools, including false and deceptive statements
 17 to the public and regulators, to delay regulation of e-cigarettes.” TVC ¶ 55. Each of the
 18 defendants “played a critical role—at times overlapping and varying over time—in each of these
 19 strategies.” *Id.*

20 As a result of the youth e-cigarette crisis created by this misconduct, school districts and
 21 local governments were compelled to respond. The school districts spent significant and
 22 unexpected levels of time and resources to address the pervasiveness of youth e-cigarette use and
 23 had to divert resources and deploy new ones to combat the problem. *See* TVC ¶¶ 597–604
 24 (educate about the dangers of youth e-cigarette use, including staff training and new counseling
 25 services); *id.* ¶¶ 605–06 (costs associated with discipline and suspensions related to incidents of e-
 26 cigarette use in schools, including additional legal expenses in connection with disciplinary
 27 hearings and costs for home-tutoring services to suspended students at risk of falling behind
 28 academically); *id.* ¶ 607 (monitoring bathrooms for pervasive e-cigarette use as well as installing

1 e-cigarette detectors, additional cameras and anti-vaping signs around the property); *id.* ¶ 608 (loss
2 of personnel hours of school staff who had to direct time and activity towards discipline,
3 education, and health care attention associated with e-cigarette use); *id.* ¶ 609 (costs associated
4 with safely disposing of hazardous waste contained in JUUL products).

5 Local governments also seek to recover costs that they incurred when responding to the
6 youth e-cigarette crisis. *See* Santa Cruz ¶¶ 601–622 (public health staff spent significant time and
7 resources addressing youth e-cigarette use, including educational campaigns and buying ads to
8 combat defendants’ misinformation); *id.* ¶¶ 610, 615 (responding to schools who requested
9 assistance in dealing with increased youth e-cigarette use, including time and resources from local
10 police departments; increased need for disciplinary alternatives, including trained addiction
11 specialists, counselors, and social workers, as well as developing effective cessation methods
12 targeted at youth); *id.* ¶¶ 612–13 (dealing with hazardous waste disposal in the county’s landfills).

13 Based on these allegations, the seven government entity complaints at issue allege the
14 following causes of action: (1) violations of RICO (18 U.S.C. § 1962(c)); (2) conspiracy to violate
15 RICO (18 U.S.C. § 1962(d)); (3) public nuisance under Arizona, California, Florida, New York
16 and Pennsylvania law; and (4) negligence and gross negligence under the same state laws. Three
17 Village, Broward and Escambia also allege violations of the New York and Florida consumer
18 protection statutes.

19 Together, these government entity complaints seek abatement, injunctive relief, equitable
20 relief to fund prevention education and addiction treatment, actual and compensatory damages,
21 punitive damages,⁹ statutory damages, attorneys’ fees and costs, and pre- and post-judgment
22 interest.

23 DISCUSSION

24 I. MOTIONS TO STAY OR DISMISS BASED ON PRIMARY JURISDICTION

25 JLI moves to stay all proceedings in this MDL pending the Food and Drug Administration
26

27 _____
28 ⁹ Santa Cruz County concedes to dismissal of its standalone punitive damages claim because it is not a distinct cause of action under California law, but maintains its request for punitive damages in its prayer for relief. Dkt. No. 817 at 48 n.20.

1 (“FDA”) ruling on JLI’s recently filed premarket tobacco application (“PMTA”) for its electronic
 2 nicotine delivery system (“ENDS”) product. Dkt. No. 626.¹⁰ Pursuant to its authority under the
 3 Family Smoking Prevention and Tobacco Control Act of 2009 (“TCA”, 21 U.S.C. § 387 et seq.),
 4 the FDA will review JLI’s PMTA and determine whether JLI may continue to sell its products in
 5 the United States, and if so how, with approved designs (*e.g.*, nicotine yields, ingredients, and
 6 flavorings) and marketing strategies (*e.g.*, product labels, disclosures/warnings, and sales
 7 strategies). JLI asserts that because it filed its PMTA at the end of July 2020, the FDA must
 8 complete its review of JLI’s PMTA by September 9, 2021.¹¹ It argues that efficiency weighs in
 9 favor of staying these proceedings so that the FDA can determine the technical matters that are
 10 squarely within its areas of expertise, such as the CAC and PEC claims that JLI’s product was and
 11 is defective, that JLI breached its duty to warn consumers, and that JLI engaged in false and
 12 misleading advertising.

13 Plaintiffs argue that efficiency and fairness weigh strongly against a stay where the FDA’s
 14 “forward-looking” process will not consider or resolve the actual claims for damages, restitution,
 15 and abatement sought here under the claims of the CAC, PIC, and PECs. They dispute the length
 16 of time the FDA will take to determine JLI’s PMTA and related issues. And they also contend
 17 that any overlap between issues in these proceedings and the going-forward issues that the FDA
 18 will resolve is speculative, but manageable if the need arises.

19 **A. Legal Standard**

20 “The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a
 21

22 ¹⁰ JLI filed its PMTA with the FDA on July 29, 2020, following the completion of the briefing on
 23 these motions. Dkt. No. 910 at 8 n.6. The Retailer Defendants separately move to dismiss the
 24 state law claims asserted against them in the PIC under the primary jurisdiction doctrine. They
 25 argue that because FDA will set standards for the design and marketing of JLI’s products within
 26 its area of technical expertise, the attempts by the PIC to enforce potentially different standards
 27 should be rejected. Dkt. No. 750. The arguments raised by the Retailer Defendants are identical
 28 to, and rise and fall with, the arguments raised by JLI.

¹¹ This deadline is shorter than that initially contemplated by the FDA and results in part from a
 challenge to delayed enforcement by pediatric physician and anti-tobacco groups. *See Am. Academy of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 481 (D. Md. 2019). Subsequent to that
 decision, in January 2020, the FDA finalized its Enforcement Guidance imposing the current
 deadlines.

1 complaint without prejudice pending the resolution of an issue within the special competence of
 2 an administrative agency.” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).
 3 The doctrine is a “prudential” one, “under which a court determines that an otherwise cognizable
 4 claim implicates technical and policy questions that should be addressed in the first instance by the
 5 agency with regulatory authority over the relevant industry rather than by the judicial branch.” *Id.*
 6 (citing *Sytek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir.2002)).

7 However, “[n]ot every case that implicates the expertise of federal agencies warrants
 8 invocation of primary jurisdiction. Rather, the doctrine is reserved for a ‘limited set of
 9 circumstances’ that ‘requires resolution of an issue of first impression, or of a particularly
 10 complicated issue that Congress has committed to a regulatory agency.’” *Astiana v. Hain Celestial*
 11 *Group, Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (quoting *Clark*, 523 F.3d at 1114).

12 To determine whether to defer to an agency, the Ninth Circuit has traditionally examined
 13 the factors set forth in *General Dynamics*, and found that the doctrine applies in cases where there
 14 is: “(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of
 15 an administrative body having regulatory authority (3) pursuant to a statute that subjects an
 16 industry or activity to a comprehensive regulatory authority that (4) requires expertise or
 17 uniformity in administration.” *Sytek*, 307 F.3d at 781 (citing *U.S. v. Gen. Dynamics Corp.*, 828
 18 F.2d 1356, 1362 (9th Cir. 1987)). “[C]ourts must also consider whether invoking primary
 19 jurisdiction would needlessly delay the resolution of claims,” and under Ninth Circuit precedent,
 20 “‘efficiency’ is the ‘deciding factor’ in whether to invoke primary jurisdiction.” *Astiana*, 784 F.3d
 21 at 760 (quoting *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir.2007)).

22 **B. Primary Jurisdiction**

23 **1. Efficiency of a Stay**

24 The primary dispute between the parties is whether the FDA’s resolution of JLI’s PMTA –
 25 drawing on the FDA’s significant expertise in regulating nicotine containing products and related
 26 marketing/advertising – will impact the claims asserted in this MDL enough so that efficiency
 27 weighs significantly in favor of a stay. I conclude that efficiency weighs against a stay.

28 The FDA’s consideration of the design and marketing of JLI’s products as described in the

1 undisclosed PMTA will be forward-looking, based on JLI’s proposals for the design and
 2 marketing of approved products. While JLI contends that the PMTA will include products that
 3 have been on the market since 2016, plaintiffs contend that the design of JLI’s products and
 4 marketing materials submitted in the undisclosed PMTA for the FDA’s review and approval
 5 might, instead, be focused on “next generation” products that differ substantially from products
 6 that were sold and injured the plaintiffs in these proceedings. In addition, plaintiffs note that JLI
 7 has voluntarily ceased much of the conduct that plaintiffs’ challenge – including sales of the
 8 flavored JUUL pods and the youth and tribal marketing initiatives – and therefore the FDA’s
 9 review may not touch upon the bulk of the conduct alleged here.

10 Without disclosure of the actual PMTA submitted by JLI, I am unable to verify the
 11 assertions about what is actually before the FDA concerning JLI’s products and suggested
 12 labelling and marketing and what past JLI conduct (marketing or design elements) the FDA will
 13 consider. For purposes of this motion, I assume that the FDA will review some significant portion
 14 of the design and marketing elements that underlie plaintiffs’ claims. That assumption does not
 15 support a stay.

16 The heart of plaintiffs’ claims concerns JLI’s past conduct that centers on intentional youth
 17 marketing or negligent knowledge but encouragement of youth use of its products, alleged
 18 conduct that JLI has voluntarily ceased or reduced.¹² The design allegations – sleek, discrete
 19 devices designed with intent to appeal to youth – are relevant to plaintiffs’ claims about
 20 defendants’ intent to capture *new* nicotine users, but are not at the center of plaintiffs’ claims.
 21 Closer to the line are plaintiffs’ allegations regarding failures to warn or omissions about the
 22 amount of nicotine delivered as well as “smoother” delivery, leading to known or expected
 23 overuse. The FDA will undoubtedly consider these design and delivery elements in determining
 24

25 ¹² For example, the FDA has committed itself to prioritizing premarket review and enforcement
 26 aimed at ENDS manufacturers who fail to take “adequate” measures to prevent minors’ access to
 27 ENDS or whose marketing is “likely to promote” use by minors. Future enforcement actions and
 28 determinations by the FDA may well be relevant to proceedings in this MDL regarding JLI’s past
 acts or even possibly to future sales and marketing efforts by JLI, but what may happen and when
 with respect to enforcement as to unknown ENDS’ manufacturers or distributors would not appear
 to have a central impact of the claims and defenses across the actions in this MDL.

1 what products JLI may sell going forward and with what labels and disclosures or warnings. But
2 it is not clear that the FDA will address the central part of these claims – the past marketing, the
3 past disclosures, and the past sales of flavored pods.

4 Plaintiffs also point out, and defendants do not really dispute, that the FDA’s ruling on the
5 PMTA will not resolve the various personal injury claims and false, misleading, and unfair
6 advertising claims based on JLI’s and other defendants’ conduct up to now. The FDA will
7 determine on a going-forward basis whether, and if so how, JLI’s product may be sold, with
8 respect to nicotine delivery, labeling and warnings. It will not determine whether JLI’s and the
9 other defendants’ past conduct (much of which has now allegedly ceased) – the allegations of
10 intentional or negligent youth and tribal marketing, the misleading marketing, and the failure to
11 disclose nicotine uptake of existing and prior product versions that are at the center of this MDL--
12 was illegal and caused plaintiffs’ injury.

13 The myriad of legal issues and fact questions contained within this MDL, as well as the
14 significant allegations based on conduct that JLI has admittedly or apparently ceased (and
15 therefore will not be subject to FDA review in JLI’s PMTA), differentiate this MDL from the
16 Ninth Circuit and Northern District of California cases relied on by defendants where stays or
17 dismissals in favor of primary jurisdiction were appropriate. The issues in this MDL proceeding
18 are nowhere near as narrow or limited as in those cases, where the issue under agency
19 consideration would directly impact the central claims. *See, e.g., Kane v. Chobani, LLC*, 645 Fed.
20 Appx. 593, 594 (9th Cir. 2016)(unpublished) (determining that primary jurisdiction was
21 appropriate for state law deception and mislabeling claims based on use of “natural” and
22 “evaporated cane juice” that were made in alleged violation of FDA regulations); *Astiana v. Hain*
23 *Celestial Group, Inc.*, 783 F.3d 753, 761 (9th Cir. 2015) (primary jurisdiction appropriately
24 invoked where FDA actively determining “what chemical compounds may be advertised as
25 natural on cosmetic product labels”); *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir.
26 2008) (primary jurisdiction of FCC over question of whether a VoIP provider qualifies as a
27 “telecommunications carrier” under Telecommunications Act of 1996); *Syntek Semiconductor*
28 *Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 782 (9th Cir. 2002) (“Referral under the doctrine

1 of primary jurisdiction is therefore appropriate for the Register of Copyrights to determine to what
2 extent administrative cancellation remedies are available to third parties who seek registration
3 cancellation.”); *MCI Commun. Corp. v. Am. Tel. & Tel. Co.*, 496 F.2d 214, 222 (3d Cir. 1974)
4 (primary jurisdiction appropriate where agency needed to determine in first instance
5 technologically complex question of whether specific conduct was required by federal
6 telecommunications law); *Colette v. CV Scis., Inc.*, 2020 WL 2739861, at *1 (C.D. Cal. May 22,
7 2020) (staying case where the “crux of this lawsuit is Plaintiffs’ allegations that Defendant’s
8 products are illegal under the Federal Food, Drug, and Cosmetic Act of 1938” as mislabeled as
9 dietary supplements, an issue under active FDA consideration); *Glass v. Glob. Widget, LLC*, 2020
10 WL 3174688, at *1–2 (E.D. Cal. June 15, 2020) (staying CBD-related claims concerning the
11 quantities of CBD in products and regarding representations regarding legality of sales); *Grimm v.*
12 *APN, Inc.*, 2018 WL 4793088, at *2 (C.D. Cal. Jan. 8, 2018) (staying because “issue of the use of
13 the term ‘natural’ in pet food labeling is within the” agency’s expertise); *Swearingen v. Amazon*
14 *Preservation Partners, Inc.*, 13-CV-04402-WHO, 2014 WL 3934000, at *2 (N.D. Cal. Aug. 11,
15 2014) (approving short stay of false advertising claims based on use of “evaporated cane juice”
16 where FDA was finalizing draft guidance on meaning of that specific term); *Backus v. Gen. Mills,*
17 *Inc.*, 122 F. Supp. 3d 909, 935 (N.D. Cal. 2015) (staying for primary jurisdiction where FDA was
18 determining and case rested on “safety of the ingredient, not whether a reasonable consumer
19 would be misled” by advertising with respect to that ingredient).

20 The FDA’s analysis of JLI’s PMTA will likely touch upon going-forward issues such as
21 the injunctive and equitable relief to which plaintiffs may be entitled with respect to labelling,
22 warnings, and the marketing and advertising of any products that are allowed to remain on the
23 market. But I can address their impact when the FDA’s decisions on the JLI PMTA become final.
24 Similarly, I will address the preemptive effect of the FDA’s decisions on JLI’s PMTA or other
25 rulings regarding how ENDS may be designed, labelled, or marketed, if and when they occur.
26 That theoretical future possibility is not a sufficient reason to stay these proceedings.

27 Resolution of the PMTA will not be irrelevant to the determination of some of the issues in
28 this MDL and could well impact the scope of going-forward relief sought by plaintiffs. But the

1 unclear scope of and likely limited relevance of the FDA's actions, and the uncertainty of when
 2 the FDA will act, does not weigh strongly in favor of staying these large and complex proceedings
 3 that can and should move forward efficiently.

4 2. Delay from a Stay

5 Plaintiffs argue that delaying the three tracks of cases in this MDL pending the FDA's
 6 resolution of the PMTA will cause an unnecessary delay in the resolution of the hundreds if not
 7 eventually thousands of cases that are part of the MDL. They contend that while JLI has now filed
 8 its PMTA, it has already caused significant delay by initially intentionally avoiding FDA guidance
 9 (taking the position that the FDA did not have jurisdiction over its products under the TCA) and
 10 by opposing any expedited review of its products by the FDA when Congress included ENDS
 11 within the TCA. JLI disputes the allegations of intentional delay and asserts that its prior acts are
 12 irrelevant now that its PMTA has been filed and the FDA is under deadlines to act.

13 Plaintiffs contest the firmness of those deadlines, noting the FDA's limited resources in
 14 light of the demands resulting from the COVID-19 pandemic and the number of PMTAs that it
 15 now has under review. These factors make it probable that the FDA will need to seek additional
 16 time to consider the hundreds of now-pending PMTAs from JLI and others.¹³ Plaintiffs add that
 17 even since a court ordered the FDA to adhere to specific deadlines for processing PMTAs,
 18 manufacturers have sought and the court or the FDA has granted further extensions to the
 19 deadlines because of the limited agency resources. Plaintiffs contend, therefore, that further
 20 extensions are highly likely while JLI asserts that any further delays or extensions are purely
 21 speculative.

22 At a minimum, a delay of *at least* twelve months is at stake. There is a significant risk of a
 23 longer delay given the demands on the FDA. Whatever action it takes on JLI's PMTA, the FDA
 24 will not affect, much less resolve, the bulk of plaintiffs' liability theories based on JLI's and the
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26 ¹³ Plaintiffs assert that since 2014, the FDA has approved only 14 PMTAs and that as of June 29,
 27 2020, the FDA had received 205 PMTAs in 2020 alone. PJ Oppo. at 17. Plaintiffs also point to
 28 the FDA's handling of a PMTA from Marlboro Heatsticks, that was submitted in May 2017 and
 not decided by the FDA until more than two years later, despite the FDA having far fewer PMTAs
 pending for ENDS during that time. *Id* at 17-18.

1 other defendants' past conduct. There is no reason to impose such a lengthy delay. It is more
2 efficient to proceed to address and potentially narrow the claims and issues in these proceedings.

3 **3. Other Factors**

4 The other factors do not strongly weigh one way or the other. As noted, there are
5 significant claims in these proceedings that will need to be resolved irrespective of what the FDA
6 determines. JLI is correct that the FDA has a high level of expertise in regulating tobacco and
7 nicotine containing products, although its responsibility for and expertise with respect to ENDS is
8 relatively new and developing. But the technical and policy questions that will be addressed by
9 the FDA do not supplant the legal and fact-based issues to be resolved by me or a trier of fact. For
10 example, was JLI's and the other defendants' marketing unfairly and illegally targeted to youth
11 and tribes? Did the level of nicotine found in the products (or their possible if not encouraged
12 method of use) cause significant health impacts on the personal injury plaintiffs? Those sorts of
13 questions are squarely within the expertise of courts and juries to answer.

14 JLI is also correct that a comprehensive federal approach to the design and marketing of
15 ENDS is undoubtedly in the public interest. However, whether the FDA's regulation of ENDS
16 generally and JLI's products specifically will be uniform and touch upon some significant portion
17 of the issues raised in this case is uncertain. In the end, what the FDA regulates and mandates
18 regarding the design for any permitted JLI products or what labels and other marketing will be
19 allowed might impact some claims, but likely will not be determinative of the vast majority of
20 them. Such issues can be addressed if and when they actually arise.¹⁴

21 JLI's motion to stay and the Retailer Defendants' motion to dismiss based on primary
22 jurisdiction are DENIED.¹⁵

23
24 ¹⁴ For this reason, the Retailer Defendants' argument that plaintiffs are asking this Court to "create
25 a new or different standard regarding the labeling and marketing of JUUL products" is not well
26 taken. Dkt. No. 878. The primary question for liability with respect to Retailer Defendants, for
27 past marketing for JLI products created or used by Retailer Defendants, is unlikely to be impacted
28 by the FDA's forward-looking determinations. If there is any impact, I can consider it when it
occurs.

¹⁵ Portions of plaintiffs' opposition were filed under seal because JLI had designated information
confidential. Dkt. Nos. 754, 853. JLI only seeks to maintain under seal Exhibits C-F, asserting
that compelling justifications exist to seal these documents containing "confidential and

II. MOTIONS TO DISMISS BASED ON PREEMPTION

Absent a stay or dismissal under the primary jurisdiction doctrine, JLI and the Retailers also move to dismiss because plaintiffs' state law claims are preempted by the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA) that gave the FDA broad authority to regulate all tobacco products, including the "deemed" ENDS products at issue in these proceedings.

I considered similar arguments in the *Colgate v. JUUL Labs, Inc.* class action that was pending before the inception of this MDL. See *Colgate v. JUUL Labs, Inc.*, 345 F. Supp. 3d 1178 (N.D. Cal. 2018) (*Colgate I*); *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 745 (N.D. Cal. 2019) (*Colgate II*). I addressed the express preemption of plaintiffs' false advertising and related consumer protection claims. Considering the scope of the false advertising and related claims alleged, I concluded that most of plaintiffs' state law claims were not preempted, except for a narrow set of claims based on allegations that "the product label fail[s] to disclose the greater potency and addictiveness of JUUL's benzoic acid and nicotine salt formulation." *Colgate I*, 345 F. Supp. 3d at 1189. The preempted claims were related to statements on the labels of the products and not more generally to "advertising" of the products. *Id.* at 1190 (concluding the exception clause at 21 U.S.C § 387p(2)(B), "expressly excepts advertisements from preemption and no aspect of plaintiffs' claims based on an allegedly misleading or fraudulent advertising is preempted by the TCA, including the issue of warning consumers about the potency and addictiveness of JUUL's benzoic acid and nicotine salt formulation."). I concluded that false advertising and related claims "based on the allegation that JUUL mislabels the dosage of nicotine on its pods at 5% when the dosage of nicotine is higher than 5%" were not preempted. *Id.* at 1189. In *Colgate II*, I concluded that point-of-sale advertising did not constitute preempted "labelling." *Colgate II*, 402 F. Supp. 3d at 745.

competitively sensitive business information, including proprietary business strategy and scientific research pertaining to JLI's upcoming premarket tobacco product application ('PMTA') as well as confidential disclosures made to potential investors regarding JLI's market strategy, research and technology, and financial data." Dkt. No. 853 ¶ 6 ("The information contained in these exhibits is neither public nor known to JLI's competitors, and its public release in connection with Plaintiffs' opposition brief would permit JLI's competitors to unfairly compete with it in the PMTA process and elsewhere in the marketplace."). The request to seal those exhibits at this juncture is GRANTED.

1 In the current motions, JLI and the Retailer defendants contend that preemption should be
2 extended because the *Colgate* orders were made with “less extensive briefing” and considered
3 “less expansive claims” than those asserted in the MDL proceedings. That is true, but there are
4 two main reasons why the end result regarding preemption is essentially the same as in *Colgate*.

5 First, the only relevant area where the FDA has in fact spoken – and where any state law
6 might seek to impose duties “different from, or in addition to” those imposed by the FDA – is the
7 limited nicotine warning required by 21 C.F.R. § 1143.3. Claims that seek to impose labelling
8 requirements different from or in addition to nicotine addictiveness warnings regarding only
9 nicotine *and* addiction are preempted. Once the FDA rules on JLI’s PMTA or if the FDA issues
10 other rules and regulations with respect to ENDS more generally there may be new preemption
11 issues that I need to address. But it would be speculative and premature to attempt to foresee
12 those arguments at this juncture.

13 Second, an issue only touched upon in passing in *Colgate II* is the TCA’s express savings
14 clause that expressly preserves state law products liability claims. That express savings clause (21
15 U.S.C. § 387p(b)) *preserves* the majority of the claims in the PIC and potentially other claims
16 asserted in the CAC or PECs that sound in product liability under applicable state law. Whether
17 or not some subset of those otherwise saved claims may nonetheless be impliedly preempted in
18 light of the FDA’s eventual actions is a relevant but not yet ripe issue for consideration.

19 As explained below, the vast majority of plaintiffs’ claims may proceed now. No claims
20 other than the false and misleading claims based on failure to disclose nicotine addictiveness on
21 labels of JLI’s products are preempted.

22 **A. Legal Standard**

23 **1. Preemption**

24 Under the Supremacy Clause “[i]f federal law ‘imposes restrictions or confers rights on
25 private actors’ and ‘a state law confers rights or imposes restrictions that conflict with the federal
26 law,’ ‘the federal law takes precedence and the state law is preempted.’” *Kansas v. Garcia*, 140 S.
27 Ct. 791, 801 (2020) (quoting *Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461, 1480
28 (2018)). “In all cases, the federal restrictions or rights that are said to conflict with state law must

1 stem from either the Constitution itself or a valid statute enacted by Congress.” *Garcia*, 140 S. Ct.
2 at 801. That preemption may either be express or implied. *Id.*

3 Express preemption is found where Congress “enact[s] a clear statement to that effect.”
4 *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Products Liab. Litig.*, 959 F.3d
5 1201, 1211 (9th Cir. 2020). “Congress may also preempt state law implicitly,” but implied
6 preemption will only be found where there is sufficient evidence of Congressional intent to
7 preempt that overcomes the “high threshold” of the strong presumption against preemption of state
8 law. *Id.* That implied preemption may be found only where Congress’ intent was to occupy the
9 “field” of regulating the subject matter or where state law “conflicts” with the federal regulatory
10 scheme, and compliance with both is impossible or raises an obstacle to the regulatory objective of
11 Congress. *Id.* at 1212.

12 2. Statutory Scheme

13 The Family Smoking Prevention and Tobacco Control Act of 2009 (TCA, 21 U.S.C. § 387
14 et seq.) provides the Food and Drug Administration with comprehensive regulatory powers over
15 “tobacco products.” Relevant here, the FDA in 2016 “deemed” ENDS like JLI’s products to be
16 “tobacco products” subject to its regulation. 81 Fed. Reg. 28973 (2016). However, despite the
17 comprehensive regulatory powers given to the FDA, the TCA and its implementing regulations
18 carve out areas where state actions (and related claims arising under state law) are expressly
19 permitted. The statutory and regulatory provisions at issue on this motion follow.

20 “A tobacco product shall be deemed to be misbranded” if “its labeling is false or
21 misleading in any particular,” 21 U.S.C § 387c(a)(1), or “if, in the case of any tobacco product
22 distributed or offered for sale in any State (A) its advertising is false or misleading in any
23 particular.” *Id.*, (a)(7)(A).

24 21 U.S.C. § 387p is titled “Preservation of State and local authority” and provides:

25 (a)(2) Preemption of certain State and local requirements

26 (A) In general

27 No State or political subdivision of a State may establish or
28 continue in effect with respect to a tobacco product any
requirement which is different from, or in addition to, any

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requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

(B) Exception

Subparagraph (A) does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products....

(b) Rule of construction regarding product liability

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.

21 U.S.C. § 387p.

21 C.F.R. § 1143.3, is titled “Required warning statement regarding addictiveness of nicotine” and provides that “packages” of “covered” products must contain a specific warning:

“WARNING: This product contains nicotine. Nicotine is an addictive chemical.”

21 C.F.R. § 1143.3(a)(1). The regulations impose specific location and formatting requirements for the warning on the packages. A “safe harbor” provision is provided for retailers specifying:

(3) A retailer of any tobacco product covered by paragraphs (a)(1) and (2) of this section will not be in violation of this section for packaging that:

(i) Contains a health warning;

(ii) Is supplied to the retailer by the tobacco product manufacturer, importer, or distributor, who has the required state, local, or Alcohol and Tobacco Tax and Trade Bureau (TTB)-issued license or permit, if applicable, and

(iii) Is not altered by the retailer in a way that is material to the requirements of this section.

Id., § 1143.3(a)(3). For “Advertisements,” under paragraph (b), “it is unlawful” for any manufacturer, distributor, or retailer “to advertise or cause to be advertised” “any tobacco product unless each advertisement bears the required warning statement specified in paragraph (a)(1) of this section.” *Id.*, §1143.3(b)(1). Paragraph (b), like (a), imposes specific location and formatting requirements for the required “nicotine addiction” warning on advertisements. The section

1 explained that “paragraph (b) applies to a retailer only if that retailer is responsible for or directs
 2 the health warning required under the paragraph. However, this paragraph does not relieve a
 3 retailer of liability if the retailer displays, in a location open to the public, an advertisement that
 4 does not contain a health warning or contains a health warning that has been altered by the retailer
 5 in a way that is material to the requirements of this section.” *Id.*, §1143.3(b)(3).

6 **B. Express Preemption**

7 **1. Product Liability**

8 Defendants argue that under § 387p(a)(2)(A) “nearly all” of plaintiffs’ state-law claims are
 9 expressly preempted. Their apparent but not explicitly identified carve out extends presumably to
 10 “saved” product liability claims that defendants and plaintiffs agree are not expressly preempted
 11 under the savings clause in 21 U.S.C. § 387p(b). JLI Preempt Mot. [Dkt. No. 627] at 1, 17-18;
 12 *Oppo. JLI Preempt* at 5.¹⁶ Both sides also agree that what constitutes a “saved” product liability
 13 claim is determined under the applicable state law. JLI Preempt Mot. at 17; *Oppo. JLI Preempt* at
 14 7.

15 Neither side, however, provides helpful or specific analysis to assist me in drawing those
 16 lines. Defendants generally stick with “nearly all” of plaintiffs’ claims are not true product
 17 liability claims, for example because the claims in the PIC are “generic claims” untethered to any
 18 particular state’s laws. In response, plaintiffs assert that “all or most of their claims” sound in
 19 product liability and more specifically that each of the 19 claims in the PIC are product liability
 20 claims by simple virtue of being alleged in the PIC.

21 Defendants contend more specifically that any claim in the PIC seeking “economic
 22 damages for alleged misrepresentations” cannot be considered a product liability claim. PIC ¶ 997
 23 (Unjust Enrichment), ¶ 1011 (Violation of Unfair Trade Practices/Consumer Protection Laws), ¶
 24 1029 (Breach of Warranty), ¶ 1044 (Breach of Implied Warranty). Plaintiffs do not directly
 25 address whether some of the claims in the PIC are true product liability claims under various state
 26 laws, but insist instead that because the “PIC” as a whole asserts personal injury the claims are

27 _____
 28 ¹⁶ Defendants contend that product liability claims falling with the savings clause are nonetheless
 impliedly preempted. That argument is discussed below.

1 immune from preemption. That is an unhelpful response. Plaintiffs also argue that “to the extent
2 the Court’s preemption determination turns on application of the product-liability savings clause,
3 the prudent approach is to apply that ruling in the context of bellwethers.” *Oppo. JLI Preempt.* at
4 8. In the end, both sides agree that this issue – sorting out which claims are product liability
5 claims – is better handled at the bellwether stage or a different, later date.

6 Another difficult question is whether “failure to warn” claims that are product liability
7 claims are nonetheless subject to preemption to the extent that they touch upon JLI’s past or future
8 failures to disclose the FDA’s now-approved nicotine addiction warning in 21 C.F.R. § 1143.3.
9 The legal question is how to reconcile a strong preemption provision with an equally strong
10 savings clause. As discussed below, I conclude that despite the strong savings clause, normal
11 principles of implied preemption may still preclude specific product liability claims. What those
12 are or might be will be decided as the individual cases and state law PI claims are tested.

13 **2. Product Design/Standards Claims**

14 Defendants argue that plaintiffs’ non-product liability claims are expressly preempted.
15 Design and product standards (*e.g.*, nicotine yields, components, ingredients, additives, and
16 properties of tobacco products) are committed to the authority of the FDA; the CAC, PIC, and the
17 PECs assert broad claims challenging both product design features (*e.g.*, smooth delivery of
18 nicotine and sleek easily concealable design) and standards (*e.g.*, dosage of nicotine and flavored
19 products) of JLI’s products. But that argument fails because the FDA has not yet proscribed any
20 actual design or product standards for ENDS. Without the existence of any defined “standards”,
21 there can be no supposed preemption of state law standards that are “different from or in addition
22 to” the federal ones. *See, e.g., GoodCat, LLC v. Cook*, 202 F. Supp. 3d 896, 912 (S.D. Ind. 2016)
23 (“the clause does not operate unless the FDA regulates the adulteration of tobacco products”).
24 Express preemption does not bar any of plaintiffs’ claims touching on design and standards at this
25 point.

26 **3. Packaging and Labelling Claims**

27 In the *Colgate* Orders I concluded that labeling claims – both based on the presence or
28 absence of false and misleading disclosures about nicotine addiction and failure to warn theories –

1 were preempted to the extent that they implicated the nicotine addiction warning specifically
2 approved and required by the FDA under 21 C.F.R. § 1143.3. *See Colgate I*, 345 F. Supp. 3d at
3 1189; *Colgate II*, 402 F. Supp. 3d at 752 (“failure to warn claims [based] on a lack of labelling”
4 were preempted”). I also concluded that the preempted claims were limited to disclosures or lack
5 of disclosures on the product labels themselves and did not extend to “advertising” more
6 generally. *Colgate I*, 345 F. Supp. 3d at 1190. Both sides take some issue with the boundaries or
7 substance of those prior conclusions.

8 Defendants argue that numerous claims in all three sets of operative complaints (CAC,
9 PIC, and PECs) allege that JLI “failed to warn” about alleged risks of nicotine addiction and
10 physical harm and that JLI advertised JUUL products are “reasonable alternatives” to combustible
11 cigarettes when they were not. Defendants contend that these claims are preempted because they
12 “would impose” additional or different requirements under state law related to “misbranding” and
13 “labelling” that are within the exclusive control of the FDA under section 387p(a)(2)(A).
14 However, the only misbranding or labelling requirement that the FDA has adopted for ENDS is
15 the “minimum” nicotine addiction warning under 21 C.F.R. § 1143.3(a)(1).

16 I cannot determine what might be “different from or in addition to” any particular
17 standards that the FDA might adopt in the future. I do not agree with defendants’ implicit
18 argument that the states are wholly without authority with respect to ENDS and that state laws
19 may not impose *any* requirements on labelling. That is contrary to the “exception” clause in 21
20 U.S.C. § 387p(a)(2)(B) (preserving state “requirements relating to the sale, distribution,
21 possession, information reporting to the State, exposure to, access to, the advertising and
22 promotion of, or use of, tobacco products”). It is akin to “field” preemption, which plaintiffs
23 persuasively point out is not contemplated by the text, history, and precedent under and in light of
24 the Congressional amendments to and extension of the Federal Food Drug, and Cosmetic Act
25 (FDCA) through the TCA. As explained in the *Colgate* orders, claims that JLI falsely or
26 misleadingly mislabeled the dosage of nicotine on its labels were not preempted by Congress
27 committing the “authority” to the FDA to regulate labelling as it sees fit. *See also Altria Group,*
28 *Inc. v. Good*, 555 U.S. 70, 81 (2008) (claims asserting a “duty not to deceive” in labelling based in

1 state common-law rule not preempted by Federal Cigarette Labeling and Advertising Act
2 (FCLAA)).

3 Defendants ask me to depart from *Colgate* and conclude that under on *Nat'l Meat Ass'n v.*
4 *Harris*, 132 S. Ct. 965, 970 (2012), the broad “which is different from, or in addition to”
5 preemptive language with respect to labelling means that no labelling claims can be asserted.
6 They argue that any theoretical requirement imposed under state law would be different from or in
7 addition to the labeling required by the FDA. But the only requirement in place is the self-
8 described “minimum” nicotine warning.¹⁷ A theoretical warning or disclosure that might be
9 required under state common law on a wholly different topic (for example, regarding the amount
10 of recommended use given a particular device’s delivery method) is not different from or in
11 addition to any existing FDA labelling requirement on that specific topic.

12 Therefore, plaintiffs are correct that omissions of “deadly safety defects” that they contend
13 should have been made under state law duties are not expressly preempted, other than any related
14 to the minimum nicotine addiction warning from the labels of the JUUL products. If and when the
15 FDA issues additional labelling requirements, this argument can be reassessed.¹⁸

16 I agree with defendants that labelling claims based on nicotine addiction are preempted, as
17 found in the *Colgate* orders. Plaintiffs dispute whether that analysis extends to the “failure to
18 warn” product liability claims asserted in the PIC. Given the savings clause “preserving” state
19 authority over claims that are not expressly preempted, the issue becomes one of implied, not
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21 ¹⁷ In *Harris* the Court’s decision was informed by the agency’s issuing “extensive regulations to
22 govern the inspection of animals and meat, as well as other aspects of slaughterhouses’ operations
23 and facilities” and employing “9,000 inspectors, veterinarians, and investigators to implement its
24 inspection regime and enforce its humane-handling requirements.” *Harris*, 565 U.S. at 456.
25 Therefore, that plaintiffs’ members could have theoretically complied with the *additional* but not
26 conflicting requirements required under California’s law did not save it from preemption. Here,
27 though the FDA has been given extensive authority to potentially regulate extensively, the FDA’s
28 regulations regarding ENDS are nowhere near as extensive or detailed as the regime in *Harris*.

¹⁸ I recognize that in the court in *In re Fontem US, Inc.*, SACV1501026JVSRAOX, 2016 WL
6520142, at *4 (C.D. Cal. Nov. 1, 2016), *order clarified sub nom. In re Fontem US, Inc.*
Consumer Class Action Litig., 2017 WL 10402988 (C.D. Cal. Mar. 8, 2017 – itself relying on
Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 970 (2012) – found that section 387p(a)(1)(A)’s
language swept broadly and would preempt *any* state-label requirement that was not identical to
the federal requirement. In my opinion, the scope of any specific preemptive effect is better
considered when and if the FDA actually issues standards.

1 express, preemption and is addressed below.

2 Defendants do not persuade me that claims that JUUL labels included statements that were
 3 “false and misleading” (other than the discussed nicotine addiction warnings) are expressly
 4 preempted. I find instructive the Ninth Circuit’s food and cosmetic labelling cases interpreting
 5 similar preemptive language, like “different from,” “in addition to,” or “not identical with,” from
 6 the relevant federal regulations. Those cases conclude that where plaintiffs were not asking
 7 defendant to “modify or enhance any aspect of its [] labels that are required by federal law,”
 8 claims regarding false and misleading labels were not preempted. *Astiana v. Hain Celestial*
 9 *Group, Inc.*, 783 F.3d 753, 758 (9th Cir. 2015); *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 964 -
 10 965 (9th Cir. 2016) (the claim based on the “omission of supplemental statements is not expressly
 11 and affirmatively permitted by law”).¹⁹

12 Relatedly, I disagree with defendants’ attempt to revisit and reverse the conclusions in the
 13 *Colgate* orders concerning whether claims regarding false and misleading “labeling” are not
 14 expressly preempted because “misbranding” is defined as including, among other acts, if a product
 15 label “is false or misleading in any particular.” 21 U.S.C § 387c(a)(1). Misbranding *is* broadly
 16 included in Section 387p’s preemption provision (“No State . . . may establish or continue in effect
 17 with respect to a tobacco product any requirement which is different from, or in addition to, any
 18 requirement under the provisions of this subchapter relating to . . . misbranding”). But as noted
 19 above, numerous Ninth Circuit decisions have recognized that “different from, or in addition to”
 20 does not preclude liability for label statements that are “false and misleading” when that same or
 21 substantially similar conduct is likewise prohibited under the federal law at issue. Absent the
 22 FDA’s actions defining or proscribing specific “misbranding” on JLI’s products, there is nothing
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25 ¹⁹ In Reply, defendants contend that California’s “likely to deceive” standard under consumer
 26 protection laws cannot be identical to the “false or misleading” standard under the TCA but cite no
 27 persuasive authority explaining why that is so. Preempt Reply at 6 (citing *Critcher v. L’Oreal*
 28 *USA, Inc.*, 959 F.3d 31, 36 (2d Cir. 2020) (plaintiffs’ theory that “compliance with one part of the
 FDCA and its regulations counterintuitively results in a violation of another part of the FDCA”
 preempted because “to avoid liability under Plaintiffs’ theory” defendant “must make an
 additional disclosure on its packaging” not required by federal law)).

1 further to address at this juncture.²⁰

2 Finally, the answer to whether disclosures regarding a product on a “website” constitutes
3 labelling – discussed by the parties in footnotes – would seem to be straight-forward. The statute
4 defined “labeling” to mean “all labels and other written, printed, or graphic matter (1) upon any
5 article or any of its containers or wrappers, or (2) accompanying such article.” 21 U.S.C. § 321m.
6 Defendants do not explain how website text can under any possible circumstance “accompany”
7 the product at issue. Although in *Lanovaz v. Twinings N.A., Inc.*, C-12-02646-RMW, 2014 WL
8 46822, at *6 n.5 (N.D. Cal. Jan. 6, 2014), the Hon. Ronald Whyte noted that “the parties do not
9 seem to dispute that FDA labeling rules should apply to the content on [the] website under section
10 201(m),” he then cited at least two district court decision that questioned whether or concluded
11 that websites did not constitute labeling.

12 4. Advertising Claims

13 Relatedly, defendants argue that all false and misleading advertising claims in the three
14 sets of operative complaints are preempted because the preemptive “different from, or in addition
15 to” language of the express preemption provision includes “misbranding” and misbranding is
16 defined in part as when “in the case of any tobacco product distributed or offered for sale in any
17 State (A) its advertising is false or misleading in any particular,” 21 U.S.C § 387c(a)(7)(A).

18 I rejected that argument in *Colgate I*. See 345 F. Supp. 3d at 1190 (the “exception clause
19 expressly excepts advertisements from preemption”); see also *Natl. Ass'n of Tobacco Outlets, Inc.*
20 *v. City of Providence, R.I.*, 731 F.3d 71, 82 (1st Cir. 2013) (under the Family Smoking Prevention
21 and Tobacco Control Act, “the savings clause, overrides the standards preemption but allows only
22 regulations ‘relating to’ the sale of tobacco products”). It unduly expands the concept of
23 misbranding, one aspect of which may be advertising with respect to products sold in states. It
24

25 ²⁰ Nor will I revisit my prior conclusion in *Colgate* that plaintiffs’ misstated nicotine content
26 labeling claims are not preempted. In Reply, defendants focus on section 387c(a)(2)’s definition
27 of misbranding as failure to disclose “an accurate statement of the quantity of the contents in terms
28 of weight, measure, or numerical count.” Defendants skim over the obvious difference between a
required disclosure of the “quantity of a package’s contents” as applied to a package containing X
ounces of product or 20 items of product and disclosure of the nicotine content of an ENDS
product.

1 also ignores the “exception” clause of 21 U.S.C. § 387p(a)(2)(B) that preserves state requirements
 2 regarding the “exposure to, access to, the advertising and promotion of, or use of, tobacco
 3 products.” *Id.* The notion that section 387p(a)(2)(A)’s reference to misbranding – itself defined
 4 elsewhere as including false and misleading advertising – is somehow more specific than the
 5 following very specific “exception” clause that expressly preserves “advertising”, is not well-
 6 taken. The concepts of “advertising and promotion” are readily understood, while the term
 7 “misbranding” is more of a regulatory term of art. But that does not support defendants’ argument
 8 that (a)(2)(A) is more specific and (a)(2)(B) more general. The explicit “exception” is more
 9 *specific* even though it uses readily understood terms to define the powers reserved to the states.

10 If the FDA eventually issues a regulation or standard saying, “if product X is advertised as
 11 Y, that is misbranded and illegal under the TCA,” the FDA could – presumably – take action like
 12 forcing the misbranded product from the market. But even if the FDA acted in that matter and
 13 identified a particular JLI or other ENDS advertisement as false and misleading and misbranded,
 14 that would not automatically wipe out a state law “false and misleading” claim that was identical
 15 to and perfectly consistent with the FDA’s interpretation.

16 The parties’ dispute over the implications flowing from the amendments the TCA made to
 17 the Federal Cigarette Labeling and Advertising Act (FCLAA) is interesting but, as plaintiffs note,
 18 the FDA’s Deeming Rule itself recognized that each statute has to be considered given its own
 19 terms. 81 Fed. Reg. at 28, 989 (“For example, the FCLAA and CSTHEA provisions expressly
 20 preempt State and local regulation of the content of cigarette and smokeless product
 21 advertisements, while section 916(a)(2)(B) of the FD&C Act exempts State and local advertising
 22 restrictions from preemption.”). The FCLAA amendments concern preemption of state “statutes”
 23 and “regulations” on content (but not regulations governing the time, place, and manner of
 24 advertisements), and those provisions do not help inform the interpretation of the express saving
 25 of state law “claims” on which plaintiffs rest most heavily for the claims asserted in the PIC.

26 5. Modified-Risk Claims

27 Defendants argue that because plaintiffs repeatedly claim that JLI misrepresented its
 28 products as “less harmful” than combustible cigarettes, plaintiffs are alleging that JLI’s products

1 were “modified risk” tobacco products. Because advertising and labeling for modified risk
 2 tobacco products must be pre-approved by the FDA, any state law claims based on those products
 3 are preempted. JLI Preempt at 12. But plaintiffs expressly disclaim any intent to characterize
 4 their claims as based on arguments that JLI’s products were “modified-risk products” subject to
 5 separate FDA requirements. Oppo. JLI Preempt at 18-19.

6 I agree with plaintiffs. The mere fact that defendants allegedly misleadingly portrayed
 7 their products as something they were not does not bring the claims (or, in fact, the products)
 8 under the separate modified-risk regulations.

9 **6. Retailer-Specific Preemption**

10 The Retailer Defendants, like the other defendants, join in the preemption arguments made
 11 by JLI. Those are addressed above. They separately argue that the claims against them – related
 12 to their conduct advertising, promoting, and selling JUUL products – are preempted under 21
 13 C.F.R. §§ 1143.3(a)(3) and (b)(3). Specifically, the Retailers²¹ argue for themselves only that
 14 plaintiffs’ (i) misrepresentation and failure to warn claims regarding nicotine content and potential
 15 harm from JUUL products claims, (ii) strict liability claims for “defective products that contained
 16 inadequate warnings” claims, and (iii) failure to provide adequate warnings and instructions to
 17 prevent harm to plaintiffs, are all also preempted given the “safe harbor” provisions in section
 18 1143.3(a)(3). That provision provides that a retailer “will not be in violation of this section for
 19 packaging that” “(i) Contains a health warning; (ii) Is supplied to the retailer by the tobacco
 20 product manufacturer, importer, or distributor, and (iii) Is not altered by the retailer in a way
 21 that is material to the requirements of this section.” Retailers argue that in light of this provision
 22 they cannot be liable for any inclusion or omission of any health warning on a product’s
 23 packaging unless the warning was specifically required by the FDA and they altered it.

24 The Retailers also point out – with respect to the broader concepts of “misbranding” and
 25 “advertising” – that the FDA mandated that the nicotine addiction warning be carried on
 26 “packaging *and advertising*” for the newly deemed ENDS (81 Fed. Reg. at 28,988) and that
 27

28 ²¹ The Retailers are named defendants only in the PIC.

1 subsection (b) of section 1143.3 contains similarly very detailed requirements (font, placement,
2 and formatting) for the required nicotine addiction warning on “advertisements.” Because under
3 (b)(3) the FDA provided another “safe harbor” for advertisements, the Retailers contend that they
4 can only be liable if they were responsible for “directing” a mandated FDA health warning and
5 failed to do so or (if the manufacturer was responsible for directing the health warning) they
6 display an advertisement without a mandated health warning or one with a “materially” altered
7 health warning.

8 Plaintiffs respond, as above, that none of their claims is expressly or impliedly preempted
9 because state law product liability claims are expressly saved under the TCA, and because only
10 product liability claims are asserted in the PIC against the Retailers and other defendants.

11 The Retailer-specific arguments under Section 1143.3 are derivative from the only FDA
12 mandated warning currently imposed on ENDS under that section, the nicotine-addiction warning
13 discussed in *Colgate I*. As noted above, plaintiffs’ claims (generally, across all three sets of
14 complaints) regarding failures to disclose or misleading disclosures on labels regarding *other*
15 topics are not preempted absent further action by the FDA. More broadly, advertising is expressly
16 exempted from the TCA’s express preemption clause despite defendants’ rejected attempt to bring
17 all advertising-based claims within the distinct “misbranding” arena.

18 The Retailer Defendants’ motion to dismiss based on express preemption is DENIED.

19 **C. Implied Preemption**

20 Defendants also argue that *all* of the claims within this MDL – even the product liability
21 claims falling within the savings cause – are impliedly preempted under “conflict” preemption
22 principles. They contend that because plaintiffs’ claims *may* seek to impose liability and standards
23 of conduct on defendants that *may* conflict, undermine, or otherwise interfere with the standards
24 and regulatory actions the FDA *may* issue and take in the future, the claims are preempted. But
25 this puts the cart well before the horse.

26 I assume for purposes of this motion that implied preemption principles could apply to
27 preempt a specific product liability claim notwithstanding the express savings clause if the FDA
28 issues a regulation or standard that directly conflicts with state law-based personal injury claims

1 either because of a set of extensive regulations and standards or because compliance would be
 2 impossible. Plaintiffs are correct that it is appropriate to “begin our search for implied preemptive
 3 intent by observing the [statute’s] express preemption clause creates a ‘reasonable inference’ that
 4 Congress did not intend to preempt state and local laws that do not fall within the clause’s scope.”
 5 *Atay v. County of Maui*, 842 F.3d 688, 704 (9th Cir. 2016). But “the inclusion of either a saving
 6 clause or an express preemption clause within a statutory scheme does not foreclose the
 7 application of ordinary implied preemption principles.” *Natl. Fedn. of the Blind v. United Airlines*
 8 *Inc.*, 813 F.3d 718, 731 (9th Cir. 2016); *see also In re Volkswagen “Clean Diesel” Mktg., Sales*
 9 *Practices, and Products Liab. Litig.*, 959 F.3d 1201, 1213–14 (9th Cir. 2020) (“though a saving
 10 clause raises the inference that Congress did not intend to preempt state law, the existence of a
 11 saving clause does not ‘foreclose or limit the operation of ordinary pre-emption principles’
 12 We may not interpret a saving clause as preserving a state law that would so conflict and interfere
 13 with a federal enactment that it would defeat the federal law’s purpose or essentially nullify it;
 14 rather, such a state law is preempted under ordinary preemption principles.”) (internal citations
 15 omitted). Therefore, I disagree with plaintiffs that the existence of a clear and strong savings
 16 clause precludes defendants from showing that specific otherwise-saved products liability claims
 17 may be preempted under traditional conflict preemption principles.

18 However, this analysis depends on (1) whether and how the FDA exercises what both sides
 19 recognize as its broad regulatory authority and (2) whether it does so in a manner that will create a
 20 conflict so that (i) a specific goal of the FDA would be frustrated by allowing specific state law
 21 claims to proceed or (ii) the FDA issues a specific regulation or standard that would be impossible
 22 for defendants to comply with in light of particular product liability claims asserted by plaintiffs.
 23 Other than with respect to the nicotine-addiction warning addressed above, there is no evidence
 24 that either of these scenarios will occur, much less when they might occur. It is true that the FDA
 25 could take actions that impact the strength of some of plaintiffs’ claims or even conflict-preempt
 26 them. If and when that potential conflict arises, I can address it. Absent the FDA’s issuance of
 27 those standards under the TCA, I cannot assess conflict preemption now. No one knows how
 28 broadly or narrowly the FDA will regulate ENDS generally or JLI’s products specifically, other

1 than regarding the standards that already apply to JLI’s products like the nicotine addiction
2 warning addressed above.

3 This posture is unlike the main authority on which JLI relies, *Geier v. Am. Honda Motor*
4 *Co., Inc.*, 529 U.S. 861, 874–75 (2000), because the federal standard here is not final. The federal
5 standard at issue in *Geier* – the passive restraint standard issued by the Secretary of the
6 Department of Transportation that expressly gave car manufacturers a number of different passive
7 restraints they could use – was final. Despite the presence of a savings clause that generally
8 preserved state law product liability claims, the Supreme Court determined that implied, conflict
9 preemption prevented a specific product liability claim. The Court agreed that allowing a state
10 law products liability action based on the failure of a manufacturer to adopt one of the allowed
11 (but not required) passive restraint standards (use of air bags) “conflicts with the objectives of” the
12 federal standard to allow a mix of restraints and if allowed would stand as an “obstacle to the
13 variety and mix of devices that the federal regulation sought.” *Geier*, 529 U.S. at 866, 881.²²

14 Given that field preemption is clearly not contemplated by the structure of the TCA – the
15 statute expressly preempts only “different or identical too” standards, except advertising and other
16 laws governing sales and promotion, and includes a strong, express saving clause preserving state
17 law product liability claims – defendants’ arguments that allowing state law claims generally
18 “frustrates” federal objectives is not well-taken.²³ If the FDA later imposes methods (standards
19 and regulations) on ENDS generally or JLI products specifically that would be frustrated by
20 allowing state law claims to proceed or if specific state law claims create an impossibility conflict
21 with those not-yet-issued federal standards or regulations, this issue will be reconsidered.

22 Finally, the nicotine addiction warning that *has* been promulgated might conflict-preempt
23

24 ²² Defendants also argue that to the extent any of plaintiffs’ claims are based on a “fraud on the
25 FDA” theory – in other words that JLI misled the FDA in some manner – those too are impliedly
26 preempted under *Buckman Co. v. Plaintiffs’ Leg. Comm.*, 531 U.S. 341, 348 (2001). JLI Preempt
27 at 19. Plaintiffs in opposition argue that they have not pleaded any claims that are actionable
28 based solely on a “fraud on the FDA” basis and clarify that the allegedly fraudulent
misrepresentations made to the FDA are simply part of the broader scheme to defraud alleged.
Oppo. JLI Preempt at 21.

²³ Defendants do not assert field preemption. Preempt Reply at 13 n.7.

1 an otherwise saved product liability claim if the specific relief sought by a personal injury plaintiff
2 (or the PIC) would require JLI to make a different or additional disclosure on that specific topic
3 *and* it would either frustrate Congressional intent or it would be impossible to comply with both
4 the FDA standard and a standard imposed as a matter of state product liability law. As neither
5 side has fully briefed this narrow issue, I will address it when the state law product liability claims
6 or bellwether plaintiffs' claims are tested.

7 Defendants' motions to dismiss based on preemption are DENIED.

8 **III. MOTIONS TO DISMISS RICO CLAIMS**

9 Defendants JLI, Altria, and the Officer and Director Defendants move to dismiss the RICO
10 claims asserted against each of them in both the CAC and the PECs.

11 **A. Legal Standards**

12 To state a RICO claim, plaintiffs must plausibly allege that each defendant acted, directly
13 or indirectly, in (1) the conduct, (2) of an enterprise that affects interstate commerce, (3) through a
14 pattern, (4) of racketeering activity. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d
15 990, 997 (9th Cir. 2014) (citing 18 U.S.C. § 1962(c)). Plaintiffs must connect the alleged
16 racketeering activity with the conduct of an "enterprise" that affects interstate or foreign
17 commerce. 18 U.S.C. § 1962(c). Here, plaintiffs allege defendants were part of an associated-in-
18 fact enterprise (AIF). *See* 18 U.S.C. § 1961(4). To plead an AIF enterprise, plaintiffs must
19 plausibly allege the following three elements: (1) a common purpose, (2) a structure or
20 organization, and (3) longevity necessary to accomplish the purpose. *Boyle v. United States*, 556
21 U.S. 938, 946 (2009).

22 "In order to 'participate, directly or indirectly, in the conduct of [an] enterprise's affairs,'
23 one must have some part in directing those affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179
24 (1993) (quoting 18 U.S.C. § 1962(c)). This requirement does not limit RICO liability "to those
25 with primary responsibility for the enterprise's affairs," nor does it require a participant to exercise
26 "significant control over or within an enterprise." *Id.* at 179 & n.4 (emphasis omitted). But "some
27 part in directing the enterprise's affairs is required," *id.* at 179, and "[s]imply performing services
28 for the enterprise," or failing to stop illegal activity, is not sufficient. *Walter v. Drayson*, 538 F.3d

1 1244, 1248-49 (9th Cir. 2008).

2 RICO defines “racketeering activity” as any of the predicate acts listed in 18 U.S.C. §
3 1961(1). Those acts include mail and wire fraud, which are the acts plaintiffs claim defendants
4 committed, agreed to, or supported other defendants committing. Mail and wire fraud are
5 identical offenses except for the particular method used to disseminate the fraud. *Eclectic Props.*,
6 751 F.3d at 997. The elements are (1) a scheme to defraud, (2) the use of the mails or wires to
7 further that scheme, and (3) the specific intent to defraud. *Id.* The “scheme to defraud” element
8 requires “an affirmative, material misrepresentation.” *United States v. Green*, 592 F.3d 1057, 1064
9 (9th Cir. 2010) (quoting *United States v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986)). But the
10 misrepresentation does not need to be made through the mails or wires; rather, the use of the mails
11 or wires only needs to be “a step in the plot.” *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir.
12 2004) (internal quotation marks omitted). The misrepresentation also does not need to be made to
13 the RICO plaintiff, but instead may be made to a third-party. *See Bridge v. Phoenix Bond &*
14 *Indem. Co.*, 553 U.S. 639, 661 (2008) (bidder on public tax liens had standing to assert RICO
15 claim against a competing bidder who made misrepresentations to the auctioneer, which deprived
16 plaintiff of other bids; “a plaintiff asserting a RICO claim predicated on mail fraud need not show
17 ... that it relied on the defendant’s alleged misrepresentations”).

18 The “scheme to defraud” element of mail and wire fraud is “treated like conspiracy in
19 several respects.” *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002) (quoting *United*
20 *States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992)). As a result, each member of the scheme
21 does not need to make a separate misrepresentation. *Id.*

22 A “pattern of racketeering activity” requires the commission of at least two predicate acts
23 within a ten-year period. 18 U.S.C. § 1961(5). “Evidence of multiple schemes is not required ...
24 and, indeed, proof of a single scheme can be sufficient so long as the predicate acts involved are
25 not isolated or sporadic.” *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004) (citing *H.J. Inc. v.*
26 *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989)).

27 RICO’s injury standard requires the plaintiff to plead “a harm to a specific business or
28 property interest,” which is “a categorical inquiry typically determined by reference to state law.”

1 *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (*en banc*). Not only must a RICO plaintiff
2 adequately plead an injury to a specific business or property interest, but the injury must also be
3 “tangible” or “concrete.” *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008);
4 *Diaz*, 420 F.3d at 900. An out-of-pocket loss satisfies this requirement. In *Canyon County*, for
5 example, the court noted that “[i]n the ordinary context of a commercial transaction, a consumer
6 who has been overcharged can claim an injury to her property, based on a wrongful deprivation of
7 her money.” 519 F.3d at 976.

8 A plaintiff asserting a private cause of action for a RICO violation must also satisfy a
9 causation requirement: the plaintiff must plausibly allege at the pleading stage that the RICO
10 violation was a “but for” cause and proximate cause of its asserted injuries. *Canyon Cty.*, 519 F.3d
11 at 981. “When a court evaluates a RICO claim for proximate causation, the central question it
12 must ask is whether the alleged violation led directly to the plaintiff’s injuries.” *Anza v. Ideal Steel*
13 *Supply Corp.*, 547 U.S. 451, 461 (2006). Three non-exhaustive factors are considered: “(1)
14 whether there are more direct victims of the alleged wrongful conduct who can be counted on to
15 vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the
16 amount of the plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether
17 the courts will have to adopt complicated rules apportioning damages to obviate the risk of
18 multiple recoveries.” *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1169 (9th Cir. 2002) (relying on
19 *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992)).

20 “[A] RICO conspiracy under § 1962(d) requires only that the defendant was ‘aware of the
21 essential nature and scope of the enterprise and intended to participate in it.’” *United States v.*
22 *Christensen*, 828 F.3d 763, 780 (9th Cir. 2015) (quoting *United States v. Fernandez*, 388 F.3d
23 1199, 1230 (9th Cir. 2004)).

24 **B. RICO Allegations**

25 **1. CAC**

26 Plaintiffs assert claims arising under the Racketeer Influenced and Corrupt Organizations
27 Act (“RICO”) (18 U.S.C. §§ 1962(c), (d)) against defendants JLI, the Altria Defendants, Monsees,
28 Bowen, Pritzker, Huh, and Valani. CAC ¶ 705. Plaintiffs allege that the RICO Defendants formed

1 an “association-in-fact enterprise—the Nicotine Market Expansion Enterprise,” which exists
 2 separately from the otherwise legitimate business operations of JLI, Altria, or the investment
 3 companies with which the Other Director Defendants are affiliated. *Id.* ¶ 714. The RICO
 4 defendants are alleged to have “created and maintained systematic links for a more nefarious
 5 common purpose: maintaining and expanding the number of nicotine-addicted e-cigarette users in
 6 order to ensure a steady and growing customer base, including by maintaining and expanding
 7 JLI’s massive, and ill-gotten, share of the e-cigarette market.” *Id.* The Enterprise went beyond
 8 “business as normal” according to plaintiffs because its purpose – and the purpose of each of the
 9 defendants – was according to plaintiffs to addict many more people and especially minors to
 10 nicotine. *Id.*

11 Those efforts to expand the market of nicotine-addicted e-cigarette users, including youth,
 12 included the following Enterprise acts: (1) developing a product with an undisclosed and
 13 heightened ability to smoothly deliver and addict nicotine users and running it through purposely
 14 reengineered tests to obscure nicotine content and delivery, *see, e.g.*, CAC ¶¶ 115, 125, 168, 179;
 15 (2) distributing advertisements that omitted references to or misrepresented the nicotine content in
 16 JUUL products and developing marketing campaigns that intentionally targeted youths, *see, e.g.*,
 17 CAC ¶¶ 286-304, 341-43, 752; (3) coordinating with Altria to distribute misleading statements to
 18 the FDA fraudulently characterizing mint (a flavor offered by both JLI and Altria) as a non-
 19 flavored tobacco and menthol product, claiming that it was a product for adult smokers, *see, e.g.*,
 20 CAC ¶¶ 472-505, 752; (4) sharing data between JLI and Altria to allow the Enterprise members to
 21 align on strategy for growing the e-cigarette market, *see, e.g.*, CAC ¶ 42-44, 48, 124, 397, 419-25;
 22 (5) formalizing the partnership between JLI and Altria through an equity investment, *see, e.g.*,
 23 CAC ¶¶ 42-46; (6) coordinating with non-defendant co-conspirator Veratad on means of defeating
 24 age-verification processes, *see, e.g.*, CAC ¶¶ 374-95; (7) transmitting to the FDA a fraudulent
 25 youth prevalence study addressing both tobacco products generally and JUUL products that
 26 misrepresented the popularity of the Mint flavor among kids and vastly understated the percentage
 27 of youth using e-cigarettes, *see, e.g.*, CAC ¶ 474-78, 752; (8) coordinating with Altria to distribute
 28 the fraudulent and misleading “Make the Switch” advertisements, *see, e.g.*, CAC ¶¶ 202-04, 752;

1 and (9) coordinating with Altria on lobbying efforts to “prevent[] new federal or state legislation
2 targeting JUUL or the e-cigarette category more broadly.” CAC ¶ 439.

3 Plaintiffs allege that “Early Enterprise Defendants” JLI, Monsees, Bowen, Pritzker, Huh,
4 and Valani “formed the Nicotine Market Expansion Enterprise by at least 2015” with non-
5 defendant co-conspirator Veratad Technologies LLC when these defendants “prepared to launch
6 the JUUL e-cigarette and capture and grow a market of nicotine-addicted users that would serve as
7 customers for life.” *Id.* ¶ 715. The Early Enterprise Defendants are alleged to have developed a
8 product that gave a quicker buzz and a more palatable yet higher dosage of nicotine to consumers
9 after manipulating studies and deceiving the consumers and the public regarding the highly
10 addictive nature of the JUUL product. *Id.* ¶¶ 32, 74, 88-116, 168-175, 175-199.

11 Plaintiffs contend that the Early Enterprise Defendants knew that the most impressionable
12 and profitable user base would be youth users, and so Bowen, Monsees, Pritzker, Huh, Valani, and
13 JLI devised and implemented a marketing plan to target youth, including the “Vaporized”
14 campaign and other youth-oriented campaigns. *Id.* ¶¶ 333-353. Once the JUUL product hit the
15 market, these defendants hired Veratad, which is alleged to have coordinated with the Enterprise
16 defendants to “to get JUULs into the hands of the largest number of consumers possible.” CAC ¶
17 374. Plaintiffs claim that Veratad provided JLI with “age verification services” for purchases
18 made through JLI’s website from 2015 to 2018, and that Veratad provided age verification
19 services to other e-cigarette sellers, including Lorillard and Altria. *Id.* ¶ 376. Plaintiffs contend
20 that “JLI and Veratad designed and implemented an age verification system designed to maximize
21 the number of prospective purchasers who ‘pass’ the process rather than to minimize the number
22 of underage sales. As a result of these intentionally permissive age verification practices, JLI and
23 Veratad used online payment systems and the US mails to ship tens of millions of dollars of JUUL
24 pods to unverified customers, many of whom were minors.” *Id.* ¶ 377. “Veratad’s age
25 verification system was purposefully flexible, so JLI and Veratad could work together to decide
26 just how closely a prospective purchaser’s personal information had to match records in Veratad’s
27 database in order to “pass” the age verification process; JLI and Veratad worked together to
28 “bump up” the number or purchasers who could pass the flexible age verification process,

1 including by “divorcing” an address verification step. *Id.* ¶¶ 381 – 386, 390.

2 Plaintiffs contend that “[i]n the Spring of 2017, Defendant Altria joined the Nicotine
3 Market Expansion Enterprise. Non-defendant member Veratad would leave the Enterprise
4 sometime in 2018 when it stopped coordinating with Defendant JLI. Each Early Enterprise
5 Defendant is liable for the predicate acts of the enterprise committed no later than its formation in
6 2015, and Defendant Altria is liable for the predicate acts of the enterprise committed no later than
7 when it joined the Enterprise in Spring 2017.” *Id.* ¶ 718.

8 **2. Public Entity Complaints**

9 The factual allegations and bases of purported RICO liability in the PECs are materially
10 similar to those in the CAC, with additional allegations regarding injury from defendants’ alleged
11 conduct specifically targeting youth and schools. *See, e.g.*, TVC ¶¶ 176, 441, 445, 701. There are,
12 however, significant differences with respect to the government entities’ allegations regarding the
13 types of injuries and damages caused. The PECs allege that the youth e-cigarette epidemic caused
14 by defendants’ actions forced them expend “limited financial and other resources to mitigate the
15 health crisis of youth e-cigarette use,” by “providing new programs and new services as a direct
16 result and in direct response to Defendants’ misconduct.” TVC ¶¶ 701-703; *see also* TVC ¶ 597
17 (generally allege that plaintiffs were “forced to divert resources and deploy new ones to combat
18 the problem of teen e-cigarette use”); TVC ¶ 605 (“incurred additional legal expenses in
19 connection with disciplinary hearings”); TVC ¶ 607 (purchased and installed e-cigarette detectors,
20 cameras and anti-vaping signs around school district property); TVC ¶ 609 (property damage
21 caused by growing hazardous waste problem, “either from youth improperly disposing of [the
22 products] by littering or throwing them in the trash or toilets, or because teachers and school staff
23 must confiscate and store them”).

24 **C. Enterprise**

25 An associated in fact enterprise has three elements: (1) a common purpose, (2) a structure
26 or organization, and (3) longevity necessary to accomplish the purpose. *Boyle v. United States*,
27 556 U.S. 938, 946 (2009). Plaintiffs in the CAC and PECs allege, generally, that the common
28 purpose of the RICO Nicotine Market Expansion Enterprise was to increase the number of

1 nicotine addicted consumers and to target the youth market to create a new generation of nicotine
 2 addicts. The common purpose element of an associated-in-fact enterprise is different from (but
 3 related to) the pattern of predicate acts (discussed below). The “common purpose” does not itself
 4 have to be fraudulent. *See, e.g., Odom v. Microsoft Corp.*, 486 F.3d 541, 552 (9th Cir. 2007)
 5 (“Defendants had the common purpose of increasing the number of people using Microsoft’s
 6 Internet Service, and doing so by fraudulent means.”).²⁴ And an “associated-in-fact enterprise
 7 under RICO does not require any particular organizational structure, separate or otherwise,” and
 8 can be made up of parts of an otherwise legitimate business entity. *Odom*, 486 F.3d at 551.
 9 However, an enterprise “is not simply the same ‘person’ referred to by a different name,” and
 10 RICO liability “depends on showing that the defendants conducted or participated in the conduct
 11 of the ‘enterprise’s affairs,’ not just their own affairs.” *Cedric Kushner Promotions, Ltd. v. King*,
 12 533 U.S. 158, 161, 163 (2001).

13 Plaintiffs allege that the associated-in-fact Nicotine Market Expansion Enterprise began in
 14 2015 and expanded in Spring 2017 to include Altria. Plaintiffs contend that the Enterprise existed
 15 separately from the otherwise legitimate business operations of JLI, Altria, and the investment
 16 companies with which the Other Director Defendants are affiliated because it was focused on the
 17 illegitimate and undisclosed (to the public and regulators) goals of creating new nicotine addicts
 18 and targeting youth. CAC ¶¶ 714, 727. Plaintiffs state, generally, that the Enterprise achieved its
 19 common purpose through the co-conspirators’ actions in deceiving consumers, regulators, and the
 20 general public about the nature of the product (the potency of nicotine delivery and potential for
 21 fostering addiction) and its intent (falsely or unduly portraying it as a smoking cessation product
 22 when the Enterprise intended to capture new nicotine addicts and denying its true intent to target
 23

24 ²⁴ As the *Odem* court noted: “‘The enterprise is an entity, for present purposes a group of persons
 25 associated together for a common purpose of engaging in a course of conduct. The pattern of
 26 racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The
 27 former is proved by evidence of an ongoing organization, formal or informal, and by evidence that
 28 the various associates function as a continuing unit. The latter is proved by evidence of the
 requisite number of acts of racketeering committed by the participants in the enterprise. While the
 proof used to establish these separate elements may in particular cases coalesce, proof of one does
 not necessarily establish the other.’” *Id.* at 549 (quoting *United States v. Turkette*, 452 U.S. 576,
 583 (1981)).

1 youth and create new nicotine addicts). CAC ¶¶ 735-737. Plaintiffs allege that these acts lulled
2 public officials into delaying or deferring regulation of the JUUL products, in full or in part, and
3 deceived consumers about the purpose and impact of JUUL’s products in order to protect
4 defendants’ sales, profits, and secure the Enterprise’s long-term goal of creating more nicotine
5 addicts.

6 Defendants argue, generally, that plaintiffs’ allegations regarding common purpose and the
7 existence of an “organization” separate from JLI itself are fatally deficient. They do not really
8 challenge the common purpose element of the Enterprise, the alleged scheme to defraud. They do
9 contest the adequacy of allegations regarding each individual participant’s intent or agreement
10 with that purpose, which I address later. But their main defense to the existence of the AIF
11 Enterprise is that plaintiffs have not alleged facts showing that the Nicotine Market Expansion
12 Enterprise is really anything other than JLI (and JLI combined with Altria) or that conduct of the
13 participants is anything more than the fulfillment of their duties owed to JLI as officers, directors,
14 service providers, and investors. Cases recognize that where the individual constituents of an
15 asserted enterprise are alleged only to have conducted the “regular” business” of the corporate
16 entity or business in their own interests, those allegations are insufficient to support a RICO
17 enterprise.

18 Defendants characterize all of the alleged conduct of the Enterprise as “regular” business
19 of JLI (even if fraudulent, as plaintiffs allege but defendants contest) and not the separate and
20 distinct conduct of a “Nicotine Market Expansion Enterprise.” They note that the alleged goals of
21 the Enterprise are essentially aligned with JLI’s goals; expanded sales of JUUL products and
22 capture of ENDS market share.²⁵ Even if the conduct was fraudulent, that does not transform it
23 into distinct “enterprise” conduct actionable under RICO. *See, e.g., In re Toyota Motor Corp.*
24 *Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, 826 F. Supp. 2d 1180, 1202-
25 03 (C.D. Cal. 2011) (where “plaintiffs merely allege that the Defendants are associated in a
26 manner directly related to their own primary business activities” and alleged “no more than that
27

28 ²⁵ Defendants dispute the veracity of plaintiffs’ allegations that their true goals were to capture new users, particularly youth users.

1 Defendants' primary business activity . . . was conducted fraudulently," that was "insufficient to
 2 state a claim under § 1962(c)"); *In re Jamster Mktg. Litig.*, 05CV0819 JM (CAB), 2009 WL
 3 1456632, at *5 (S.D. Cal. May 22, 2009) (concluding "[w]ithout the adjectives, the allegations
 4 allege conduct consistent with ordinary business conduct and an ordinary business purpose," and
 5 dismissing RICO claim despite alleging "an overarching common purpose to engage in fraudulent
 6 conduct" because they failed "to identify specific allegations in support of the common purpose.");
 7 *Shaw v. Nissan N.A., Inc.*, 220 F. Supp. 3d 1046, 1054 (C.D. Cal. 2016) (recognizing that courts
 8 "have overwhelmingly rejected attempts to characterize routine commercial relationships as RICO
 9 enterprises") (internal quotation omitted). Defendants argue that the same is true after Altria made
 10 its first investment in JLI in December 2018 because there are no allegations that the investment
 11 was for purposes *other* than ordinary commercial purposes shared by JLI and Altria.

12 Plaintiffs respond, first, that these general attacks raise questions of fact that are not
 13 appropriately determined on a motion to dismiss. Oppo. JLI/Altria RICO at 23-24; *see, e.g. Bias*
 14 *v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 942 (N.D. Cal. 2013) ("Wells Fargo's challenge that
 15 its actions were simply 'normal business dealings' without the existence of an enterprise or any
 16 'common purpose' is fact-determinative and cannot be resolved at this juncture.").²⁶ However,
 17 plaintiffs need to assert *plausible* allegations to support the existence of this AIF "Nicotine Market
 18 Expansion Enterprise" separate and apart from the regular business of JLI. The current allegations
 19 in the CAC often allege that JLI *itself* (including specifically those broadly in charge, like the CEO
 20 who eventually replaced Monsees and who is not alleged to be part of the AIF Enterprise) had the
 21 purpose of growing the nicotine market and even doing so by targeting youth. Those broad and
 22 undifferentiated allegations make it difficult to plausibly allege the existence of a separate AIF
 23 Enterprise.

24 _____
 25 ²⁶ In *Bias*, plaintiffs alleged that Wells Fargo set up a specific intra-corporate division to enact the
 26 Enterprise scheme with outside vendors to charge "marked-up" and illegal fees related to its home
 27 mortgage services. The court concluded that allegations regarding the existence of the intra-
 28 corporate division within Wells Fargo and "its creation of fictitious invoices to substantiate fees,
 Wells Fargo's reliance on those invoices to justify the marked-up fees, and Wells Fargo's payment
 of lesser amounts—independent of the invoices—directly to third-party vendors and brokers
 satisfy the distinctiveness requirement." *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 941
 (N.D. Cal. 2013). Plaintiffs do not allege any distinct division within JLI here.

1 Plaintiffs also attempt to distinguish *Shaw* and *Jamster* by contending that the allegations
 2 in the CAC demonstrate that defendants were not engaged in routine business activities but instead
 3 in a “collaborative scheme to defraud” such as the one outlined in *In re: Takata Airbag Products*
 4 *Liab. Litig.*, 2015 WL 9987659 (S.D. Fla. Dec. 2, 2015). In *Takata*, however, plaintiffs alleged
 5 the existence of numerous communications showing that “Takata, the Vehicle Manufacturer
 6 Defendants, and dealerships” demonstrated “a collaborative scheme to defraud consumers” that
 7 was “distinct from the conduct of any individual defendant.” *Id.* at *1. Plaintiffs plausibly alleged
 8 that the defendants acting together “as an enterprise, knew of a defect in the Takata airbag, knew
 9 that Takata had concealed the defect, and defrauded consumers by selling and servicing vehicles
 10 for more money than consumers would have paid had the vehicle not contained a defective
 11 airbag.” *Id.* There was obvious “other conduct of the defendant” in *Takata* that was not
 12 associated with the alleged AIF enterprise. That is missing here. Plaintiffs need to plausibly
 13 allege more in support of the distinct AIF Enterprise.²⁷

14 Relatedly, JLI and the Officer and Director Defendants argue that they could not have
 15 formed a separate, distinct enterprise because JLI’s officers, directors, and employees are
 16 categorically not “distinct” from JLI for purposes of RICO. *See, e.g., Living Designs, Inc. v. E.I.*
 17 *Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (“To be sure, if the ‘enterprise’
 18 consisted only of DuPont and its employees, the pleading would fail for lack of distinctiveness.”
 19 (citing *Cedric Kushner*, 533 U.S. at 164)); *In re: Gen. Motors LLC Ignition Switch Litig.*, 14-MC-
 20 2543 (JMF), 2016 WL 3920353, at *12 (S.D.N.Y. July 15, 2016). (“A corporation carrying out its
 21 own activities (even fraudulent ones) only through its agents and employees does not constitute an
 22 enterprise.”). JLI and the Officer and Director Defendants, therefore, argue that the existence of a

23 _____
 24 ²⁷ Plaintiffs’ other cases are inapposite or otherwise do not support their effort to allege the
 25 distinctiveness of the AIF Enterprise or drawing lines between what they allege were the separate
 26 acts of the Enterprise and the regular acts of JLI. *See, e.g., Asis Internet Services v.*
 27 *Consumerbargaingiveaways, LLC*, 622 F. Supp. 2d 935, 941–42 (N.D. Cal. 2009 (addressing
 28 whether “falsity or deception” must be narrowed to common-law fraud in CAN–SPAM Act);
United Energy Trading, LLC v. P. Gas & Electric Co., 200 F. Supp. 3d 1012, 1023 (N.D. Cal.
 2016 (addressing Sherman Act intent); *Bunnett & Co., Inc. v. Gearheart*, 17-CV-01475-RS, 2018
 WL 1070298, at *1 (N.D. Cal. Feb. 27, 2018) (alleging RICO scheme made up of affiliated and
 unaffiliated entities to “establish and exert control over a new distribution channel for the supply
 and sale of dairy cow nutritional supplements”).

1 properly pleaded Enterprise depends on Veratad and Altria being part of it.

2 Plaintiffs respond that an AIF enterprise does not need to have a particular structure or
3 fixed roles for the participants, Oppo. JLI/Altria RICO at 12-14, but they miss defendants' point.
4 To constitute an AIF enterprise, the presence of some third-party, separate and apart from the
5 company and its officers and employees, is necessary. Defendants persuasively argue that
6 plaintiffs have failed to plausibly allege the involvement of third-party Veratad in the Enterprise.
7 They contend that the allegations regarding the role of Veratad is categorically insufficient
8 because plaintiffs' own allegations confirm that JLI hired Veratad to provide the same age-
9 verification services that Veratad provided to other ENDS sellers. CAC ¶ 375, TVC ¶ 414. They
10 also argue that plaintiffs' allegations establish only that Veratad was acting in its own interests –
11 not part of any Enterprise – and the allegations prove that JLI hired Veratad to serve JLI's general
12 corporate interests, not the interests of the theoretically separate AIF Enterprise. As such,
13 defendants assert that the allegations regarding Veratad cannot prop up the existence of an AIF
14 Enterprise. *See, e.g., In re Countrywide Fin. Corp. Mortg.-Backed Securities Litig.*, 2012 WL
15 10731957, at *9 (C.D. Cal. June 29, 2012) (dismissing RICO claim where plaintiffs only
16 “identified exactly the type of arms-length business transaction, with each party pursuing its own
17 independent economic interests, that does not constitute a RICO enterprise”); *Chagby v. Target*
18 *Corp.*, 2008 WL 5686105, at *3 (C.D. Cal. Oct. 27, 2008), *aff'd*, 358 Fed. Appx. 805 (9th Cir.
19 2009) (unpublished) (dismissing where “plaintiff alleges no facts that could lead someone to
20 believe that Defendants' relationship with its advertising agency was anything more than a typical
21 client of the advertising agency”); *Gomez v. Guthy-Renker, LLC*, 2015 WL 4270042, at *11 (C.D.
22 Cal. July 13, 2015) (“RICO liability must be predicated on a relationship more substantial than a
23 routine contract between a service provider and its client.”); *but see City of New York v. Gordon*,
24 155 F. Supp. 3d 411, 423 (S.D.N.Y. 2015) (upholding a RICO verdict where an enterprise
25 member formed an uncontested association-in-fact enterprise with one smoke shop to deliver
26 contraband cigarettes, in part because that member handled deliveries for other smoke shops and,
27 therefore, was more than a passive party to the substantive conduct alleged).

28 Plaintiffs respond that they have “extensive” allegations regarding how Veratad worked

1 with JLI to get around and minimize the impact of age verification requirements and changed
2 processes to increase the numbers of prospective purchasers who “passed.” CAC ¶¶ 377, 382,
3 385. But plaintiffs do not allege facts showing that Veratad undertook *those* efforts as part of a
4 joint “scheme to defraud” to mislead regulators and the public or to specifically to grow the
5 market of nicotine-addict as services *in aid of* the “Nicotine Market Expansion Enterprise” as
6 opposed simply securing higher returns for JLI, which was in both Veratad’s and JLI’s general
7 economic interests.

8 That is why plaintiffs’ reliance on *City of New York v. Gordon*, 155 F. Supp. 3d 411, 423
9 (S.D.N.Y. 2015) is not useful. There, the fact that the third-party participant in an admitted AIF
10 enterprise was hired by defendants *and* others to deliver contraband cigarettes, did not undermine
11 the RICO claim as the conduct was in all circumstances illicit. Here, plaintiffs attempt to allege an
12 Enterprise distinct from the “otherwise legitimate business operations of JLI, Altria, or the
13 investment companies with which Defendants Pritzker, Huh, and Valani are affiliated,” CAC ¶
14 714, but fail to connect Veratad and indeed much of the alleged Enterprise participants’ conduct to
15 anything other than JLI and Altria’s normal business. Plaintiffs have not adequately alleged
16 plausible facts that Veratad joined, was part of, and provided services for, the *separate* Nicotine
17 Market Expansion Enterprise.

18 As for the subsequent “Altria period,” defendants argue that the allegations establish only
19 that Altria and JLI were acting in their joint corporate interests, not as a distinct Enterprise.
20 Defendants point out that Altria and JLI were purported competitors from Spring 2017 to
21 December 20, 2018, and the only alleged coordination during that time was that Altria had
22 apparent access to JLI’s sales data in 2017 that plaintiffs allege was secured through a third party,
23 Avail Vapor. CAC ¶¶ 419-423, 731; TVC ¶¶ 463-467, 671. The allegation is that both JLI and
24 Altria used Avail Vapor as a conduit for their confidential negotiations about joining forces.

25 Defendants contend that this attenuated connection cannot establish an “association-in-
26 fact” enterprise with Altria. *See Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1090-91
27 (N.D. Cal. 2006) (dismissing RICO claim where all “that is alleged is that defendants entered into
28 these agreements with numerous third-parties—who notably are unnamed in the complaint—and

1 through the information gained from these agreements, committed their fraudulent acts. Plaintiffs
2 make no allegations that defendants and these unnamed third parties worked in concert to engage
3 in the alleged racketeering activities or to distribute its proceeds.”). Plaintiffs respond that they
4 allege Altria and JLI were not true competitors during this time frame, given JLI’s dominance, and
5 that Altria and JLI were in fact engaged in secret negotiations to join forces, undercutting the
6 “competition” argument. But the presence of limited data in Altria’s possession regarding JLI’s
7 sales data in 2017 is a thin reed to rest a claim that Altria and JLI were part of an association in
8 fact prior to Altria’s formal investment.

9 Plaintiffs also point to their allegations (taken as true for purposes of motion to dismiss)
10 that Altria secured shelf-space that it intended *for JUUL* products (with knowledge of JLI’s youth-
11 targeting through marketing and product displays) and that Altria joined with JLI to attempt to
12 keep mint-flavored products on the market (knowing that mint pods were a main driver of youth
13 use and JLI sales generally). CAC ¶¶ 427-429, 472-489. These allegations do not support
14 distinctiveness or that Altria’s conduct was intended to support the Enterprise as opposed to the
15 general business of JLI which, as plaintiffs plausibly allege, Altria worked to support in advance
16 of the culmination of its investment in December 2018.

17 The significance of the amount of Altria’s investment as of December 2018 (35%) is
18 likewise contested. Plaintiffs contend that high percentage of Altria’s investment is significant in
19 and of itself and supports the inference that Altria joined the Enterprise in order to grow the
20 number of nicotine addicts and create a new pipeline for profits. Defendants counter that the size
21 of the investment strengthens *their* argument that Altria invested for its own economic interests,
22 and not to join an already existing Enterprise. *See, e.g., In re Countrywide*, 2012 WL 10731957,
23 at *8 (where “parties that enter commercial relationships ‘for their own gain or benefit’ do not
24 constitute an ‘enterprise,’”); *Toyota*, 826 F. Supp. 2d at 1202-03. (“[T]he SAC alleges no more
25 than that Defendants’ primary business activity—the design, manufacture, and sale or lease of
26 Toyota vehicles—was conducted fraudulently.”).

27 In short, plaintiffs have not plausibly alleged the existence of a distinct Enterprise,
28 separate and apart from the general business of JLI. There is too little to plausibly allege that

1 Veratad and Altria specifically joined that distinct Enterprise, as opposed to going into business
2 with JLI to support the general business of JLI for their mutual benefit.

3 **D. Conducted Affairs of Enterprise**

4 Each defendant also challenges the pleadings regarding the alleged roles and conduct in
5 support of the Enterprise. Two lines of authority are implicated by defendants' challenges.

6 Rule 9(b) applies to the fraudulent conduct relevant to both the common purpose of the
7 Enterprise and the underlying predicate acts discussed below, and requires a heightened showing
8 of the circumstance of fraudulent acts, including "the time, place, and specific content of the false
9 representations as well as the identities of the parties to the misrepresentation." *Schreiber*
10 *Distribg. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Particularly
11 relevant here, Rule 9(b) "does not allow a complaint to merely lump multiple defendants together"
12 but requires plaintiffs to "differentiate" their allegations to "inform" each defendant separately of
13 the allegations particular to that defendant's alleged participation in the fraud. *Swartz v. KPMG*
14 *LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007). "In the context of a fraud suit involving multiple
15 defendants, a plaintiff must, at a minimum, 'identif[y] the role of [each] defendant[] in the alleged
16 fraudulent scheme.'" *Id.* (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541
17 (9th Cir.1989)).

18 On the merits, "[i]n order to 'participate, directly or indirectly, in the conduct of such
19 enterprise's affairs,' one must have some part in directing those affairs. Of course, the word
20 'participate' makes clear that RICO liability is not limited to those with primary responsibility for
21 the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is
22 not limited to those with a formal position in the enterprise, but some part in directing the
23 enterprise's affairs is required." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). "Numerous
24 courts have held that *Reves* is satisfied by evidence that lower-rung members of an enterprise
25 implemented decisions directed by those higher up the ladder in the enterprise or committed
26 racketeering acts which furthered the basic goals of the enterprise at the direction of other
27 members of the enterprise." *U.S. v. Philip Morris USA, Inc. (Philip Morris I)*, 449 F. Supp. 2d 1,
28 876 (D.D.C. 2006) A defendant can satisfy this "conduct" element by simply "coordinating and

1 causing the public dissemination of false, misleading or deceptive statements” in support of the
2 RICO conspiracy. *Id.* at 877.

3 **1. Bowen**

4 Bowen argues that he must be dismissed from the RICO claims because nowhere in the
5 CAC or PECs is he alleged to have personally committed any fraud and there are no facts alleged
6 regarding his agreement to join the Enterprise or how he personally managed or operated the
7 Enterprise. He claims that the facts alleged show only that he was furthering the regular business
8 of JLI.

9 Plaintiffs identify the following allegations regarding Bowen’s role and conduct in the
10 Enterprise: “JLI and Bowen designed the JUUL product to deliver nicotine in larger amounts and
11 at a faster rate than even cigarettes, and then knowingly misled the public about those facts,”
12 including by altering or re-engineering his own studies concerning nicotine content to mask the
13 true content and impact in the products he developed. CAC ¶¶ 100-115, 171, 222. Bowen
14 discussed those engineered test results (the Phase 1 results), and how they differed from the Phase
15 0 results, with defendants Monsees, Pritzker, and Valani. *Id.* ¶ 178. Bowen was personally
16 involved in approving the fraudulent advertisements and other “public-facing” statements
17 attributed generally to the “Early Enterprise Defendants” because, as defendant Monsees testified
18 to Congress that he, Bowen, Pritzker, Huh, and Valani had “final say” over marketing campaigns.
19 *Id.* ¶ 333. It was through this “final say” that plaintiffs claim that Bowen conducted the affairs of
20 the enterprise and is jointly responsible for acts of mail and wire fraud attributed to the “Early
21 Enterprise Defendants” in paragraph 752 of the CAC, including the early Vaporized campaign,
22 which omitted any reference to JUUL’s highly addictive nicotine content. *Id.* ¶ 752. Plaintiffs
23 assert that Bowen is responsible for these fraudulent advertisements because he was “directing and
24 monitoring the launch plans [the JLI Board] had set in motion,” *id.* ¶ 346, and that he suggested
25 affirmatively leveraging youth user generated content to further expand youth addiction. *Id.* ¶
26 357. Finally, plaintiffs say that his involvement, through the JLI Board of Directors, was critical
27 to the coordination with Altria and its ultimate investment in JLI. *Id.* ¶ 44.

28 Bowen responds that the only specific facts alleged regarding him concern his co-founding

1 of JLI and his work designing and testing the product and performing related acts as part of his
2 “legitimate” performance of his job as CTO. He also points out that none of the instances of
3 alleged mail or wire fraud identified in the CAC is directly attributed to him. Instead, the bulk of
4 those advertisements and website marketing materials are identified as “from” “All Early
5 Enterprise Defendants.” Finally, he notes that there are no allegations that connect him to Veratad.

6 Plaintiffs argue that the lack of specific connections between any defendant and Veratad is
7 not itself significant under established caselaw recognizing that “it is not necessary to prove ‘that
8 every member of the enterprise participated in or knew about all its activities.’” *Philip Morris I*,
9 449 F. Supp. 2d at 868 (quoting *United States v. Cagnina*, 697 F.2d 915, 922 (11th Cir.1983)).
10 Plaintiffs contend that their very generalized allegations regarding “control” by the Officer and
11 Director Defendants support the inference that some of them were responsible and directly
12 knowledgeable about Veratad’s conduct in support of the Enterprise. In their opposition, plaintiffs
13 reference additional evidence they have secured to support that inference. As noted, the
14 allegations regarding Veratad are currently insufficient. If plaintiffs amend, they can allege what
15 their “discovery map” has shown with respect to connections between Veratad and Bowen or the
16 other Officers and Directors who are alleged part of the Enterprise.

17 Bowen’s other persuasive point is an argument raised by all of the Officer and Director
18 Defendants; that attributing the advertisements and marketing to “All Early Enterprise
19 Defendants” is impermissible group pleading prohibited by *Swartz, supra*. Plaintiffs contend that
20 generalized attribution is of no legal moment because other express acts that contributed to and set
21 in motion the deception are sufficiently alleged with respect to Bowen, such as his development of
22 the product and re-engineering of tests.

23 I agree that those independent allegations identifying Bowen’s role and personal conduct at
24 the initial design and engineering of the JUUL product and then the subsequent development and
25 rollout of the JUUL product are sufficient *as to him* for RICO conduct. That said, I agree with
26 Bowen that the lack allegations regarding his and any of the other Officer and Director
27 Defendants’ roles with Veratad – addressed above – is problematic and needs further support. I
28 also agree with Bowen and the other Officer and Director Defendants that their alleged “final say”

1 over marketing, an allegation that is repeatedly used throughout the CAC and the PECs, is
2 generally insufficient.

3 Plaintiffs repeatedly allege that the Officer and Director Defendants, both as a group and
4 individually, committed acts cognizable as RICO conduct and by the UCL (as well as the other
5 consumer protection statutes addressed below with respect to the Government Entity Complaints)
6 because these defendants had “final say” over advertising and marketing as part of their role on
7 JLI’s Board or on the Board’s Executive Committee. *See, e.g.,* CAC ¶ 333. Bowen’s and the
8 other Officer and Director Defendants’ challenge to this allegation as impermissible “group”
9 pleading is not particularly persuasive. *See, e.g., U.S. v. United Healthcare Ins. Co.*, 848 F.3d
10 1161, 1184 (9th Cir. 2016) (“There is no flaw in a pleading, however, where collective allegations
11 are used to describe the actions of multiple defendants who are alleged to have engaged in
12 precisely the same conduct.”).

13 But the “final say” allegation is insufficient for other reasons. First, the only citation in the
14 CAC that gives any factual support to this allegation is a reference to Monsees’ July 25, 2019
15 statement before Congress. *See, e.g.,* CAC ¶ 333 (citing to Examining JLI’s Role in the Youth
16 Nicotine Epidemic: Part II: Hearing Before the Subcomm. on Econ. & Consumer Policy of the
17 Comm. on Oversight & Reform, H.R., 116th Cong. 70 (2019)). In their opposition to the motion
18 to dismiss the RICO claims, plaintiffs quote the following exchange from that testimony:

19
20 Q: Who has the final say, I guess, on what the company is doing now,
operationally, related to marketing?

21 Mr. Monsees. You know, it is a combination between Kevin Burns,
22 our CEO, and then our board, of which I am a member.

23 Oppo. JLI/Altria RICO at 16 n.15. On its face, that statement concerns only who was responsible
24 for marketing as of July 2019.²⁸ Second, plaintiffs do not expressly allege that the marketing

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26 ²⁸ As this testimony was cited in plaintiffs’ CAC and this excerpt was quoted by plaintiffs
themselves in their opposition, it is subject to judicial notice under the doctrine of incorporation.
See Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001).

27 Defendants and plaintiffs ask me to take judicial notice of various documents and facts. In Dkt.
28 No. 630, JLI asks me to take judicial notice of: (i) orders from other cases; (ii) FDA statements
and press releases; (iii) JLI news and press releases; (iv) research journal and educational

1 plans, steps, or initiatives that plaintiffs allege were key to further the RICO Enterprise (and that
2 separately constitute consumer protection act violations, discussed below) were presented for
3 Board approval and that the Officer and Director Defendants voted as a bloc to approve them and
4 had sufficient numerical control or other influence over the Board to ensure their effectuation.
5 Without identification of specific acts taken by the Officer and Director Defendants on the Board
6 (or perhaps a plausibly supported allegation that marketing was controlled through the Board) and
7 the defendants' actual, numerical control of the Board, the very general "final say" allegation is
8 insufficient as a hook for conduct of the Enterprise.

9 Turning back to Bowen specifically, there are sufficient allegations about his role in
10 conducting the RICO Enterprise other than the "final say" and Board control allegations. Given
11 his role in the company as a founder and officer and given the more specific allegations about his
12 direct involvement and control over the design, testing, and initial rollout of the JUUL product
13 identified above, the conduct element has been adequately alleged as to Bowen.

14 _____
15 publications; (v) articles from various media and news outlets. Those requests are partially
16 opposed by plaintiffs. The request is granted as to the orders from other cases, and granted for the
17 existence of the FDA and news statements as well as the journal and educational publications, but
18 does not extend to notice of the truth of the facts in those statements and publications.

19 In Dkt. No. 633, Altria asks me to take judicial notice of letters from Altria's CEO to Congress
20 and FDA and a copy of an Altria marketing initiative under doctrine of incorporation. That
21 request is GRANTED, but not for truth of statements contained therein. Altria also requests
22 judicial notice of: (i) two Altria SEC filings; (ii) filings from the *Colgate* case; and of (iii) an FDA
23 press release. Judicial notice will be taken of the court filings and judicial notice will be taken of
24 the existence of the SEC and FDA documents, but not for the truth of or meaning of disputed facts
25 and statements therein.

26 In Dkt. No. 648, Monsees asks me to take judicial notice of the facts that he resigned from JLI on
27 March 12, 2020, and is no longer an employee, officer, director, or adviser of the company.
28 These facts do not appear to be disputed by plaintiffs, but given plaintiffs' clarification regarding
injunctive relief, the request is DENIED.

In Dkt. Nos. 739 & 880, Altria asks me to take judicial notice of: (i) a document summarizing PFS
data from MDL Centrality; (ii) an FDA press release; (iii) and the complaint in the *Colgate* case.
The request is granted as to the *Colgate* pleading, and granted as to the FDA press release (as to its
existence, not the truth of the facts therein), but DENIED as to the PFS data summarized from
MDL Centrality.

In Dkt. No. 759, plaintiffs ask me to take judicial notice of one statement on JLI's website
regarding mailing of JUUL products. The request is DENIED. In Dkt. No. 760, plaintiffs ask me
to take judicial notice of facts regarding the FDA's handling and processing of PMTAs. That
unopposed request is GRANTED.

2. Monsees

1 Plaintiffs allege that Monsees was a co-founder of the Enterprise and instrumental in the
 2 scheme to expand the market of nicotine-addicted e-cigarette users beyond those “who aren’t
 3 perfectly aligned with traditional tobacco products.” CAC ¶ 31. He is alleged to have studied
 4 cigarette industry marketing strategies and “personally reviewed” the photographs used in the
 5 allegedly fraudulent advertisements accompanying JUUL’s launch. *Id.* ¶¶ 62, 289. He
 6 purportedly “provided specific direction on the content of the website to JLI employees” that
 7 plaintiffs contend included false, misleading, and deceptive statements. *Id.* ¶ 333. He personally
 8 spread the allegedly fraudulent messages that JUULs are a cessation product and that JLI did not
 9 target youth. *Id.* ¶¶ 205-06, 210, 414, 416. And, as part of the Enterprise, he is alleged to be
 10 jointly responsible for the “multiple” acts of mail and wire fraud attributed to the Early Enterprise
 11 Defendants. *Id.* ¶ 752. While plaintiffs admit that Monsees ceded control of the JLI Board of
 12 Directors to Defendants Pritzker, Huh, and Valani in 2015, they contend that Monsees did so only
 13 to “allow those individuals to further co-opt the resources of JLI and take the Enterprise further
 14 than he could,” (*id.* ¶¶ 347-48), but his continued involvement with Bowen on the Board was
 15 “critical” to the unlawful coordination with Altria and its ultimate investment in JLI that directly
 16 benefitted Monsees, Bowen, Pritzker, Huh, and Valani. *Id.* ¶¶ 44-45.

17 Monsees argues these allegations fail to adequately allege his sufficient “direction or
 18 control” over the Enterprise and, instead, simply allege acts by Monsees that were taken as part of
 19 the “ordinary” business operations of JLI. All of this activity, according to Monsees, is the normal
 20 activity of a CEO and then Director of a company and not separate, distinct efforts on behalf of a
 21 RICO Enterprise. Drilling down on his “personal” involvement, Monsees notes that plaintiffs
 22 allege that persons other than Monsees “led” or directed some of the Enterprise acts alleged by
 23 plaintiffs (CAC ¶¶ 34, 728-729), which defeats the vaguer allegations about Monsees’s direction
 24 or control after October 2015. CAC ¶ 729. Finally, he notes that there are no specific facts
 25 alleged regarding his involvement prior to October 2015 other than his general status as a co-
 26 founder and CEO.

27 Putting aside the group allegations that Monsees as part of the Board had “final say” over
 28

1 marketing (that, as noted above, are impermissibly vague and insufficient), there are sufficient
 2 allegations concerning specific acts in which Monsees engaged that show sufficient RICO
 3 conduct. Those include, along with Bowen, the intentional design of the product, the intent to
 4 copy the tactics of tobacco, and his personal direction and approval of specific marketing
 5 campaigns and more generally misleading content on JLI’s website.²⁹

6 3. Other Director Defendants

7 Huh, Valani, and Pritzker also argue that the allegations are not sufficient as to them.³⁰
 8 Plaintiffs assert that, through their control of the JLI Board of Directors, these three Other Director
 9 Defendants worked with Bowen and Monsees to “finaliz[e] a ‘messaging framework’” at the time
 10 JLI launched JUUL. CAC ¶¶ 345-346. But, as noted above, the allegation regarding control of the
 11 Board is insufficiently alleged. Similarly, plaintiffs also state that each Other Director Defendant
 12 was involved in approving the fraudulent advertisements and other public-facing statements
 13 attributed generally to the “Early Enterprise Defendants,” given the “final say” allegation, but that
 14 too is insufficiently alleged.

15 Plaintiffs’ repeated blanket assertion that the “Board of Directors” generally and Huh,
 16 Valani, and Pritzker (along with Bowen and Monsees) through their “control” of the Board of
 17 Directors had “final say” over JLI’s marketing materials does not establish the requisite individual
 18 “direction or control” to pin liability for marketing acts or even specific marketing campaigns of

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 21 ²⁹ Monsees also argues that two of the public statements attributed to him (and alleged as predicate
 22 acts of mail or wire fraud) are not actionable as a matter of law. Bowen argues his testimony
 23 before Congress on behalf of JLI (*id.* ¶ 205) is protected by the *Noerr-Pennington* doctrine and his
 statement to the *New York Times* on behalf of JLI is protected opinion or non-actionable puffery.
Id. ¶ 752. Those arguments will be addressed below but are not necessary to sustain the RICO
 conduct element as to Monsees.

24 ³⁰ Huh is alleged to have been on the Board of Directors of JLI “since at least June 2015. At least
 25 from October 2015 to August 2016, he was on the Executive Committee in the Board of Directors.
 26 As of November 2017, he served as Pritzker’s second seat on the Board.” CAC ¶ 22. Valani is
 27 alleged to have been on “the Board of Directors of JLI since at least May 2011. At least from
 28 October 2015 to August 2016, he was on the Executive Committee in the Board of Directors. As
 of November 2017, he controlled two Board seats.” *Id.* ¶ 23. Pritzker is alleged to “have been on
 the Board of Directors of JLI since at least June 2014 and from October 2015 to August 2016, he
 was on the Executive Committee in the Board of Directors. As of November 2017, he controlled
 two Board seats (the second of which was occupied by Hoyoung Huh.” *Id.* ¶ 21.

1 JLI on *each* member of the Board of Directors or any of the defendants in their individual capacity
 2 as Board members. *See, e.g.*, CAC ¶¶ 207 n. 213, 333 n. 364, 415.³¹ Nor can the generalized
 3 reference to the “Board’s decision” in October 2015 to resolve the alleged internal JLI debate to
 4 specifically target teens (allegedly supported by Huh and unnamed others) support individual acts
 5 despite the concern expressed by Pritzker and others. CAC ¶¶ 334-336. There is no allegation of
 6 a Board vote or other *action* identified. Nor do plaintiffs identify any specific items proposed by
 7 the defendant Directors together or by one specific Director and then approved through their
 8 numeric or other control over the full Board.

9 Plaintiffs also contend that the three Directors’ roles in the Enterprise went beyond the
 10 early fraud accompanying JUUL’s launch because they “orchestrated a take-over” of the JLI
 11 Board in October 2015, acting in concert with Bowen and Monsees, to install themselves as the
 12 Executive Committee of the JLI Board of Directors. *Id.* ¶¶ 347-48; *see also id.* ¶ 34 (“October
 13 2015, Monsees stepped down from his role as Chief Executive Officer of JLI (to become Chief
 14 Product Officer) and, in his stead, Pritzker, Huh, and Valani formed an Executive Committee of
 15 the JLI Board of Directors that would take charge of fraudulently marketing JUUL products,
 16 including to youth.”) In those roles, plaintiffs allege that Pritzker, Huh, and Valani pushed for
 17 “even ‘more aggressive rollout and [marketing].’” *Id.* ¶ 353; *see also id.* ¶ 348 (alleging that
 18 Defendant Huh in particular supported continuing the fraudulent youth marketing).

19 The most specific allegations regarding conduct of the Executive Committee are: when
 20 Monsees stepped down in October 2015, the Executive Committee of Huh, Valani, and Pritzker is
 21 alleged to have “taken over the power of the CEO.” CAC ¶¶ 349, 350. Plaintiffs rely on a very
 22 few examples of Board minutes to “illustrate” that starting in late 2015, the Executive Committee
 23 exercised “direct control” over the company: (a) Huh ran board meetings, (b) the Executive
 24 Committee was to decide on reporting structure for a particular VP, (c) Huh was to make decisions
 25 on behalf of the Executive Committee, and Pritzker or Huh would be in office to “help manage
 26

27 ³¹ As noted, the admitted factual support for the “final say” allegation is Monsees’ July 2019
 28 statement to Congress, where in he indicated that the Board and others were *currently* responsible
 for marketing. *See, e.g.*, CAC ¶333 n. 364.

1 people.” *Id.* ¶¶ 351, 352. Plaintiffs then allege that over the next year, “until the installation of a
2 new CEO in August 2016,” Pritzker, Huh, and Valani used the Executive Committee “to expand
3 the number of addicted e-cigarette users through fraudulent advertising and representations to the
4 public. They cleaned house at JLI by ‘dismiss[ing] other senior leaders and effectively tak[ing]
5 over the company,’” and they committed to even “more aggressive rollout and [marketing].” *Id.* ¶
6 353.

7 These generalized allegations are insufficient to connect each Other Director Defendant to
8 conduct of the separate AIF Enterprise, as opposed to general acts to run or direct JLI. This
9 dovetails with the concept of distinctiveness discussed above. There is weight to the Other
10 Director Defendants’ argument that plaintiffs are simply trying to hold them liable for acts taken
11 in their capacity as corporate directors, which is impermissible. *See, e.g., Schwartz v. Pillsbury*
12 *Inc.*, 969 F.2d 840, 843 (9th Cir. 1992) (“Under California law, which the parties do not dispute
13 applies to this claim, directors and officers of a corporation do not incur personal liability for the
14 torts of the corporation ‘unless they participate in the wrong or authorize or direct that it be
15 done.’” (quoting *United States Liab. Ins. Co. v. Haidinger–Hayes, Inc.*, 1 Cal.3d 586 (1970))). The
16 Other Director Defendants can be held liable only if they personally participated, authorized, or
17 directed specific fraudulent acts or under RICO conducted or directed specific acts of the distinct
18 Enterprise separate and apart from routine business conducted by the Directors as a consequence
19 of their positions on the Board. Those sorts of acts have not been adequately alleged. *See, e.g.,*
20 *Ferrari v. Mercedes-Benz USA, LLC*, 15-CV-04379-YGR, 2016 WL 7188030, at *4 (N.D. Cal.
21 Dec. 12, 2016) (“the allegations of the SAC might state a simple claim for fraud or unfair business
22 practices by their respective companies, but they do not allege that the individual defendants
23 participated in a pattern of racketeering acts by a RICO enterprise.”).

24 Plaintiffs assert that their allegations are sufficient to establish each of the Other Director
25 Defendants’ personal roles in the conduct of the Enterprise and that they are not trying to hold
26 them liable simply because they were directors on JLI’s Board but because each is alleged to have
27 “coordinat[ed] and caus[ed] the public dissemination of false, misleading or deceptive statements”
28 in support of the RICO conspiracy. *Philip Morris I*, 449 F. Supp. 2d at 877. However, plaintiffs

1 need to allege more in support of distinctiveness of the RICO enterprise generally, as well as more
2 specifics regarding these three Other Director Defendants, to tie them to allegations that they
3 specifically conducted the affairs of that distinct Enterprise. So far, plaintiffs have failed to do
4 so.³²

5 **4. Altria**

6 Altria contends that plaintiffs fail to allege sufficient plausible facts regarding Altria’s role
7 in the Enterprise during Spring 2017 through December 2018, noting first that no facts are alleged
8 concerning any agreement by Altria to join the “existing” Enterprise framework or the role any
9 Altria party undertook during this period exclusively for that Enterprise. The only allegations
10 from this time period are that Altria and JLI had “confidential discussions” and that some JLI sales
11 data was shared through Avail Vapor (CAC ¶ 423). Altria contends that those allegations are
12 insufficient under Rule 9(b) because they are fatally speculative and conclusory and fully
13 consistent with parties laying the groundwork for its legitimate 35% investment.

14 Altria dismisses other allegations identified by plaintiffs in their RICO opposition brief,
15 one stemming from the pre-December 2018 period and the others from the post-December 2018
16 period, that it: (1) fraudulently acquired “shelf space” on behalf of the Enterprise, *id.* ¶ 427-31,
17 440; (2) executed “direct mail and email campaigns and related activities” for JUUL products, *id.*
18 ¶ 436; (3) leveraged “Altria’s field sales force” to promote JUUL products to a broader footprint
19 than JLI would have been able to reach independently, *id.* ¶¶ 436, 440; and (4) engaged in
20 lobbying efforts with the FDA to ensure more people, including nonsmokers and youth, could gain
21 access to and become addicted to JUUL. *Id.* ¶ 439.

22 Altria disputes the significance of the “shelf space” allegation, noting that plaintiffs
23 elsewhere in the CAC allege that the purchase was for Altria’s own products that were still on the
24 market in 2018 (although its own pod-based product was withdrawn in October 2018). *Compare*
25 CAC ¶ 427 *with* ¶ 428. It then contends that the remaining allegations are simply activities that
26 plaintiffs admit one or more of the undifferentiated Altria-defendant companies and their

27
28 ³² With respect to conduct of the Enterprise, JLI similarly reasserts its persuasive argument regarding the failure of plaintiffs to adequately allege a distinct Enterprise.

1 employees undertook for “contractual compensation,” an allegation that supports only an inference
2 that both entities were acting in their normal business interests. *See, e.g., Gardner v. Starkist Co.*,
3 418 F. Supp. 3d 443, 461 (N.D. Cal. 2019) (plaintiffs “failed to plausibly allege facts that show
4 StarKist and RICO Co-Conspirators committed acts towards this alleged common purpose.
5 Simply characterizing routine commercial dealing as a RICO enterprise is not enough.”).

6 Plaintiffs respond that, taking the inferences in their favor, their pre-December 2018
7 allegations (the shelf space, Altria’s possession of JLI sales data from 2017, and Altria’s efforts to
8 keep mint on the market to benefit JLI) establish non-routine coordination between Altria and JLI
9 in the pre-December 2018 period. They also argue that the services contract, under which Altria
10 was reimbursed for the services its employees provided to JLI, provided only a “vener of
11 legitimacy” for Altria’s coordinated fraudulent conduct with JLI. *Oppo. JLI/Altria RICO* at 27.
12 These are thin reeds on which to allege that Altria actively joined an existing RICO Enterprise and
13 then “conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own
14 affairs.” *Cedric Kushner*, 533 U.S. at 161; *see also In re Volkswagen “Clean Diesel” Mktg., Sales*
15 *Practices, and Products Liab. Litig.*, MDL 2672 CRB (JSC), 2017 WL 4890594, at *16 (N.D. Cal.
16 Oct. 30, 2017) (“But ‘some part in directing the enterprise’s affairs is required,’ [*Reves*, 507 U.S.
17 at 179], and ‘[s]imply performing services for the enterprise,’ or failing to stop illegal activity, is
18 not sufficient. *Walter v. Drayson*, 538 F.3d 1244, 1248-49 (9th Cir. 2008).”). Plaintiffs need to
19 allege more.

20 Finally, Altria contends that plaintiffs do not sufficiently identify which of the four
21 *different* Altria defendants named in the operative complaints but lumped together as “Altria” in
22 the complaints was responsible for the specific Enterprise acts identified. This, according to
23 Altria, is impermissible group pleading not permissible under Rule 9(b). Plaintiffs respond that
24 they are not yet in a position to know which Altria defendant engaged in what specific actions,
25 given the complex nature of Altria’s corporate structure. *See, e.g., In re Chrysler-Dodge-Jeep*
26 *Ecodiesel Mktg., Sales Practices, and Products Liab. Litig.*, 295 F. Supp. 3d 927, 990 (N.D. Cal.
27 2018) (“at this early stage in the proceedings, Plaintiffs have essentially been forced to lump the
28 Bosch companies because the Bosch Defendants have chosen to operate a specific way, grouping

1 business sectors by function (instead of location)"). But those "complex structure" allegations are
2 not included in the CAC.

3 On amendment, plaintiffs shall add allegations regarding Altria's conduct in support of the
4 allegedly distinct Enterprise (as opposed to conduct which, even if coordinated with JLI, was
5 simply in furtherance of its own economic and JLI's ordinary business interests). Plaintiffs shall
6 also identify which Altria defendant undertook what specific Enterprise conduct or explain why
7 they cannot be more specific at this juncture.

8 **E. Predicate Acts and Pattern of Racketeering**

9 Plaintiffs allege that the defendants engaged in predicate acts of mail and wire fraud in
10 violation of 18 U.S.C. §§ 1341 and 1343 through communications meant to defraud "regulators
11 and the public" as to both the impact of JLI's products (delivery, nicotine dosages, flavors) and
12 their coordinated intent to market to youth and to create a pipeline of new, nicotine addicts. *See,*
13 *e.g.*, CAC ¶¶ 735-737, 749-752, 756.³³ The specific acts of mail and wire fraud are identified in
14 Paragraph 752 of the CAC with a chart listing "from, to, date, and description" for each alleged
15 fraudulent statement. There, spanning five pages, plaintiffs identify various packaging statements,
16 advertisements, marketing materials, JLI website statements, Altria website statements,
17 correspondence with regulators, testimony to Congress, and statements to print, television and
18 social media that plaintiffs contend were fraudulent. The "from" identified for each of the
19 statements identifies them as being made by "All Early Enterprise Defendants" (mostly
20 advertisement and marketing materials); "All RICO Defendants" (mostly packaging statements);
21 statements by "JLI" or its former CEOs (Monsees or Burns) or Chief Administrative Officer
22 (Ashely Gould); and statements by Howard Willard (Altria CEO). *Id.* ¶ 752. Some of these
23 statements are also described at other places in the CAC. *See* CAC ¶¶ 416-417 (Altria's October
24 25, 2018 and October 14, 2019 letters sent respectively to the FDA Commissioner and Senator
25 Durbin); CAC ¶¶ 749, 752 (Altria's helping JLI distribute JUUL product with deceptive

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27 ³³ As noted above, mail and wire fraud "are identical except for the particular method used to
28 disseminate the fraud, and contain three elements: (A) the formation of a scheme to defraud, (B)
the use of the mails or wires in furtherance of that scheme, and (C) the specific intent to defraud."
Eclectic Properties, 751 F.3d at 997.

1 packaging, Altria attaching “Make the Switch” advertisements to packages of cigarettes).

2 These statements are all alleged to be part of the scheme: (1) misrepresenting the nicotine
3 content, nicotine delivery profile, and risks of JUUL products; (2) misrepresenting to the public
4 that JUUL was a smoking cessation tool; and, (3) using third-party groups to spread false and
5 misleading narratives about e-cigarettes, and JUUL in particular, in order to grow the market for
6 nicotine users, particularly among youth. CAC ¶ 167; *see also id.* ¶¶ 725-27, 735-40.

7 Defendants argue generally that the predicate wire and mail fraud acts are not pleaded with
8 sufficient particularity or are otherwise insufficient.

9 **1. Scheme to Defraud**

10 Defendants raise a number of challenges to the alleged scheme to defraud. Many of them
11 are variants on a theme addressed before, that defendants’ acts were not fraudulent but were
12 regular business acts meant to ensure that JLI’s products could remain on the market and would
13 have successful sales. But the issue of the distinctness of an Enterprise from an otherwise
14 legitimate corporate organization is significantly different from the question of whether plaintiffs
15 have adequately alleged a “scheme to defraud.” Alleged fraudulent conduct does not create a
16 RICO enterprise. But that a distinct RICO enterprise is not supported by various fraud-based
17 allegations does not, conversely, mean that those acts are not plausibly alleged to be fraudulent.

18 Separately, Bowen argues that allegations that defendants were generally undertaking
19 conduct in order to increase market share and sell “legal goods” cannot constitute a scheme to
20 defraud plaintiffs of property. *See, e.g., Bitton v. Gencor Nutrientes, Inc.*, 654 Fed. Appx. 358,
21 363 (9th Cir. 2016) (unpublished) (where plaintiffs failed to allege defendants knew “results of the
22 study were altered or that any Defendant knew that the study was either falsified or unreliable”
23 allegations were insufficient to reasonably infer “that the conduct at issue—the purchase,
24 marketing, and sale of legal goods by legitimate businesses— ‘is plausibly part of a fraudulent
25 scheme.’”). Of course, the sale of JUUL products by itself is not the crux of the scheme to
26 defraud. It is instead the intentional design and related fraudulent misrepresentations or omissions
27 regarding its intentional addictiveness and method of nicotine delivery, combined with the intent,
28 contrary to public statements, to grow the market for nicotine-addicted individuals (particularly

1 youth who did not use traditional tobacco products). This has been adequately alleged.

2 Plaintiffs have adequately alleged a scheme to defraud using mails and wires to conduct
3 and further that fraudulent scheme.

4 2. Intent

5 An element of both the wire and mail fraud predicate act claims is the “specific intent to
6 defraud.” *Eclectic Properties*, 751 F.3d at 997. The intent to defraud need not be shown for each
7 alleged use of the mails or wires as long as there is evidence that the use of mails or wires was
8 done to further the overarching scheme to defraud. *See, e.g., U.S. v. Woods*, 335 F.3d 993, 999
9 (9th Cir. 2003) (reaffirming that under the mail fraud statute the government is not required to
10 prove any particular false statement was made, and there are “alternative routes” including “proof
11 of a scheme to defraud that may or may not involve any specific false statements”). As explained
12 in *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, and Products Liab. Litig.*, 295 F.
13 Supp. 3d 927, 977 (N.D. Cal. 2018), “[i]ntent to defraud may be inferred ‘by examining the
14 scheme itself.’” *Id.* at 977 (quoting *Eclectic Props.*, 751 F.3d at 997). Given the well-pleaded
15 allegations that defendants knowingly participated in an inherently fraudulent scheme (to falsify
16 emissions), “intent to defraud easily follows.” *Id.*

17 JLI and Altria do not contest intent, but Bowen, Monsees, and the Other Director
18 Defendants do. For the same reasons that sufficient acts in support of conducting an enterprise
19 have been alleged for Bowen and Monsees, as well as the existence of a scheme to defraud that
20 stems in part from express acts and representations taken by Bowen and Monsees, the showing of
21 intent is satisfied for both of them.³⁴ As noted, neither of those elements has been shown with
22 respect to Huh, Valani, and Pritzker; facts plausibly showing intent are for related reasons
23 insufficiently alleged as to each of them.

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27 ³⁴ Monsees complains that plaintiffs have failed to allege that *he* sought to secure, through his
28 allegedly fraudulent statements to Congress and the *New York Times*, money or property from
Congress or the *New York Times*. He misses the point. The clear target of the alleged fraud
alleged are end-consumers, from whom (as discussed below) money and property were taken.

3. Predicate Acts

a. Puffery or Opinion

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A number of the defendants – in particular Bowen and Monsees – argue that predicate acts of mail or wire fraud cannot be based on public statements that amount in their view to opinion or puffery. For example, Monsees argues his August 2019 response to questions from the *New York Times* on behalf of JLI – that selling JUUL products to youth was “antithetical to the company’s mission” and which plaintiffs claim was a fraudulent statement – is protected opinion or non-actionable puffery. CAC ¶¶ 414, 752.

The trier of fact may determine what the true mission of the company or the distinct Enterprise within the company was, given defendants’ oft-repeated statements that JUUL is a smoking cessation device contrasted with its alleged intentional youth targeting to grow the market of nicotine-addicted users. The cases relied on by defendants are inapposite. *See, e.g., Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 1000 (9th Cir. 2014) (finding statements by defendants “about the relative security of the investments constitute ‘puffing’ or related expressions of opinion that are common in sales and not actionable as fraud.”); *Retail Wholesale & Dept. Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017) (plaintiffs could not base securities claim based on “inherently aspirational” code of conduct).

Similarly, defendants’ argument that a scheme to defraud and fraud-based predicate acts cannot be based on statements made to others (like media outlets or government officials) is not persuasive. The Supreme Court in *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642 (2008), determined that a showing of first-party reliance is not required under the mail or wire fraud statutes. The Ninth Circuit’s recent decision in *U.S. v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020), does not alter that conclusion because *Miller* simply reiterated that “a defendant must act with the intent not only to make false statements or utilize other forms of deception, but also to deprive a victim of money or property by means of those deceptions.” Here the intended victims, as consistently alleged, are the end consumers.

b. *Noerr-Pennington* and Petitioning Activity

1 Plaintiffs also expressly rely on statements various defendants made at different times to
2 Congress and regulators at the FDA. CAC ¶¶ 416,417. Defendants claim that these statements
3 cannot, as a matter of law, be actionable frauds because they are petitioning conduct protected
4 under the *Noerr-Pennington* doctrine. This “doctrine derives from the First Amendment’s
5 guarantee of ‘the right of the people ... to petition the Government for a redress of grievances.’
6 U.S. Const. amend. I.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006).

7 Under the *Noerr-Pennington* doctrine, “those who petition any department of the
8 government for redress are generally immune from statutory liability for their petitioning
9 conduct.” *Sosa*, 437 F.3d at 929. Defendants rely on *Sosa*, where the Ninth Circuit determined
10 that plaintiff’s lawsuit, which sought to impose RICO liability on DIRECTV for sending
11 prelitigation demand letters, would “quite plainly burden DIRECTV’s ability to settle legal claims
12 short of filing a lawsuit” and therefore implicated the *Noerr-Pennington* doctrine directly. *Id.* at
13 932.³⁵

14 Plaintiffs dispute the impact of *Noerr-Pennington*, arguing that the statements to Congress
15 and the FDA were intentionally false statements that fall within *Noerr-Pennington*’s “sham”
16 exception. *See Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009) (noting that
17 the *Sosa* court “suggested that the question of whether there would be absolute immunity for
18 conduct including intentional misrepresentations or fraud should be analyzed under the sham
19 exception”); *see also Clipper Express v. Rocky Mt. Motor Tariff Bureau, Inc.*, 690 F.2d 1240,
20 1253 (9th Cir. 1982) (“It is unquestionably true, as defendants assert, that *Noerr-Pennington*
21 confers antitrust immunity for conduct genuinely intended to influence governmental action.
22 Whether something is a genuine effort to influence governmental action, or a mere sham, is a
23 question of fact.”).

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26 ³⁵ In *Sosa*, the Ninth Circuit sought to “determine whether *Sosa*’s RICO lawsuit burdens
27 DIRECTV’s petitioning activities. If it does, we must examine the precise petitioning conduct
28 DIRECTV engaged in to determine whether the burden identified may be imposed consistently
with the Constitution. If there is a substantial question that it may not, we must determine whether
RICO or the RICO predicate acts *Sosa* alleges clearly provide for liability for the conduct at issue.
If a reasonable construction of RICO or the predicate act statutes exists that avoids the burden, we
will adopt that construction.” 437 F.3d at 932.

1 Whether or not an otherwise non-actionable statement falls within the sham exception is
2 generally a question of fact not appropriate for resolution on a motion to dismiss. Plaintiffs
3 concede that JLI and Altria genuinely sought to influence the government through these
4 statements (to defer regulation and allow them to keep JLI’s mint pods on the market), even if the
5 information they used to achieve those ends was fraudulent. It is unclear whether the sham
6 exception stretches to cover this scenario. That said, even if the representations to Congress and
7 the FDA are not actionable as predicate acts, they are nonetheless evidence of the alleged overall
8 scheme to defraud. *See In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab.*
9 *Litig.*, 181 F. Supp. 3d 278, 306 (E.D. Pa. 2016) (*Noerr-Pennington* provides immunity from
10 liability for simply petitioning government, but doctrine does not foreclose use of communications
11 to government as evidence, *e.g.*, of knowledge, intent, state of mind).

12 Relatedly, defendants argue that plaintiffs’ “lulling” of regulators theory – that JLI and
13 Altria pretended to be concerned about youth-use but in reality were attempting to placate the
14 FDA and postpone FDA action while maintaining JUUL on the market generally and mint as a
15 flavored-youth-preferred pod specifically – is untenable under a recent Supreme Court decision,
16 *Kelly v. U.S.*, 140 S. Ct. 1565 (2020). In *Kelly*, the Court considered a wire fraud conviction,
17 noting that 18 U.S.C. § 1343 makes it a crime to “to effect (with the use of the wires) ‘any scheme
18 or artifice to defraud, *or for obtaining money or property* by means of false or fraudulent
19 pretenses, representations, or promises.” U.S.C. § 1343 (emphasis added). The Court held that
20 because the purpose of the scheme at issue was to punish a local elected official (for failing to
21 endorse the Governor) and was carried out through the means of restricting access to commuter
22 lanes by directing the Port Authority to do so, a wire fraud claim could not be asserted because
23 defendants did not attempt to “obtain the Port Authority’s money or property.” *Id.* at 1568-69 (no
24 cognizable injury where the only harm was “realignment of the toll lanes was an exercise of
25 regulatory power—something this Court has already held fails to meet the statutes’ property
26 requirement. And the [extra toll taker’s] labor was just the incidental cost of that regulation, rather
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1 than itself an object of the officials' scheme.”).³⁶

2 Here, however, the scheme was to secure the money and property of the end consumers, in
3 particular the new and youth users who were not previously addicted to nicotine. Defendants did
4 so by allegedly lulling Congressional legislators and the regulators at the FDA into inaction, or
5 more limited action, to allow their products to remain on the market. *Kelly* does not foreclose the
6 plaintiffs' RICO claim.

7 Defendants likewise rely on *Buckman Co. v. Plaintiffs' Leg. Comm.*, 531 U.S. 341, 353
8 (2001) to argue that “fraud on the agency” cannot be a predicate wire or mail fraud act. In
9 *Buckman*, however, the question was preemption of a claim based on a duty created “solely” by
10 virtue of the FDCA disclosure requirements. That is not the basis of the mail or wire fraud claims
11 here. There is no claim that the allegedly fraudulent statements made to the government officials
12 were specifically *required* by Congress or the FDA. Indeed, the statements were voluntarily made
13 by the speakers with an alleged aim to deter or defer government action, placate the public, and
14 preserve JLI's ability to continue to sell mint pods and continue to grow the youth market
15 (contrary to its disclosed intent).³⁷ See *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales*
16 *Practices, and Products Liab. Litig.*, 295 F. Supp. 3d 927, 995 (N.D. Cal. 2018) (distinguishing
17 *Buckman* where “the gravamen of the affirmative misrepresentation claims is that Defendants
18 deceived consumers. Thus, the fraud claims here do not arise ‘solely by virtue of’ noncompliance
19 with FAA emissions rules; they arise out of the alleged deceit practiced on consumers by
20 Defendants.”); *Ferrari v. Nat. Partners, Inc.*, 15-CV-04787-LHK, 2016 WL 4440242, at *5 (N.D.
21 Cal. Aug. 23, 2016) (allowing fraud on the FDA-type claims to proceed and recognizing
22 “*Buckman* addresses federal preemption of claims, not of individual allegations.”). *Buckman*

23 _____
24 ³⁶ The regulatory power issue discussed in *Kelly* referred to the holding in *Cleveland v. United*
25 *States*, 531 U.S. 12 (2000) where the Court held that defendant's scheme “to influence, to his own
26 benefit, Louisiana's issuance of gaming licenses” was aimed at depriving the State of property by
altering its licensing decisions and that was an “intangible right” of allocation, exclusion, and
control and not a cognizable “property interest.” *Id.* at 26; see also *Kelly*, 140 S. Ct. at 1572.

27 ³⁷ As the Ninth Circuit recognized, the claims in *Buckman* also failed because there was “clear
28 evidence” that Congress intended that the relevant act to be enforced exclusively by the Federal
Government. As noted above in the preemption discussion, that is clearly not the case with the
TCA. *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1040 (9th Cir. 2015).

1 likewise does not bar plaintiffs' RICO claim. *See also McClellan v. I-Flow Corp.*, 776 F.3d 1035,
 2 1040–41 (9th Cir. 2015) (claims were barred “fraud-on-the-FDA claims” under *Buckman* where
 3 the “failure-to-warn claims McClellan alleged did not arise solely by virtue of the MDA. Further,
 4 there is no suggestion that Congress intended to displace traditional tort law by making all
 5 policing of medical labels and warnings the exclusive province of the FDA.”).

6 **c. Acts Committed by Enterprise or by Co-Conspirators**
 7 **Individually**

8 Defendants argue, generally, that plaintiffs have failed to show that each of them
 9 committed at least two predicate acts of mail or wire fraud, but that is not the standard. Instead,
 10 plaintiffs need only allege that each defendant was “(1) a knowing participant in a scheme to
 11 defraud, (2) that [defendant] participated in the scheme with the intent to defraud, and (3) that a
 12 co-schemer’s acts of mail and wire fraud occurred during [defendant’s] participation in the scheme
 13 and were within the scope of the scheme.” *In re Volkswagen “Clean Diesel” Mktg., Sales*
 14 *Practices, and Products Liab. Litig.*, MDL 2672 CRB (JSC), 2017 WL 4890594, at *13 (N.D. Cal.
 15 Oct. 30, 2017) (relying on *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002)); *see*
 16 *also In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, and Products Liab. Litig.*, 295
 17 F. Supp. 3d 927, 979 (N.D. Cal. 2018) (“When the predicate acts are acts of mail or wire fraud,
 18 however, the Ninth Circuit has held that ‘knowing participants in the scheme are legally liable for
 19 their co-schemers use of the mails or wires’” and requiring only plausibly supported facts “that
 20 each Defendant was a knowing participant in the scheme to defraud.”); *Dufour v. BE LLC*, C 09-
 21 03770 CRB, 2010 WL 2560409, at *11 (N.D. Cal. June 22, 2010) (“[I]t is not necessary that all
 22 named defendants themselves used the wires. . . . Therefore, it is not necessary for [defendant] to
 23 have sent any messages himself; it is sufficient that he knew of the scheme and participated in
 24 it.”).

25 Bowen. Bowen argues that because there are no particularized allegations that he
 26 committed any particular act of mail or wire fraud, much less that he participated in the marketing
 27 or commercial messaging of the JUUL products other than the unsupported allegation that Bowen
 28 had, along with Monsees and the Other Director Defendants, “final say” over marketing materials,

1 he must be dismissed from the RICO claim. CAC ¶¶ 207 n. 212, 340, 415, 719. But, as noted
2 above, Bowen misstates the applicable standard. Plaintiffs have plausibly alleged that Bowen was
3 a knowing participant in the scheme to defraud.

4 Monsees. Monsees also points out that plaintiffs specifically identify only two statements
5 from him as predicate Enterprise acts. The first was the written testimony submitted to Congress
6 in July 2019, where Monsees stated that JLI never wanted to capture non-nicotine addicted or
7 youth users, which Monsees argues is protected under the *Noerr-Pennington* doctrine. CAC ¶
8 752. I addressed that argument earlier.³⁸ He also argues that because the aim of this statement is
9 to influence Congress, and not to obtain money or property from the government, it cannot
10 constitute mail or wire fraud. That argument, too, is rejected above. The second alleged statement
11 is his August 2019 statement to the *New York Times* that selling to youth was “antithetical” to
12 JLI’s mission. CAC ¶ 752. Monsees argues that it is protected opinion and “objectively true”
13 given JLI’s mission statement expressing its intent to “combat underage usage of our products.”
14 CAC ¶ 77. These arguments were likewise addressed above and at most raise disputes of fact not
15 appropriate for resolution now.³⁹

16 Other Director Defendants. The Other Director Defendants point out that there are no
17 allegations that any of them directly engaged in any of the predicate acts or had knowledge of
18 others doing so. Again, that is not the standard. But because plaintiffs have failed (at this
19 juncture) to plausibly allege facts showing that the Other Director Defendants were knowing
20 participants in the scheme to defraud and that they personally participated in the scheme with the
21 intent to defraud, the RICO claim has not been adequately alleged against each of them.

22 Altria. Altria separately contends that predicate acts of mail fraud cannot be based on
23

24 ³⁸ Monsees also contends that no RICO-cognizable harm could have flowed from the
25 Congressional testimony because lulling Congress into inaction on JLI’s products is too remote a
26 theory of causation and is impermissibly contingent on Congress inaction. Proximate cause is
addressed below.

27 ³⁹ In footnotes, Monsees argues the Congressional testimony and statements to the *New York*
28 *Times* are not alleged to have been material to the scheme to defraud. Monsees MTD at 11 n.11,
12 at n.12. Plaintiffs do, however, allege that these were material statements and materiality is
not appropriately determined at this juncture.

1 Altria shipping JLI products that allegedly contained misleading and fraudulent statements
2 because Altria did not use the “mails” but used freight delivery services. That simply raises a
3 dispute of fact that is not appropriately resolved on a motion to dismiss.

4 JLI. Finally, JLI contends that the predicate acts from 2015 fall outside RICO’s statute of
5 limitations. That argument depends on whether the “injury discovery rule” tolls the statute of
6 limitations and can be addressed on summary judgment.

7 **4. Pattern**

8 A RICO pattern consisting of different acts by the Enterprise is shown where the acts are
9 “related” and extend over a “substantial” period of time. *Howard v. Am. Online Inc.*, 208 F.3d
10 741, 750 (9th Cir. 2000).

11 **a. Relatedness**

12 Various defendants argue that the specific isolated acts with which they are charged are too
13 distinct, separated by too much time, or otherwise not sufficiently related to other acts to be part of
14 the requisite “pattern.” So, for example, Monsees challenges the relatedness of his alleged
15 specific predicate acts to the pattern of Enterprise acts as a whole. But even if Monsees’s acts
16 were made through different channels and made to different audiences (comments to Congress,
17 regulators, the news media, or the public), the goal of the scheme to defraud as consistently
18 alleged by plaintiffs remains plausibly the same: to lull the public and government into false
19 beliefs about the JUUL product and defendants’ intent while defendants worked (contrary to those
20 public statements) to increase nicotine addiction and specifically target the youth market.

21 **b. Continuity**

22 Plaintiffs contend that: (i) by identifying predicate wire and mail fraud acts over a course
23 of five years, they have alleged “closed-ended” continuity; and (ii) by alleging that some of the
24 misrepresentations continue to this day, they have likewise alleged “open-ended” continuity. *See*
25 *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1526-27 (9th Cir. 1995). Monsees challenges the showing
26 of both closed-ended and open-ended continuity by focusing exclusively on the two predicate acts
27 he is alleged to have personally committed (to Congress and the *New York Times*). He points out
28 that those two acts do not span a “substantial” period of time (generally recognized at 12 months

1 or more) but were committed within approximately one month. However, those two acts are part
 2 of the larger context of Enterprise acts that extend over a five-year period. Sufficient continuity
 3 has been alleged.

4 **F. Proximate Cause and Injury to Money or Property**

5 Defendants contest whether plaintiffs in the CAC and PECs have alleged sufficient
 6 proximate causation under the heightened RICO standard, which bars “suits for alleged harm that
 7 is ‘too remote’ from the defendant’s unlawful conduct” and instead demands some “direct
 8 relation between the injury asserted and the injurious conduct alleged.” *Painters and Allied*
 9 *Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1248–49
 10 (9th Cir. 2019) (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133
 11 and *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992)). However, plaintiffs “are not
 12 required to show that each individual predicate act caused them an injury, but rather that the
 13 pattern of racketeering activity did.” *Just Film, Inc. v. Merchant Services, Inc.*, C 10-1993 CW,
 14 2012 WL 6087210, at *12 (N.D. Cal. Dec. 6, 2012).

15 Plaintiffs generally allege that the purpose of the Enterprise was “maintaining and
 16 expanding the number of nicotine-addicted e-cigarette users in order to ensure a steady and
 17 growing customer base, including by ... addicting children to nicotine.” CAC ¶ 750. In
 18 furtherance of the Enterprise’s common purpose, defendants “made false and misleading
 19 statements directly to the public,” leading them to purchase JUUL. CAC ¶ 763. As such, plaintiffs
 20 contend that they are the direct victims of defendants’ alleged fraudulent scheme. *See, e.g.*,
 21 *Painters*, 943 F.3d at 1251 (finding proximate cause based on allegations that defendants actively
 22 concealed the risk of a product to sell more to unsuspecting persons and increase revenue and that
 23 plaintiffs would not have purchased the product but for the deception).

24 **1. CAC**

25 **a. Directness**

26 JLI and Altria argue, first, that the alleged deception to regulators cannot support “direct”
 27 proximate causation because any harm to plaintiffs from those statements resulted from the
 28 intervening acts or inaction of the regulators, not the Enterprise. JLI RICO Mot. at 12-13; *see also*

1 Altria RICO/UCL MTD (Dkt. No. 632) at 37-38 (asserting that Altria’s only pre-investment
2 conduct is the mint comments to regulators that cannot support the “direct” causation required
3 under RICO because it impacted (theoretically) only the acts of the third-party regulators).
4 Defendants’ comments to the regulators (in hopes of inaction) are only one part of the scheme
5 alleged. Plaintiffs also identify statements made directly to the public through marketing
6 materials, website materials, media statements, and press releases.

7 In addition, the line of cases on which defendants rely – rejecting proximate causation
8 where the RICO conduct alleged most directly impacted the government – do not control here.
9 *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006) (alleged injury to the business
10 caused by competitor unlawfully selling products free of sales tax and submitting fraudulent sales
11 tax returns was not sufficiently direct to show proximate cause because it was the government’s
12 loss of sales tax that was primary and direct injury); *Rezner v. Bayerische Hypo-Und Vereinsbank*
13 *AG*, 630 F.3d 866 (9th Cir. 2010) (purchasers of tax shelters could not show RICO proximate
14 cause based on allegations that defendants engaged in scheme to defraud United States of tax
15 revenue through fraudulent tax shelters).⁴⁰ Here, the aim of the scheme and those who most
16 directly suffered the harm plaintiffs allege, for purposes of the CAC allegations, were the end
17 consumers of JLI’s products.

18 Closer to the posture of this case is *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales*
19 *Practices, and Products Liab. Litig.*, 295 F. Supp. 3d 927, 967 (N.D. Cal. 2018). In *Ecodiesel*, the
20 plaintiffs alleged that defendants concealed that they had installed devices that reduced the
21 effectiveness of the promised and government-regulated emissions levels and based their RICO
22 claim, in part, on a scheme to defraud the agencies that regulated emissions. *Id.* at 965. The Hon.
23 Edward M. Chen persuasively distinguished *Anza* and *Rezner* (where government entities, not the
24

25 ⁴⁰ *See also Halpin v. Crist*, 405 Fed. Appx. 403, 406 (11th Cir. 2010) (unpublished) (dismissing
26 RICO claim for lack of proximate causation where State of Florida was the intended target of the
27 fraudulent scheme (bribes related to provision of services in prisons) and prisoner-plaintiffs’
28 injuries (payment of higher prices) was “not directly caused by the acts of racketeering” bribes);
Callahan v. A.E.V., Inc., 182 F.3d 237, 261 (3d Cir. 1999) (proximate cause lacking based on
scheme involving false submissions to state liquor control board, because the board and the state
“more generally were the direct victims of the defendants’ actions; the plaintiffs’ losses are at
most derivative of any injuries to the [board’s] regulatory mission”).

1 plaintiffs, were more directly damaged by the loss of tax monies, *not* the plaintiffs), because in
 2 *Ecodiesel* the “alleged ‘fraud on the regulators’ plausibly led directly to Plaintiffs’ economic
 3 injury. By deceiving regulators, Defendants were able to sell Class Vehicles that emitted NOx at
 4 levels up to 20 times legal limits and that contained one or more defeat devices. This deceit
 5 plausibly caused Plaintiffs to overpay for the defective Class Vehicles by an amount directly
 6 attributable to the alleged wrongful conduct of the Defendants.” *Id.* Here too (for purposes of the
 7 CAC), the end consumers are the ones injured by defendants’ false representations to federal
 8 regulators and others. *See also In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and*
 9 *Products Liab. Litig.*, MDL 2672 CRB (JSC), 2017 WL 4890594, at *9 (N.D. Cal. Oct. 30, 2017)
 10 (“What matters, though, is not whether there is a direct relationship between the plaintiff and
 11 defendant, but whether there is a ‘sufficiently direct relationship between the defendant’s wrongful
 12 conduct and the plaintiff’s injury.’”) (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S.
 13 639, 657 (2008)).

14 That some of the predicate acts or fraudulent statements were made to regulators did not
 15 break the causal chain for purposes of RICO.

16 **b. Benefit of Bargain**

17 In the CAC, plaintiffs allege that defendants’ conduct caused “the RICO Class members to
 18 purchase JUUL products that they would not have purchased, or—in the alternative—to pay more
 19 for JUUL products than they would have otherwise paid.” CAC ¶ 762; *see also, e.g.*, CAC, App.
 20 A ¶¶ 9, 22, 37, 48, 63, 79, 95, 108, 119. This lost money, plaintiffs argue, is cognizable “lost
 21 money or property” under RICO. *See, e.g., Painters and Allied Trades Dist. Council 82 Health*
 22 *Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1247 (9th Cir. 2019) (plaintiffs sought “to
 23 recover economic damages under RICO for the payments they made to purchase Actos under the
 24 assumption that it was a safe drug, which they allege they would not have purchased had they
 25 known that Actos” was not safe).

26 While JLI contests whether these “expectation” or “benefit-of-the-bargain” damages are a
 27 cognizable RICO injury, in the Ninth Circuit and this District they are. *Canyon County v.*
 28 *Syngenta Seeds, Inc.*, 519 F.3d 969, 976 (9th Cir. 2008) (“a consumer who has been overcharged

1 can claim an injury to her property, based on a wrongful deprivation of her money”); *In re*
2 *Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, and Products Liab. Litig.*, 295 F. Supp. 3d
3 927, 960 (N.D. Cal. 2018) (“when a plaintiff alleges that he or she overpaid for a good or service
4 because of anticompetitive or deceptive conduct, the Supreme Court’s decision in *Reiter* and the
5 Ninth Circuit’s decision in *Canyon County* support that such an injury is one to ‘property,’ not
6 merely ‘expectation interests.’”).⁴¹

7 2. PECs

8 In the PECs, Three Village and the other public entities generally allege that “Defendants
9 intentionally sought to reach into schools . . . to continue growing JLI’s youth customer base,”
10 TVC ¶ 701, and “intentionally addict[ed] . . . youth in [Three Village]’s schools.” TVC ¶ 702.
11 Defendants’ conduct “required [Three Village] to expend its limited financial and other resources
12 to mitigate the health crisis of youth e-cigarette use” in Three Village schools, TVC ¶ 702, forcing
13 Three Village to: conduct staff training on e-cigarette use, TVC ¶ 599; hold assemblies to educate
14 students and parents on the dangers of e-cigarette use, TVC ¶ 600; modify its health curricula to
15 focus on the dangers of e-cigarette use, TVC ¶ 601; hire a new student assistant counselor, TVC ¶
16 603; pay the costs of tutoring services for suspended students, including transportation, TVC ¶
17 606; purchase e-cigarette detectors and surveillance cameras, TVC ¶ 607; and purchase anti-e-
18 cigarette signage for school property. TVC ¶ 607.

19 Defendants raise separate proximate cause arguments with respect to the damages alleged
20 in the PECs. First, they argue that the proximate cause between the government entities’ damages
21 and the defendants’ acts is not “direct” enough because the claims rely on the intervening
22 consumers’ conduct. For example, in *Oregon Laborers-Employers Health & Welfare Tr. Fund v.*
23 *Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999), the Ninth Circuit found too indirect a health
24 care trust funds’ RICO claim and attempt to recover damages for smoking-related costs of health
25

26 ⁴¹ JLI relies heavily on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) and *In*
27 *re General Motors LLC Ignition Switch Litigation*, No. 14-md-2543 JMF, 2016 WL 3920353
28 (S.D.N.Y. July 15, 2016), both of which were rejected as contrary to circuit precedent (and for
McLaughlin also persuasively distinguished) in both *Ecodiesel*, 295 F. Supp. 3d at 960 and *In re*
Volkswagen “Clean Diesel” Mktg., Sales Practices, and Products Liab. Litig., 349 F. Supp. 3d
881, 905 (N.D. Cal. 2018).

1 care for its insureds. The Ninth Circuit found those damages “too remote” from defendants’
 2 alleged conduct (efforts to conceal the scientific evidence about smoking risks and prevent
 3 measures to curb smoking). *Id.* at 961-62. The Ninth Circuit explained that “all of plaintiffs’
 4 claims rely on alleged injury to smokers-without any injury to smokers, plaintiffs would not have
 5 incurred the additional expenses in paying for the medical expenses of those smokers. Thus, there
 6 is no ‘direct’ link between the alleged misconduct of defendants and the alleged damage to
 7 plaintiffs.”⁴² *See also Assn. of Washington Pub. Hosp. Districts v. Philip Morris Inc.*, 241 F.3d
 8 696, 702 (9th Cir. 2001) (“All other Courts of Appeals that have addressed the issue have agreed
 9 that union trust funds lack standing to bring antitrust and RICO claims against the tobacco
 10 industry to recover their increased expenditures for treating tobacco-related illnesses.”).

11 Defendants contend that the PEC damages are like the health care trust funds’, wholly
 12 dependent on actual damages suffered by *users* of JLI’s products and, therefore, too remote to
 13 satisfy proximate cause and establish standing. However, while the public entities’ damages
 14 would not have been incurred but for defendants’ scheme to defraud and create a youth market as
 15 alleged, significant distinctions between the PEC allegations and the health care trust fund cases
 16 make that line of authority inapposite. The most significant of those distinctions is that the
 17 damages incurred by end-users are wholly distinct from the damages incurred by the PECs. Even
 18 if the consumers in the end are unable to prove any benefit of the bargain damages or if some
 19 personal injury plaintiffs are unable to prove causation between use of JUUL and their injuries,
 20 that would not undercut the damages sought by the PECs, such as the costs of hiring and training
 21 staff to address e-cigarette use, development of programs and materials to address e-cigarette use,
 22 costs of tutoring and other services for students who were disciplined for e-cigarette use, physical
 23 alterations to their properties to address and deter further e-cigarette use, and disposal of the
 24

25 ⁴² The court went onto weigh the three *Holmes* factors, specifically considering “(1) whether there
 26 are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the
 27 law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the
 28 plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether the courts will
 have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries”
 (*Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1169 (9th Cir. 2002)), and found each of those
 factors weighed against the trust funds’ standing. *Id.* at 964.

1 hazardous waste resulting from e-cigarette use. An additional distinction is that the PECs contain
 2 numerous allegations that defendants intentionally targeted school-aged youth and schools (*see*,
 3 *e.g.*, TVC ¶¶ 176, 441, 445) and that conduct created and/or perpetuated some of the government
 4 entities' harms. None of the *Holmes* factors, *see supra*, weigh against the PECs' showing of
 5 proximate cause and standing.

6 Second, defendants argue that the damages each of the PEC's seek are not recoverable as a
 7 matter of law under *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008). In
 8 that case, the County alleged that it was damaged by having to spend millions of dollars on health
 9 care and criminal justice services for the illegal immigrants who have been employed by the
 10 defendants in violation of federal law. The Ninth Circuit held that was insufficient "injury to" the
 11 County's property noting first, that the law "commonly distinguishes between the status of a
 12 governmental entity acting to enforce the laws or promote the general welfare and that of a
 13 governmental entity acting as a consumer or other type of market participant." *Id.* at 976.
 14 Providing health care and criminal justice services were necessary to "enforce the laws or promote
 15 the public well-being" and normal governmental acts that did not constitute injury to its property
 16 cognizable under RICO.

17 Plaintiffs contend that the expenditures here – wholly new or expanded services
 18 necessitated solely by the crisis of youth use of JUUL products – were "extraordinary" and not the
 19 sort of typical and expected government expenditures at issue in *Canyon County*. This distinction
 20 was accepted by Judge Polster in *In re Natl. Prescription Opiate Litig.*, 1:17-MD-2804, 2018 WL
 21 6628898, at *10 (N.D. Ohio Dec. 19, 2018) (distinguishing *Canyon County* given "the scope and
 22 magnitude of the opioid crisis—the illicit drug market and attendant human suffering—allegedly
 23 created by Defendants have forced Plaintiffs to go far beyond what a governmental entity might
 24 ordinarily be expected to pay to enforce the laws or promote the general welfare. Plaintiffs have
 25 been forced to expend vast sums of money far exceeding their budgets to attempt to combat the
 26 opioid epidemic.").

27 A recent decision from the Hon. Charles R. Breyer in this District rejected that distinction
 28 and instead concluded that *Canyon City* established a bright line rule and that government entities

1 may never recover for government expenditures when acting to enforce the laws or promote the
 2 general welfare, even if those expenditures are the result of a “man-made crisis” unexpected in
 3 magnitude and of a scope far beyond typical government expenditures. *City and County of San*
 4 *Francisco v. Purdue Pharma*, 3:18-CV-07591-CRB, 2020 WL 5816488, at *19 (N.D. Cal. Sept.
 5 30, 2020). If I were to follow that decision, a large segment of the PEC damages under RICO
 6 would be cut away.

7 However, the PECs here also allege that they have suffered damage directly to their
 8 physical property and that suffices to confer standing. For example, Three Village alleges that
 9 hazardous products have been wrongfully disposed of as regular waste in Three Village schools
 10 and littered on Three Village property, and that Three Village has had to make physical
 11 modifications to its property by installing e-cigarette detectors, cameras, and anti-vaping signs
 12 around its property. TVC ¶¶ 607, 609. The disposal of hazardous waste is similar to an alleged
 13 property injury that Judge Breyer rejected as too indirectly caused to satisfy proximate cause in
 14 *City and County of San Francisco v. Purdue Pharma*, 2020 WL 5816488 * 24. In that case,
 15 however, there were many more interim links between the defendants’ conduct (sale and creation
 16 of illegal secondary market for opioids) and the plaintiff’s alleged harm (disposal of needles used
 17 to inject crushed opioids) than exist here. *Id.* at *24 (“physicians (Link 1), pharmacists (Link 2),
 18 and patients (Link 3) who then illegally misuse opioids, improperly discard the needles, and thus
 19 damage city-owned property and businesses (the harm)”). The allegations in this case are that
 20 defendants not only intentionally targeted youth but also conducted programs on school grounds.
 21 Unlike in the *Purdue Pharma* case, there are no issues with interim links of physicians and
 22 pharmacists (although the youth users had to buy from others or circumvent age-checking
 23 requirements – conduct which plaintiffs allege defendants *intended* to occur) and the use of the
 24 products was as intended.

25 At this juncture, the allegations regarding injury to the PECs’ properties suffice for PEC
 26 standing under RICO. The potential damages available to them (if plaintiffs are otherwise able to
 27 plausibly allege a RICO claim) are better determined on a full, evidentiary record.

28

3. Altria

Altria separately argues that plaintiffs fail to adequately allege reliance, and therefore, proximate causation and sufficient injury against it, because at least 34 of the 107 putative class representatives began purchasing JUUL products before Spring 2017, the earliest the Altria defendants were alleged to have engaged in the RICO Enterprise, and almost all began using JUUL products before Altria's first investment in JLI in December 2018. Dkt. No. 632 at 36 (noting that only 3 class representatives allege they started using JUUL products in 2019).

This argument fails because the Supreme Court in *Bridge*⁴³ clarified that individual reliance is not necessary for mail and wire fraud and because liability under RICO is purposefully "joint and "several"⁴⁴ this argument fails. At this juncture, however, it is unnecessary to reach or resolve this issue because as long as there is standing for some plaintiffs, that is sufficient. As Altria is alleged to have joined the RICO conspiracy under section 1962(d), if plaintiffs are able to plausibly allege and prove the other elements of their RICO claim, Altria may be liable for conduct throughout the whole Enterprise.⁴⁵

G. Conspiracy

Finally, each defendant argues that because plaintiffs have failed to allege a substantive violation of RICO, the RICO conspiracy claim fails as a matter of law. At this juncture, that is correct, but plaintiffs are given leave to amend to attempt to plausibly allege the underlying RICO claim.

Each of the Officer and Director defendants also argues that the RICO conspiracy claims are not sufficiently stated because plaintiffs allege no facts plausibly demonstrating that each defendant agreed with specific others to commit the fraudulent acts or that he intended to commit them himself. These arguments are largely derivative of the "we were only acting in JLI's or our

⁴³ *Bridge*, 553 U.S. at 642.

⁴⁴ "Holding RICO conspirators jointly and severally liable for the acts of their co-conspirators reflects the notion that the damage wrought by the conspiracy 'is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'" *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th Cir. 2002) (quoting *Investor Prot. Corp. v. Vigman*, 908 F.2d 1461, 1468 (9th Cir.1990)).

⁴⁵ Altria also reiterates the *Noerr-Pennington* and *Buckman* arguments discussed above.

1 own business interests” discussed above. Because I am giving plaintiffs leave to amend to
2 plausibly allege a distinct RICO Enterprise, the role of Veratad (and its specific connection to
3 members of the Enterprise), and conduct in support of that Enterprise by the Other Director
4 Defendants and Altria, there is no need to reach these separate arguments.

5 For the foregoing reasons, each of the defendants’ motions to dismiss the RICO claims is
6 GRANTED. Plaintiffs are given leave to amend the deficiencies identified.

7 **IV. MOTIONS TO DISMISS UCL/CALIFORNIA CLAIMS**

8 Defendants move to dismiss the fraud, consumer protection, implied-warranty, and unjust
9 enrichment claims asserted in the CAC on behalf of the subclass of California consumers
10 represented by Bradley Colgate and minors C.D. and L.B. (collectively, California plaintiffs).⁴⁶
11 In Appendix A to the CAC, plaintiffs identify “[a]llegations specific to each plaintiff.” CAC ¶ 11.
12 These plaintiffs allege that in “purchasing JUUL products, the Plaintiffs relied on the
13 misrepresentations and/or omissions. Reasonable consumers would have been expected to have
14 relied on the misrepresentations and omissions.” *Id.* ¶¶ 644, 663 (plaintiffs relied), 672, 683
15 (plaintiffs justifiably relied); *see also* ¶¶ 813, 864, 898, 913, 948, 963, 1013, 1061, 1122, 1158,
16 1172, 1222, 1234, 1283, 1299, 1360, 1409, etc. (same).

17 Colgate had been a combustible cigarette smoker for at least seven years before he first
18 purchased JUUL products in or around October 2017, having seen social media advertisements
19 and “sponsored stories” encouraging the switch to JUUL from combustible cigarettes,
20 advertisements characterizing JUUL as an “alternative” to cigarettes (which he understood meant
21 not unhealthy and less addictive than cigarettes), and advertisements describing kits customized to
22 his lifestyle. He also started seeing JUUL product displays in retail establishments, noting that
23 JUUL products were often located on instead of behind counters with cigarettes. *See generally*
24 CAC App’x ¶¶ 203-214. He specifically alleges: “None of the advertisements, in-store
25 promotions, or labels Colgate saw adequately disclosed the nature or addiction risks of JUUL’s
26 products, the actual amount of nicotine in or delivered by JUUL’s products, that the JUUL was
27

28 ⁴⁶ In their opposition, plaintiffs dismiss the claims of M.D. *Oppo. to JLI/Altria CA (Dkt. No. 758)*
at 1 n.1.

1 engineered to deliver nicotine rapidly and in great quantities, or that the JUUL is capable of
2 delivering nicotine more rapidly and in greater quantities than a cigarette, or that use of JUUL
3 products poses significant health risks.” *Id.* ¶ 212.

4 C.D. is 16 years old and alleges that before he had used JUUL he had seen point of sale
5 (POS) materials that “featured images of JUUL’s multicolored fruit- and dessert-flavored pods and
6 offers of discounts on the JUUL” kits. “The representations and omissions in JUUL’s in-store
7 promotions materially impacted . . . C.D.’s assessment of, and eventual decision to use, JUUL
8 products.” Following his older brother’s use, C.D. started using JUUL and bought a JUUL device
9 from a classmate who had a spare for sale. C.D. alleged that but for JUUL’s social media
10 advertising, he would not have been exposed to, and would not have used, JUUL products. He
11 describes some of the JUUL social media posts he saw, and also social media posts by third-
12 parties (showing that JUUL was a “cool” thing to do) and sites advertising JUUL products without
13 or with inadequate age verification. He states that he did not know that the content he saw was
14 being created, distributed, and promoted by JUUL vendors or paid influencers whose aim was to
15 promote JUUL use to adolescents and profit from their addiction. He also alleges that he has been
16 receiving a steady stream of promotional e-mails from JUUL for months and that his Instagram
17 and Snapchat streams are “bombarded” with advertisements for JUUL products. Finally, he
18 alleges that none “of the advertisements, in-store promotions or JUUL labels . . . C.D. saw adequately
19 disclosed the nature or addiction risks of JUUL’s products, the actual amount of nicotine in or
20 delivered by JUUL’s products, that the JUUL was engineered to deliver nicotine rapidly and in great
21 quantities, that the JUUL is capable of delivering nicotine more rapidly and in greater quantities than a
22 cigarette, or that use of JUUL products poses significant health risks. Nor did they indicate that JUUL
23 was an age- restricted product. The representations and omissions in JUUL’s advertising and POS
24 promotions materially impacted . . . C.D.’s assessment of the flavored JUULs [he] eventually decided
25 to try.” CAC Appx. A ¶¶ 285-299.

26 L.B. alleges that she is currently 16 years old and started using JUUL in 2016, shortly after
27 her 13th birthday. She learned about JUUL from her friends at school and through JUUL’s point-
28 of-sale materials, which she saw in stores near her home, that showed JUUL’s flavored pods and

1 “Starter Kit” and made JUUL seem like a fun, harmless product. She alleged that none of the
 2 materials and advertisements she saw “adequately disclosed the nature or addiction risk of JUUL’s
 3 products, the actual amount of nicotine in or delivered by JUUL’s products, that JUUL was
 4 engineered to deliver nicotine rapidly and in great quantities, that JUUL is capable of delivering
 5 nicotine more rapidly and in greater quantities than a cigarette, or that use of JUUL products poses
 6 significant health risks. Nor did they indicate that JUUL was an age-restricted product. The
 7 representations and omissions in JUUL’s promotions materially impacted L.B.’s assessment of the
 8 fruit-flavored JUUL she would later be offered.” She states that the “fruit flavoring in the JUUL
 9 product L.B.’s friends offered her led L.B. to believe that JUUL was safe. She did not know she
 10 was ingesting nicotine from a nicotine delivery system that delivered as much-or more-nicotine
 11 than a cigarette. She knew not to smoke but did not understand the risks of ingesting nicotine from
 12 JUUL. L.B. would not have tried a JUUL but for the flavored pods.” L.B. obtained her pods from
 13 friends and E-Bay, and a device from JLI’s warranty department. CAC Appx. A ¶¶ 796-817.

14 **A. Common Law Fraud – California Plaintiffs**

15 **1. Affirmative Misrepresentations and Justifiable Reliance**

16 JLI argues that the California plaintiffs have failed to sufficiently identify the specific
 17 affirmative representations on which they justifiably relied as required for common law fraud and
 18 that any representations currently identified are not actionable. Plaintiffs respond that the specific
 19 deceptive and misleading statements seen by the California plaintiffs specifically included that
 20 JUUL products were smoking cessation devices, were reasonable alternatives to cigarettes, and
 21 that a pod of JUUL was equivalent to one pack of cigarettes. CAC ¶¶ 677, 679.

22 As an initial matter, JLI challenges the adequacy of the identification of the actual
 23 representations on which they claim each California plaintiffs relied. The advertisements and
 24 marketing materials that each California plaintiff saw (or were similar to the types of
 25 advertisements and marketing materials each of them saw) are identified for each in the CAC,
 26 Appendix A. However, C.D. and L.B. do not clearly specify what text in those or similar
 27 advertisements and marketing materials they contend are express affirmative representations. As
 28 plaintiffs will be given leave to amend to rectify some problems with their current allegations (*see*

1 *supra*), on amendment plaintiffs shall clarify whether C.D. and L.B. are alleging express
2 misrepresentations and, if so, identify them with more specificity.⁴⁷

3 As to Colgate, JLI argues that advertisements that “vaguely” encourage people to “switch”
4 to JUUL or that describe JUUL products as an “alternative” to cigarettes cannot constitute false
5 representations because they are too vague, too subjective, or puffery and, therefore, not
6 actionable as a matter of law.⁴⁸ This issue was briefly addressed in *Colgate II*. There, in a
7 footnote, I provided the following guidance:

8 JUUL’s use of common advertising practices and its ads that follow
9 the predominant marketing aesthetic of the last few years (“bright”
10 colors, “clean lines,” “minimal text,” “eye-catching graphics,”) would
11 not by itself constitute any sort of misrepresentation. Also, claims
12 based on themes and vague terms in JUUL’s advertising are, as JUUL
13 argues, nothing more than non-actionable puffery. *In re Fontem*,
2016 WL 11503066, at *9 (C.D. Cal. Apr. 22, 2016) (“Courts enter
dangerous territory when they consider representations actionable
based not on what they actually say, but on what plaintiffs claim
defendants seem to be stating. This goes beyond viewing the
allegations in the light most favorable to the plaintiff.”).

14 *Colgate II*, 402 F. Supp. 3d at 748. I did not rule on the use of specific phrases in JLI’s marketing
15 materials. Nor did I rule out the relevance of the overall features of an advertisement (including
16 its use bright or eye-catching colors) to the context of whether an advertisement, when considered
17 in whole, is misleading or false. Instead, I warned plaintiffs that design elements would not “by
18 themselves” constitute an actionable misrepresentation.⁴⁹

19 Turning to puffery, this is not a product comparison case where plaintiffs criticize JLI for

20 _____
21 ⁴⁷ To be clear, the minor plaintiffs may use “representative” advertisements in order to specify
22 what affirmative misrepresentations they recall having seen. The actual advertisement or
23 marketing material a particular plaintiff saw does not (for obvious reasons) need to be reproduced
but the specific or materially similar words or text that form the basis of their affirmative
misrepresentation claim should be identified.

24 ⁴⁸ JLI does not address the one pod equals one pack of cigarettes allegation that I previously found
25 stated a misrepresentation claim. *Colgate II*, 402 F. Supp. 3d at 748 (“plaintiffs have sufficiently
stated an omission claim and an affirmative misrepresentation with regards to JUUL’s claim that
one pod has as much nicotine as a pack of cigarettes”).

26 ⁴⁹ The court in *In re Fontem US, Inc. Consumer Class Action Litig.*, 2016 WL 11503066, at *9
27 (C.D. Cal. Apr. 22, 2016) considered whether plaintiffs had alleged sufficient facts to support the
inference that “No Tobacco Smoke, Only Vapor” could imply “healthfulness or even
28 harmless.” It rejected that assertion given the specific context of where and how that phrase
appeared on that product’s label. *Id.* at *9.

1 portraying JUUL as a “better” ENDS or “the best” ENDS or an ENDS that delivers “smoother”
 2 nicotine as compared to other ENDS. *Cf. Southland Sod Farms v. Stover Seed Co.*, 108 F.3d
 3 1134, 1145 (9th Cir. 1997) (“superiority claims that are vague or highly subjective often amount to
 4 nonactionable puffery”).⁵⁰ As alleged, the specific “switch” and “alternative” claims must be
 5 considered in the context of the advertisements and materials where they appear. Considering
 6 them there, for present purposes, the inference that the comparison specifically and quantifiably
 7 means – when considered in context of the advertisements as a whole – that JUUL was a healthier
 8 or less harmful alternative to combustible cigarettes is adequately alleged. *See, e.g., Shank v.*
 9 *Presidio Brands, Inc.*, 17-CV-00232-DMR, 2018 WL 510169, at *9 (N.D. Cal. Jan. 23, 2018)
 10 (where allegation concerned representation that products contained “only naturally derived
 11 ingredients,” when considered with other statements and use of imagery on packaging actionable
 12 and not mere puffery since a consumer “could interpret Presidio’s statements as a definitive
 13 representation that its [products] contain only naturally derived ingredients, and do not contain
 14 synthetic ingredients.”).

15 For similar reasons, JLI is incorrect that Colgate cannot, as a matter of law, allege
 16 justifiable reliance because no reasonable reader could agree with his inference that
 17 advertisements encouraging him to switch to the alternative JUUL product from traditional
 18 tobacco products could not support a reasonable inference that JUUL was attempting to convince
 19 consumers its product was healthier or less harmful. *Atari Corp. v. Ernst & Whinney*, 981 F.2d
 20 1025, 1031 (9th Cir. 1992) (affirming summary judgment determination that plaintiff “possessed
 21 facts demonstrating that the representations upon which it claims to have relied were ‘patently and
 22
 23

24 ⁵⁰ Nor is this the type of case discussed in *Yetter v. Ford Motor Co.*, 428 F. Supp. 3d 210, 234
 25 (N.D. Cal. 2019), discussing puffery assertions of product superiority such as improved durability,
 26 high performance, state of the art, long life, etc. This is a case where the allegation is despite
 27 being advertised as an alternative for a switch from cigarettes, JUUL is not measurably safer and
 28 may be a measurably worse or measurably more dangerous product. While various cases have
 held that the term “health” untethered to specific or measurable attributes may not state a claim,
 that is not this case. Discovery and expert opinions in these proceedings will concern whether
 ENDS generally or JUUL specifically have different (the same, better, or worse) health impacts
 compared to combustible cigarettes across different metrics.

1 obviously false.”).⁵¹ It is also incorrect to argue that Colgate could not have justifiably relied on
 2 the “alternative” representations because, as a long-term smoker, he knew or should have known
 3 that nicotine is bad for you. This is likewise a question to be addressed after discovery on a
 4 motion for summary judgment record or at trial. *See also Colgate II*, 402 F. Supp. 3d at 748 (“It is
 5 also irrelevant that certain plaintiffs were smokers before using JUUL. Being a smoker of
 6 combustible cigarettes would not impart knowledge that JUUL’s liquid nicotine formulation might
 7 be twice as potent.”).

8 Finally, JLI argues that C.D. and L.B. fail to allege specific facts showing actual reliance
 9 on defendants’ advertisements and marketing materials when they instead relied on peer pressure.
 10 This argument, like the one raised as to Colgate, should be made after discovery and on an
 11 evidentiary record. That peer use is one aspect of these minors’ allegations of how and maybe
 12 why they started using JUUL does not defeat reliance because they also attest to the advertising
 13 and marketing materials on which they relied. Whether those materials were part of the
 14 “immediate cause” of their initial or continued use can be tested on an evidentiary record. *See*
 15 *City Sols., Inc. v. Clear Channel Commun.*, 365 F.3d 835, 840 (9th Cir. 2004) (“Because of the
 16 highly subjective nature of a causation analysis, the Supreme Court of California has instructed
 17 that the question whether a party detrimentally relied on the misrepresentation of another party is
 18 properly left to a jury.”).

19 2. Omissions and Justifiable Reliance

20 JLI challenges the plaintiffs’ fraudulent omissions claims by noting the lack of a
 21 transaction between each of the California plaintiffs and JUUL and arguing that they fail to allege
 22 justifiable reliance.⁵² JLI argues plaintiffs’ fraud claim cannot be based on omissions because,
 23

24 ⁵¹ In so concluding, I do not rely on the “reasonable consumer” standard applicable under the
 25 statutory claims.

26 ⁵² Generally, a duty to disclose arises under California law: “(1) when there is a known defect in a
 27 consumer product and there are safety concerns associated with the product’s use; (2) when the
 28 defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the
 defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes
 partial representations but also suppresses some material facts.” *In re MyFord Touch Consumer*
Litig., 46 F. Supp. 3d 936, 958–59 (N.D. Cal. 2014). Plaintiffs here rely on all but the “active
 concealment” theory. *Oppo. JLI/Altria CA* at 11.

1 given the lack of a transactional relationship between JLI and any of the California plaintiffs
 2 (where none are alleged to have purchased directly from JLI), there could be no duty to disclose.
 3 *See Deteresa v. Am. Broad. Companies, Inc.*, 121 F.3d 460, 467 (9th Cir. 1997) (explaining that
 4 no general duty to disclose arises without a transaction between the parties or the existence of a
 5 special relationship creating a duty).⁵³ It points out that neither Colgate nor C.D. allege facts
 6 regarding where or how they purchased JUUL products. L.B.’s only connection with JLI was
 7 receipt of a device from JLI’s warranty department, but there is no allegation money changed
 8 hands between L.B. and JLI and absent transfer of money JLI argues there is no sufficient
 9 transaction. *See, e.g., Dreifort v. DJO Glob. Inc.*, 2019 WL 5578240, at *5 (S.D. Cal. Oct. 28,
 10 2019) (“If Plaintiff purchased the boot himself, he has insufficiently plead the details of that
 11 transaction. . . . Plaintiff has inadequately plead the existence of a transaction between him and
 12 DJO that would give rise to DJO’s duty to disclose.”).

13 This challenge fails. Where the allegedly undisclosed defect creates a risk of bodily injury,
 14 “a manufacturer has a duty to disclose a defect that poses an unreasonable safety risk even if that
 15 manufacturer did not have a transactional relationship with the” end user. *Hamm v. Mercedes-*
 16 *Benz USA, LLC*, 5:16-CV-03370-EJD, 2019 WL 4751911, at *4 (N.D. Cal. Sept. 30, 2019); *see*
 17 *also Reniger v. Hyundai Motor Am.*, 122 F. Supp. 3d 888, 897 (N.D. Cal. 2015 (rejecting the
 18 requirement of a transaction, as “where, as here, Plaintiffs allege a safety defect that a reasonable
 19 consumer would find material.”). Here, plaintiffs adequately allege defects that create an
 20 unreasonable risk to their personal safety, even if they disclaim (in the CAC) claims based on their
 21 personal injuries as opposed to their economic loss.⁵⁴

22 _____
 23 ⁵³ In *Colgate II*, I found that “plaintiffs sufficiently plead that JUUL has materially omitted the
 24 difference between the pharmacokinetic effects of its nicotine solution as compared to combustible
 25 cigarettes.” *Colgate II*, 402 F. Supp. 3d at 746. This theory is arguably not at issue on this motion
 because JLI contends none of the California plaintiffs’ claims to have saw or relied on this
 representation.

26 ⁵⁴ Contrary to JLI’s assertions, a plaintiff proceeding under a safety-based omissions theory need
 27 not plead personal injury. Instead, she must allege a threat of physical injury or safety concerns.
 28 *See Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 836 (Cal. App. 2d Dist.
 2006), as modified (Nov. 8, 2006); *see also Bryde v. Gen. Motors, LLC*, 16-CV-02421-WHO,
 2016 WL 6804584, at *13 (N.D. Cal. Nov. 17, 2016) (fraudulent omission safety claim
 sufficiently alleged even where injury was “out-of-pocket expenses”). The cases JLI cites in reply

1 As a fallback to its transaction argument, JLI contends that it was not under a duty to
 2 disclose because the allegedly omitted information was not within its exclusive knowledge but
 3 was publicly available to plaintiffs through studies and news articles demonstrating the dangers of
 4 ENDS generally (for example linking ENDS use to lung injuries and a CDC report addressing the
 5 addictive properties of ENDS) and JLI in particular (noting the CAC cites a publicly-available
 6 study disclosing that JUUL delivers “more nicotine per puff than a Marlboro cigarette”). CAC ¶
 7 105. *See, e.g., In re NJOY, Inc. Consumer Class Action Litig.*, 2015 WL 12732461, at *16 (C.D.
 8 Cal. May 27, 2015) (plaintiffs could not rely on a 2009 FDA study regarding toxins in e-cigarettes
 9 because “the study was publicly available for three years or more” and defendants, therefore, did
 10 not have exclusive knowledge of those facts at the time of plaintiffs’ purchases); *Andren v. Alere,*
 11 *Inc.*, 207 F. Supp. 3d 1133, 1143 (S.D. Cal. 2016) (plaintiffs’ allegations re specific product defect
 12 undermined by citation to publicly available studies and FDA warning letter and FDA recall
 13 notices regarding *same* defect). JLI asserts that the omissions-based claim fails given this publicly
 14 available information and the failure of plaintiffs to allege specifically what material information
 15 JLI had within its exclusive knowledge.

16 However, plaintiffs plausibly allege that JLI had exclusive and superior knowledge of
 17 specific and undisclosed or not adequately disclosed information, including the results from the
 18 Phase 0 study (showing heightened nicotine delivery, CAC ¶¶ 100-103) at the same time that it
 19 was marketing its products without that disclosure, and likewise falsely stating on its packages that
 20 a pod was “equivalent” in terms of nicotine to a pack of cigarettes. Plaintiffs contend that
 21 information on the market about ENDS generally and JUUL specifically was not specific enough
 22 about the method of nicotine delivery and potency of JUUL; it mostly concerned the known
 23 dangers of nicotine and its addictiveness. Because the disclosures identified by JLI did not
 24 disclose the specific heightened nicotine delivery and potential for heightened addictiveness of

25
 26 – all from the Central District and all concerning the same product – do not persuade me to depart
 27 from the well-recognized “safety” exception for omissions-based fraud claims. *See, e.g., Marrujo*
 28 *v. Coloplast Corp.*, 2020 WL 3791637, at *6 (S.D. Cal. July 7, 2020) (relying solely on *Deteresa*
and no subsequent caselaw); *Cruz v. Johnson and Johnson, Inc.*, 2018 WL 7017981, at *3 (C.D.
 Cal. Dec. 10, 2018) (same); *Westgate v. Coloplast Corp.*, 2018 WL 6380746, at *3 (C.D. Cal.
 Sept. 6, 2018) (same).

1 JUUL, the “exclusive knowledge” prong has been adequately alleged. *Compare In re MyFord*
 2 *Touch Consumer Litig.*, 46 F. Supp. 3d 936, 960 (N.D. Cal. 2014) (“Even if the public—and
 3 therefore Plaintiffs—were aware of some problems with MFT, that does not establish that either
 4 the public or Plaintiffs knew or should have known of the severity of the problems, including the
 5 fact that the problems could not be fixed (as alleged by Plaintiffs).”); *with In re NJOY, Inc.*
 6 *Consumer Class Action Litig.*, 2015 WL 12732461 at *16 (plaintiffs could not argue defendants
 7 had exclusive knowledge of the presence of carcinogens in product because FDA report disclosed
 8 that specific information); *Wolph v. Acer Am. Corp.*, C 09-01314 JSW, 2009 WL 2969467, at *4
 9 (N.D. Cal. Sept. 14, 2009) (“Plaintiffs have not alleged any information known by Acer”
 10 regarding publicly disclosed computer operating system requirements, “that was unavailable to the
 11 public.”).

12 The allegations of exclusive or superior knowledge and what JLI contends was publicly
 13 disclosed and available to consumers are materially different from the allegations considered by
 14 the Hon. James Donato in *Harris v. R.J. Reynolds Vapor Co.*, 15-CV-04075-JD, 2017 WL
 15 3617061, at *2 (N.D. Cal. Aug. 23, 2017). There, plaintiffs broadly alleged that defendants failed
 16 to disclose that ENDS had risks or were comparable in those risks to traditional tobacco products.
 17 But because plaintiffs had cited numerous studies and reports broadly disclosing risks with ENDS
 18 (and defendant itself “expressly disclosed to consumers that VUSE products are tobacco products,
 19 and that ‘no tobacco product is safe or without risk’”), plaintiffs’ omissions-based fraud claim was
 20 self-defeating. Here, plaintiffs assert that the only source that specifically addressed the
 21 addictiveness of JUUL – which both sides agree is different in design and delivery than other
 22 ENDS – was published in August 2019, well after the California plaintiffs had started their JUUL
 23 use. CAC ¶ 105 & n.106.

24 JLI contends that this narrow category of JUUL-specific information – the design and
 25 potency of JUUL – was in fact publicly disclosed in its patent application. Plaintiffs acknowledge
 26 and expressly allege that the results of the Phase 0 study were disclosed in the ‘895 Patent (CAC
 27 ¶¶ 101-102). But this does not defeat the omissions-claim. Disclosure to an agency and arguably
 28 the public in the complex prose of a patent disclosure does not translate to a disclosure that any of

1 the California plaintiffs (much less a reasonable consumer) could reasonably be expected to read,
2 let alone comprehend. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*
3 *Practices, and Products Liab. Litig.*, 754 F. Supp. 2d 1145, 1192 (C.D. Cal. 2010) (“While Toyota
4 shared some information regarding [the defect] with NHTSA and eventually with consumers,
5 Toyota remained in a superior position of knowledge. While prospective customers could have
6 been tipped off to the possibility of [the defect manifesting] by researching past complaints filed
7 with NHTSA, many customers would not have performed such a search, nor would they be
8 expected to.”).

9 Under the third asserted theory, JLI contends that plaintiffs have not identified any “partial
10 disclosures” other than the puffery of the “switch” and “alternative” marketing materials identified
11 by Colgate that could trigger a responsibility to disclose omitted information.⁵⁵ But, as noted
12 above, the switch and alternative statements may, in context, be actionable and not mere puffery or
13 opinion. Plaintiffs have also alleged that the “one pod is equivalent to a pack of cigarettes” in
14 terms of nicotine delivery can also be misleading given JUUL’s otherwise not publicly
15 acknowledged different and more potent delivery method.⁵⁶

16 As to reliance for omissions-based claims, if the withheld information was material
17 reliance is presumed. *See, e.g., Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015)
18 (“That one would have behaved differently can be presumed, or at least inferred, when the
19 omission is material” and “[a]lleged defects that create ‘unreasonable safety risks’ are considered
20 material”). The allegedly withheld information at issue satisfies the materiality hurdle as a matter
21 of pleading. The particular significance of withheld information to named plaintiffs is a highly
22 fact-based analysis typically resolved based on an evidentiary record. *See, e.g., City Sols., Inc.*,
23 365 F.3d at 840.

24
25 _____
26 ⁵⁵ C.D. and L.B. have been given leave to amend to specify the text and messages they saw and
relied on in support of their fraud claims, including partial representations.

27 ⁵⁶ Where actionable omissions or partial representation claims have been adequately alleged, there
28 is no need to demonstrate a direct transaction between the manufacturer/seller and the end user,
especially where a safety defect is at issue. *See, e.g., Reniger v. Hyundai Motor Am.*, 122 F. Supp.
3d 888, 897 (N.D. Cal. 2015).

3. Damages

JLI argues that the fraud claims must be dismissed because none of the California plaintiffs alleges damages from the misrepresentations with sufficient specificity, offering only identical and conclusory allegations about their harm (at most, disclaiming nicotine addiction personal injury claims, CAC ¶ 3371) and providing no quantity or measure of resulting damages. It cites no caselaw requiring – at the pleading stage – a detailed disclosure of damages. Plausible allegations of damages are required and are made for each of the California plaintiffs. Damages may be tested after expert and fact discovery is adduced.⁵⁷

Dismissal with leave to amend for C.D. and L.B.’s affirmative misrepresentations claim is GRANTED. JLI’s motion to dismiss the California fraud claims is otherwise DENIED.

B. Breach of Implied Warranty – California Plaintiffs

Plaintiffs assert two theories under their breach of implied warranty of merchantability claim asserted only against JLI. First, the products do not conform to statements made on their labels. Second, they are not merchantable for the purpose for which they are sold and are not fit for ordinary use. CAC ¶ 689.

1. Privity with JLI

JLI moves to dismiss the implied warranty claim, arguing that because none of the California plaintiffs purchased from JLI, none can establish privity. Plaintiffs do not contest that privity is typically required but insist that two exceptions apply, the third-party beneficiary exception and the “foodstuff” exception.

As my more recent decisions have recognized, the third-party beneficiary exception has been accepted by California Courts of Appeal. *See Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 854 (N.D. Cal. 2018) (collecting cases). Under that exception, plaintiffs contend and defendants do not contest that Colgate was an intended purchaser and did purchase JUUL products, even if through retailers and not directly from JLI. The real dispute is over the minors, C.D. and L.B., whom JLI argues cannot be intended third-party beneficiaries since minors were not legally

⁵⁷ This “unquantified damages” argument also fails as to plaintiffs’ implied warranty and CLRA claim. Restitution, available under the UCL and FAL, is addressed below.

1 entitled to purchase JUUL. JLI relies on express contract cases that, understandably, hold that
 2 whether a party is an intended beneficiary turns on the terms of the contract and the parties' intent
 3 as expressed in the written contract. *See, e.g., Balsam v. Tucows Inc.*, 627 F.3d 1158, 1161 (9th
 4 Cir. 2010) (express contract). How that line of cases applies to an implied breach claim arising in
 5 the typical consumer-context (where manufacturers sell to retailers who sell to consumers) is
 6 unclear. Absent apposite caselaw, I will not dismiss C.D. and L.B.'s implied warranty of
 7 merchantability claim on this ground.⁵⁸

8 2. Non-Merchantability and Causation

9 JLI asserts that plaintiffs' claim under both of their theories of breach fails because (1)
 10 plaintiffs fail to allege that they relied on the "container or label" of the JUUL products and (2)
 11 plaintiffs cannot plausibly allege that the JUUL products are not fit for their ordinary purpose (as a
 12 safer alternative to cigarettes) because that theory is based on plaintiffs' subjective expectations of
 13 use. Under the first theory, the parties dispute whether reliance is required for an implied warranty
 14 of merchantability claim (as opposed to other variants of warranty claims). *Compare* CA Oppo. at
 15 19 (citing CACI 1231); *with* JLI CA Reply at 9 (citing two C.D. Cal. cases dismissing implied
 16 warranty claims where plaintiffs did not allege they saw particular statements). However, the
 17 CACI instruction identified by plaintiffs does not include within its scope a theory *based* on
 18 statements made on a product's container or label. Absent other persuasive authority, I conclude
 19 that plaintiffs must identify the specific statements on the label or container that they saw and that
 20 would breach the implied warranty in order to proceed under this theory. Plaintiffs may attempt to
 21 plead those facts on amendment.

22 I have already considered the second theory and found it adequately pleaded. *See Colgate*
 23 *II*, 402 F. Supp. 3d at 757 (finding that "the allegations about the pharmacokinetics of JUUL's

24
 25 ⁵⁸ Because the implied warranty claims survive the privity challenge, I need not reach whether the
 26 second asserted exception, the "foodstuffs" exception, applies to ENDS. I note that one judge in
 27 this District has declined to extend the exception to tobacco products. *Xavier v. Philip Morris*
 28 *USA Inc.*, No. C 10-02067 WHA, 787 F. Supp. 2d 1075, 1084 (N.D. Cal. 2011) ("No blanket rule
 has been articulated to cover all products intended for human consumption, and the rationale
 underlying the exceptions for foodstuffs, pharmaceuticals, and pesticides has not been extended to
 cigarettes. A good public policy argument likely lies for such an extension, but, it is up to the
 California courts—not federal courts sitting in diversity—to make it.").

1 formulation sufficiently allege that JUUL’s products do not ‘possess even the most basic degree of
2 fitness for ordinary use.’”). I need not revisit this argument again based on materially similar
3 allegations asserted in the CAC.

4 **C. UCL/FAL**

5 Unlike common law fraud and breach of the implied warranty – claims that were asserted
6 only against JLI – each of the moving defendants is named as a defendant under plaintiffs’ UCL
7 and FAL claims. Each asserts slightly different arguments in addition to joining each other’s
8 arguments.

9 **1. Stating a UCL Claim**

10 **a. JLI**

11 JLI argues that the California plaintiffs have failed to state a claim under any of the three
12 disjunctive prongs of the UCL. They contend that no fraud-prong claim has been alleged because
13 plaintiffs failed to adequately allege common-law fraud. That argument was rejected above. JLI
14 contends that plaintiffs cannot state a claim under the unlawful prong because: (a) plaintiffs’ have
15 failed to plead and cannot plead their RICO claim; (b) the Magnuson-Moss Warranty Act
16 (MMWA) claim fails for the same reason as the implied warranty claim; (c) plaintiffs have failed
17 to allege a Stake Act Claim under Cal. Bus. & Prof. Code § 22963 (imposing liability for sale of
18 tobacco to people under 21 through mail or delivery service) as C.D. and L.B. did not allege use of
19 mails to purchase tobacco; and (d) plaintiffs cannot state a claim under Cal. Penal Code § 308
20 (imposing liability for tobacco sales to a minor) because Colgate is an adult, L.B. never bought a
21 device (although she received one from warranty department), and C.D. does not allege that he
22 ever purchased anything from JLI. However, the implied warranty claim survives as to Colgate at
23 a minimum and, according to JLI, the MMWA claim is coextensive with the implied warranty
24 claim and survives as well. At this juncture, and without more fulsome briefing on the other
25 statutes plaintiffs allege also support their illegal-prong claim, I need not go further.

26 Finally, JLI argues that plaintiffs have failed to allege an unfair prong claim under the
27 balancing test. Given how the California claims currently stand, because the fraud and illegal
28 prongs have been adequately alleged, I need not separately address the unfairness prong as to JLI

1 this stage. I would note, however, that L.B. and C.D. have both adequately alleged that they saw
 2 youth-targeted marketing (either allegedly from or sponsored by JLI, although as discussed below
 3 they not have not adequately identified the specific representations within those materials that they
 4 relied on) that would be sufficient to allege harm due to JLI's actionable unfair conduct of
 5 targeting minors. *See Colgate II*, 402 F. Supp. 3d at 760.

6 **b. Altria**

7 Plaintiffs confirm that they are asserting only an unfairness-prong claim under the UCL
 8 against Altria based on Altria's conduct related to youth marketing (the phrase preferred by Altria)
 9 or youth targeting (the phrase preferred by plaintiffs). CA/UCL Oppo. at 28-31. Altria contends,
 10 however, that plaintiffs fail to allege sufficient facts under Rule 9(b) plausibly showing that Altria
 11 actually engaged in the unfair conduct of youth marketing or targeting. Dkt. No. 632 at 18.

12 As an initial matter, the parties dispute whether Rule 9(b) applies to the unfairness claims
 13 asserted against Altria based solely on youth marketing conduct. Plaintiffs point out that "youth
 14 marketing" does not necessarily "sound in" fraud or deception. That may be true in cases where a
 15 party expressly engaged in unfair youth marketing. However, as discussed in more detail below,
 16 plaintiffs' most specific allegations about Altria's youth-targeting conduct sound in deception
 17 because the allegations are that Altria coordinated and supported JLI's continued targeting of
 18 youth – *contrary* to its public statements – by lobbying the FDA to preserve mint as a flavor
 19 (knowing that mint was favored by youth and drove youth sales) and by purchasing shelf space
 20 (with the intent it would be used by JLI) to favorably display JUUL products next to its popular
 21 and/or youth-favored tobacco products. That conduct sounds in deception.⁵⁹

22 As the second, more substantive matter, Altria contends that the 157 paragraphs describing
 23 the defendants' youth marketing conduct barely mention Altria and nowhere allege that Altria
 24 marketed, advertised, or promoted JUUL products directly to youth. According to Altria's review
 25 of the CAC, the only marketing Altria is alleged to have undertaken for JUUL products was in
 26

27 _____
 28 ⁵⁹ If plaintiffs amend to allege specific acts of youth marketing expressly directed by Altria
 employees under their contracts with JLI to youth, that might not "sound in deception" and may
 not need to satisfy Rule 9(b).

1 packets of PM USA cigarettes mailed to adult smokers, advertising them to “make the switch.”
2 CAC ¶¶ 203-204. Therefore, under either the unfair conduct balancing test or the tethering test to
3 (used to determine whether acts constitute unfair conduct under the UCL), Altria contends that the
4 allegations at to its conduct are fatally insufficient.

5 I disagree. In addition to the preserving mint, shelf-space, and make the switch
6 allegations, there are allegations regarding Altria’s direct conduct and own acts that plaintiffs
7 allege directly support an inference of unfair youth-targeting. *See, e.g.*, CAC ¶¶ 395, 397 (alleging
8 that JLI provided Altria a marketing list including minors); ¶ 412 (Altria publicly “feigned
9 ignorance” over JUUL’s youth marketing intents and acts); ¶¶ 416, 417 (Altria’s statements to the
10 FDA and Congress).⁶⁰

11 Plaintiffs characterize the totality of the allegations regarding Altria’s own conduct as a
12 significant part of the coordinated (starting in 2017) “scheme of youth targeting” given Altria’s
13 knowledge of JLI’s youth marketing through the joint relationship with Avail Vapor and its
14 agreement to secure the shelf space, preserve mint, and then (after December 2018) provide
15 services to JLI in order to preserve or grow youth use of JLI’s products. *See* CAC ¶¶ 419-422,
16 425, 427-432, 432-441, 473, 489-495.⁶¹ These allegations regarding conduct over which Altria
17 had direct control are sufficient, at this stage, to sustain the unfair-prong UCL claim against
18 Altria.⁶²

19 c. Officers and Directors

20 Each of the Officer and Director Defendants moves to dismiss the UCL claim because he
21 cannot be personally liable merely due to his status as either co-founder, officer, or member of the

22

23 ⁶⁰ Altria does not contest that “youth marketing” would satisfy both the balancing and tethering
tests, a conclusion I reached in *Colgate II*, 402 F. Supp. 3d at 760.

24 ⁶¹ As noted above, while the allegations regarding Altria’s statements to Congress and the FDA
25 may not be independently actionable under the *Noerr-Pennington* doctrine, they are evidence
regarding Altria’s more broadly alleged unfair conduct.

26 ⁶² This is not inconsistent with the conclusion above that plaintiffs fail to identify plausible facts in
27 support of Altria’s agreement to join the already-established Enterprise and fail to allege facts
showing Altria’s acts were performed in support of the alleged, distinct Enterprise as opposed to
28 Altria and JLI’s consistent general business interests which (under the UCL) conceivably include
acts of unfair youth-targeting.

1 Board of Directors of JLI and plaintiffs fail to allege sufficient facts regarding his personal
2 participation or “unbridled control” over the alleged UCL acts. Dkt. No. 751.

3 Bowen, Monsees, and the three Other Director Defendants rely on the discussion of the
4 boundaries of UCL liability in *Emery v. Visa Internat. Serv. Ass'n*, 95 Cal. App. 4th 952, 960 (Cal.
5 App. 3d Dist. 2002), where the court reminded “plaintiff that his unfair practices claim under
6 section 17200 cannot be predicated on vicarious liability” and “[a] defendant’s liability must be
7 based on his personal ‘participation in the unlawful practices’ and ‘unbridled control’ over the
8 practices that are found to violate section 17200 or 17500.” *Id.* at 960; *see also People v. Toomey*,
9 203 Cal. Rptr. 642, 651 (Cal. Ct. App. 1984) (defendant aided and abetted a business’s unlawful
10 conduct because he “orchestrated all aspects of” and “had unbridled control over the practices
11 which were found [to be unlawful].”). This limiting principle is significant, according to the
12 Officer and Director Defendants, because the UCL’s purpose is to punish acts of unfair
13 competition by the corporate entities who engage in that competition, not the individual officers
14 and directors who simply approved a corporate entity’s activities. *See O’Connor v. Uber Techs.,*
15 *Inc.*, C-13-3826 EMC, 2013 WL 6354534, at *18 (N.D. Cal. Dec. 5, 2013) (dismissing UCL claim
16 against corporate officers with leave to add allegations that directors “‘actively and directly
17 participate[d] in [any] unfair business practice[s],’” because simply “[i]dentifying their roles in the
18 corporation and alleging that they were ‘responsible’ for pay practices and employment policies
19 does not make it plausible that they were personally liable, any more so than it would make any
20 officer responsible for the torts allegedly committed by their corporation. California law does not
21 impose liability on corporate officers merely for their role in the corporation, but only for
22 wrongful acts in which they have been personally involved.” (quoting *Bradstreet v. Wong*, 161
23 Cal. App. 4th 1440, 1458 (2008)); *see also Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058,
24 1069 (9th Cir. 2016) (holding CEO personally liable because he “admitted that, during the
25 promotion, he controlled and directed Power’s actions” and “admitted that the promotion was his
26 idea”).

27 Plaintiffs respond that they do not seek to hold any of the Officer or Director Defendants
28 liable merely for their roles as corporate officers or directors or under a theory of vicarious

1 liability, but instead allege that they are liable for their personal acts. Plaintiffs rely on established
2 caselaw holding that corporate officers and directors may be liable (notwithstanding the
3 protections provided by the corporate form) for torts or other acts that they specifically authorized
4 or directed. *See Frances T. v. Village Green Owners Assn.*, 42 Cal.3d 490, 503 (1986) (“It is well
5 settled that corporate directors cannot be held vicariously liable for the corporation's torts in which
6 they do not participate. Their liability, if any, stems from their own tortious conduct, not from
7 their status as directors or officers of the enterprise. . . Directors are jointly liable with the
8 corporation and may be joined as defendants if they personally directed or participated in the
9 tortious conduct.”); *see also Fitbit, Inc. v. Laguna 2, LLC*, 17-CV-00079-EMC, 2017 WL
10 8294274, at *2 (N.D. Cal. Apr. 26, 2017) (liability against a CEO actionable under UCL when
11 “predicated on his direction of and participation in the alleged trademark infringement and unfair
12 competition,” where CEO defendant personally vouched for legitimacy of goods sold); *In re*
13 *Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, and Products Liab. Litig.*, 295 F. Supp. 3d
14 927, 988 (N.D. Cal. 2018) (denying motion to dismiss consumer fraud claims alleged against a
15 specific corporate officer who was alleged to have personally “approved of, or ratified, the use of
16 the ‘EcoDiesel’ logo on the Class Vehicles, and with knowledge of the emissions problem.”);
17 *POM Wonderful LLC v. Purely Juice, Inc.*, 362 Fed. Appx. 577, 581 (9th Cir. 2009)(unpublished)
18 (“The record shows [president of the company] knew of the test results . . . , was personally
19 involved in making decisions for Purely Juice in response to the results, and had the “final word”
20 on Purely Juice’s business decisions.”).

21 The primary dispute between the parties comes down to whether under the UCL plaintiffs
22 can merely allege “individual participation” in the unfair business acts asserted under the UCL
23 (which they have) or whether they *also* need to plead plausible facts showing that each defendant
24 exercised “unbridled control” over (and hence bear personally responsibility for) each of the UCL
25 acts. However stated, the through line of the cases on which both sides rely is that liability can lie
26 against an officer or director who either personally commits a tort or, relevant here, personally
27 commits the alleged UCL act or was sufficiently responsible for the commission of that act
28 through his personal direction or action that he may be held personally liable.

1 Monsees and Bowen are alleged to have personally committed or directed acts that are
2 sufficient under the UCL. *See, e.g.*, CAC ¶¶ 4, 63, 76, 132, 218 (Bowen and Monsees
3 intentionally designed a more addictive and youth-oriented product); ¶¶ 78, 79 (Monsees and
4 Bowen expressed their intent to “disrupt” traditional tobacco and assist traditional tobacco addicts,
5 but courted the investment and expertise of “big tobacco”); ¶¶ 108, 115, 171, 178 (Bowen
6 intentionally designing and re-engineering tests); ¶ 414 (Monsees allegedly fraudulent August
7 2019 statement to the *New York Times* that selling JUUL products to youth was “antithetical to the
8 company’s mission.”).

9 It is a closer question, however, whether the Other Director Defendants (Huh, Valani, and
10 Pritzker) have. As noted above with respect to RICO, plaintiffs’ repeated blanket assertion that
11 the “Board of Directors” generally and Huh, Valani, and Pritzker (along with Bowen and
12 Monsees) through their “control” of the Board of Directors had “final say” over JLI’s marketing
13 materials, by itself, does not establish the requisite individual “direction or control” to pin liability
14 for marketing acts or even specific marketing campaigns of JLI on *each* member of the Board of
15 Directors or any of the defendants in their individual capacity as Board members. *See, e.g.*, CAC
16 ¶¶ 207 n. 213, 333 n. 364, 415.⁶³

17 Nor is the generalized reference to the “Board’s decision” in October 2015 to resolve the
18 alleged internal JLI debate about youth use (given concern over the issue expressed by Pritzker
19 and others) and to specifically target teens (allegedly supported by Huh and unnamed others)
20 enough to support individual liability. CAC ¶¶ 334-336. There is no allegation of a Board vote or
21 other *action* identified. The plaintiffs do not identify any specific matters put forward by the
22 defendant Directors together or individually that were approved through their direct control over
23 the full Board. Nor do the “Executive Committee” allegations support the UCL claim. Huh,
24 Valani, and Pritzker formed an Executive Committee of the Board in October 2015 and, as
25 Monsees had stepped down as CEO, Pritzker, Huh, and Valani took charge of JLI until a
26

27
28 ⁶³ As noted, the only factual support for the “final say” allegation is a reference to Monsees’ July
2019 statement to Congress, where in he indicated that the Board and others were currently
responsible for marketing materials. *See, e.g.*, CAC ¶333 n. 364.

1 replacement CEO was appointed in August 2016. However, the specific allegations regarding the
2 Executive Committee’s conduct during this time are merely that Huh ran meetings, the Executive
3 Committee made reporting structure decisions, it helped “manage people,” and the three were
4 committed to an even “more aggressive” rollout. CAC ¶¶ 349-353.

5 These generalized allegations are insufficient to connect each Other Director Defendant to
6 the direction or control of any unfair *acts* or youth-targeted marketing *acts*. Plaintiffs identify a
7 few internal comments made by the Other Director Defendants that (taking inference in favor of
8 plaintiffs) show their general awareness of and “expressed” concern about the issue of youth-
9 targeting. But there are no factual allegations of specific *conduct* of youth-targeting committed
10 by, at the direction of, or even with the specific knowledge of the Other Director Defendants
11 during this time frame. *See, e.g.*, CAC ¶ 334 (Pritzker commenting that branding “feels too
12 young”); ¶ 339 (Huh being aware of efforts to “mature” the brand advertising to minimize risk of
13 youth targeting); ¶ 405 (“The Board was intimately involved in these ‘youth prevention’ activities.
14 For example, in April 2018, Riaz Valani and Nicholas Pritzker edited a youth prevention press
15 release, noting that they “don’t want to get these small items wrong” and “think it’s critical to get
16 this right.”). The one comment that comes closest is Bowen’s alleged assertion that Valani was
17 interested in “leveraging” user generated content, but there is no allegation in the CAC that it was
18 the “youth” content or that Valani personally leveraged youth-content or directed anyone else to
19 do so. *Id.* ¶ 357.⁶⁴

20 In sum, the generalized allegations of “control” do not amount to plausibly alleged facts
21

22 ⁶⁴ The generalized allegations here against the Other Director Defendants are not akin to the more
23 specific and narrow allegations in *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices,*
24 *and Products Liab. Litig.*, 295 F. Supp. 3d 927 (N.D. Cal. 2018). There, plaintiffs alleged that a
25 CEO specifically “approved of, or ratified, the use of the ‘EcoDiesel’ logo on the Class Vehicles,
26 and with knowledge of the emissions problem.” *Id.* at 988-989. Even though plaintiffs state that
27 the Executive Committee functioned as the CEO of JLI from late 2015 through mid-2016, as
28 noted above plaintiffs do not identify specific acts or conduct approved by the Executive
Committee that could constitute UCL acts during that time. *POM Wonderful LLC v. Purely Juice,*
Inc., 362 Fed. Appx. 577 (9th Cir. 2009) (unpublished) is similarly inapposite considering the
allegations against the Other Direct Defendants here. *Id.* at 581 (defendant “was ‘in control’ of
Purely Juice given his position as president and principal shareholder, his direct involvement in
the manufacturing and marketing process, and his involvement in the selection of concentrate
suppliers.”).

1 showing direction or control or an adequate allegation of commission of UCL acts or acts in
 2 support of youth-targeting by either the full Board or the Executive Committee with respect to the
 3 Other Director Defendants. More specific allegations are needed to plausibly allege UCL conduct
 4 through: (i) specific acts taken by the Executive Committee when the three Other Director
 5 Defendants were in control; or (ii) specific acts taken by the Board that the three Other Director
 6 Defendants alone or in conjunction with Bowen and Monsees proposed, directed, and secured
 7 approval of, *along with* allegations that, by virtue of the number of Board members, the group of
 8 three or five were able to and did “direct or control” the Board’s approval.⁶⁵

9 More specific allegations are made against some of the Other Director Defendants
 10 regarding their efforts to negotiate and consummate the investment by Altria. *See, e.g.*, CAC ¶ 43
 11 (Pritzker and Valani, together with then-CEO were the lead negotiators on the Altria deal); ¶ 46
 12 (in October 2019 Pritzker and Valani, “and other officers and directors including Bowen,
 13 Monsees, and Huh,” would have been instrumental in bringing Crosthwaite on board at JLI”
 14 from Altria). It does not appear that plaintiffs are alleging that the acts of seeking the investment
 15 by Altria *by themselves* are alleged unfair acts under the UCL, but even if they were an
 16 independent basis, there are no allegations that these Other Direct Defendants directed or
 17 otherwise had sufficient control over the eventual deal.⁶⁶

18
 19 ⁶⁵ I recognize that plaintiffs make one other more specific allegation regarding the allegedly
 20 concealed heightened nicotine delivery of JUUL, that in a June 2014 board meeting of Ploom (a
 21 predecessor to JLI), “Pritzker, and Valani were privy to both the Phase 0 and Phase 1 results. And
 22 they knew that the data JLI (then Ploom) was pushing on the public was false and misleading, but
 23 none made any efforts to correct or withdraw those false and misleading statements.” CAC ¶ 178.
 There is a debate between the parties over what inferences attendees like Pritzker and Valani could
 have drawn from the presentation, but there is no support for the allegation that these two Other
 Director Defendants “selectively utilized” the results to direct or control JLI’s “withholding”
 information regarding JUUL’s nicotine delivery. *Oppo. to Officer and Director MTD* at 9 n.5.

24 ⁶⁶ Plaintiffs’ reliance on *PMC, Inc. v. Kadisha*, 78 Cal. App. 4th 1368, 1385 (Cal. App. 2d Dist.
 25 2000), *as modified on denial of reh’g* (Apr. 7, 2000), is a little perplexing. There, the Court found
 26 ample evidence “from which a trier of fact could reasonably infer defendants, in anticipation of
 27 enormous corporate and personal profit, knowingly invested at a bargain price in a corporation
 28 whose sole business assets consisted of stolen confidential information and processes, and
 subsequently controlled the entity which was engaging in unlawful conduct.” *Id.* at 1385. Here,
 however, plaintiffs are attempting to section off part of JLI’s operation as the RICO Enterprise
 (and the cause of presumably most if not all of the UCL acts) from the other presumably
 legitimate operations of JLI. If the acts by any of the Officer and Director defendants in securing
 the Altria investment are alleged to be actionable under the UCL, further allegations are necessary

1 The Other Director Defendants’ motion to dismiss the UCL claims against them is
2 GRANTED with leave to amend.

3 **2. Standing**

4 **a. JLI**

5 JLI contends that California minor plaintiff L.B. lacks standing to pursue the UCL and
6 FAL claims against JLI because L.B. fails to allege that she bought any JUUL products. Plaintiffs
7 argue that L.B. sufficiently alleges that she purchased product from one “unknown source” and
8 one “from eBay” according to her mother, who brings the claim on L.B.’s behalf. CAC Appx. A ¶
9 803, 806. JLI claims these assertions are “implausible” and insufficient. Not so; L.B. has
10 standing.

11 **b. Altria**

12 Separately, Altria argues that the California plaintiffs have failed to allege standing under
13 the UCL against it because they fail to allege any facts showing how they were harmed as a result
14 of Altria’s separate conduct. Altria complains that many of the allegations in the CAC assert
15 conduct against an unspecific group of “defendants” generally, and even as to “Altria” plaintiffs
16 fail to identify the specific acts for which the different Altria entities (among the four separately
17 named as defendants) were responsible. Plaintiffs do not address this issue. As noted above,
18 plaintiffs are given leave to amend additional details as to which Altria entity performed what acts
19 or to allege why they cannot do so.

20 More substantively, Altria argues that because each of the California plaintiffs started
21 using JUUL products before Altria’s first involvement with JLI in December 2018 – and indeed
22 Colgate has filed a suit against JLI based on false and misleading and youth targeting allegations
23 *prior* to that date – none of the California plaintiffs can argue that anything Altria did caused them
24 harm. In response, plaintiffs clarify that only C.D. and L.B. bring this claim and argue that
25 Altria’s unfair conduct contributed to their use of JUUL even if it was not responsible for the
26 inception of their use of the product. Those allegations and facts in support are not contained in
27

28 _____
to follow and support that distinction.

1 the CAC with respect to C.D. or L.B., but presumably can be easily rectified on amendment.

2 **3. Relief**

3 Each of the moving defendants bring separate but related arguments why the UCL claim
4 fails due to the plaintiffs' failure to allege cognizable theories of equitable relief.

5 **a. JLI**

6 JLI argues that claims for equitable relief under the UCL (and the FAL) fail because
7 plaintiffs have not shown that they have inadequate remedies at law. It relies on the Ninth
8 Circuit's recent decision in *Sonner v. Premier Nutrition Corp.*, 962 F.3d 1072, 1081 (9th Cir.
9 2020), *opinion amended and superseded on denial of reh'g*, 971 F.3d 834 (9th Cir. 2020) ("Sonner
10 must establish that she lacks an adequate remedy at law before securing equitable restitution for
11 past harm under the UCL and CLRA."). The facts of *Sonner* – where the plaintiff on the eve of
12 trial sought to secure a bench trial under the UCL by foregoing CLRA damages claims that had to
13 be tried to a jury – are inapposite considering the allegations and the posture of the CAC.
14 However, as limited amendments are already being required to the CAC, plaintiffs are given leave
15 to amend to expressly allege that their remedies at law are inadequate and to support their claim to
16 equitable restitution under the UCL and FAL.⁶⁷

17 Assuming that hurdle is cleared (as it seems likely to be given the allegations regarding
18 unfair conduct are not otherwise coextensive with plaintiffs' legal claims and given the
19 preliminary stage of these proceedings), JLI also argues that plaintiffs are not entitled to restitution
20 from JLI because they failed to allege that JLI profited from any transaction with any California
21 plaintiff and restitution only extends to "money or property that was once in the possession of that
22

23 ⁶⁷ I acknowledge the recent decision by the Hon. Edward J. Davila in *In re MacBook Keyboard*
24 *Litig.*, 5:18-CV-02813-EJD, 2020 WL 6047253, at *3 (N.D. Cal. Oct. 13, 2020). Dkt. No. 1071.
25 In that decision, plaintiffs' claim for equitable relief under the UCL was dismissed because
26 adequate damages were available against the one defendant based on a recognition that "Courts
27 generally hold that monetary damages are an adequate remedy for claims based on an alleged
28 product defect." The posture of this case is significantly different from that in *In re MacBook*
Keyboard Litig. For example, damage claims are asserted primarily against JLI, but the UCL and
equitable relief claims are asserted against JLI *and* the other defendants from whom damages may
not be recoverable. That counsels against outright dismissal of the equitable relief claims as
inadequate at this juncture. However, as noted, plaintiffs are given leave to amend to explain why
their damages at law might be inadequate.

1 person” or “money or property in which he or she has a vested interest.” *Korea Supply Co. v.*
 2 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003). JLI does not dispute that indirect
 3 purchasers – like many of the users of JUUL who purchased from retail establishments or from
 4 resellers and not directly from JLI – may nonetheless seek restitution under the UCL; that is an
 5 established point of law. *See, e.g., Cabebe v. Nissan of N.A., Inc.*, 18-CV-00144-WHO, 2018 WL
 6 5617732, at *5 (N.D. Cal. Oct. 26, 2018). Plaintiffs simply need to allege that JLI obtained
 7 money (or property) and that plaintiffs lost money or property as a result of defendants’ unfair
 8 practices. *Id.*

9 Plaintiffs do so here. *See, e.g., CAC* ¶ 649. Given the allegations regarding the diverse
 10 supply chains of JUUL products in the CAC, plaintiffs’ allegation regarding lost money and JLI’s
 11 profiting from its initial sales are plausible and sufficient to allege entitlement to UCL restitution.
 12 *See, e.g., Shersher v. Super. Ct.*, 154 Cal. App. 4th 1491, 1498, 1500 (Cal. App. 2d Dist. 2007)
 13 (“plaintiff and the putative class members clearly had an ownership interest in the restitutionary
 14 relief sought because they purchased Microsoft’s product” albeit through a retailer and rejecting
 15 defendant’s argument that “plaintiff allegedly lost any ownership interest in his money once he
 16 used it to purchase Microsoft’s product from a retailer.”). How the many JUUL supply chains
 17 worked and how much if any of plaintiffs’ money spent to purchase JUUL products constitutes
 18 appropriate restitution can only be determined following fact and expert discovery and on a full
 19 evidentiary record.

20 **b. Altria**

21 Altria asserts, first, that the California plaintiffs do not have standing to seek restitution
 22 from Altria because they started using JUUL products before Altria’s conduct occurred. However,
 23 plaintiffs plausibly allege that Altria’s conduct contributed to the youth targeting, and may (on
 24 amendment) allege that Altria’s conduct more narrowly contributed to C.D. and L.B.’s continued
 25 use of JUUL. If those allegations are included on amendment, causation – whether specific
 26 plaintiffs were harmed in some part “as a result of” Altria’s conduct – is more appropriately
 27 determined on a full evidentiary record.

28 Altria also argues that it cannot be liable for restitution as Altria did not receive any funds

1 these plaintiffs spent on JLI products. That sort of direct tracing of specific funds is not required
2 under the UCL, as discussed above. If Altria is alleged to have received money traceable to its
3 general unfair conduct that impacted C.D. and L.B., that is sufficient.

4 Plaintiffs rely on *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1340 (Cal. App.
5 4th Dist. 2009). There, the unfair conduct (charging fees) was carried out by a wholly owned
6 subsidiary. The court concluded that to the extent the parent entity “earned profits from those
7 service charge payments, its net worth increased and the value of” the parent entity’s “stock
8 investment in the subsidiary likewise increased” and sufficient benefit flowed to the parent that
9 could constitute potential restitution.

10 Altria contends that *Troyk* is inapposite because the trial court relied (on a full summary
11 judgment record) not just on the wholly-owned subsidiary/parent relationship (which it argues is
12 not comparable to a 35% minority interest) but also on facts suggesting the parent controlled the
13 subsidiary and the acts were of a single “enterprise.” *Id.* at 1340-41. That the showing in *Troyk*
14 was based on a summary judgment record (including evidence not only of parental profit from the
15 unfair act but also direction, control, and coordination), demonstrates that whether restitution is
16 warranted under a particular fact pattern should be determined on a full evidentiary record at
17 summary judgment record or post-trial.

18 **c. Officers and Directors**

19 The Officer and Director Defendants make a number of arguments that restitution is
20 generally unavailable and more specifically that restitutionary or injunctive relief against each of
21 them is inappropriate.

22 The argument that plaintiffs are not entitled to restitution because plaintiffs do not allege
23 that they purchased anything from JLI directly or a “source likely to convey funds” to JLI is
24 unpersuasive, as discussed earlier. *See, e.g.*, Dkt. No. 751. The Officer and Director Defendants
25 more persuasively argue that restitution is not warranted because there are no allegations that any
26 of them personally obtained any money that is traceable or the result of the unfair practices
27 alleged. Plaintiffs respond by pointing to the well-established case law discussed above that
28 allows courts to consider restitution despite the indirect nature of the payments received by

1 defendants as a result of their UCL conduct. *See, e.g., People ex rel. Harris v. Sarpas*, 225 Cal.
 2 App. 4th 1539, 1563 (Cal. App. 4th Dist. 2014) (evidence showed two owners of closely held
 3 company drained money from the corporation and, as such, court could “exercise its equitable
 4 discretion to conclude USHA, Sarpas, and Nazarzai acted as a single enterprise for the purpose of
 5 ordering restitution under the UCL and the FAL.”). None of plaintiffs’ cases, however, stretch the
 6 concept of “indirect benefit” to Officers and Directors of large corporations as opposed to closely
 7 held ones. I have serious concerns whether restitution could be appropriate against these Officer
 8 and Director Defendants given the size of JLI, the number of officers and directors on its board,
 9 and that some aspect of JLI’s business was legitimate. Relatedly, each of the Officer and Director
 10 Defendants challenge whether injunctive relief is arguably available given his role as merely one
 11 of many Officers of JLI or one of many directors on the board of a large corporate entity.⁶⁸ In
 12 opposition, plaintiffs do not address or explain how injunctive relief is appropriate against an
 13 officer or director of a corporate entity, much less against a subset of officers or directors.

14 In the end, if plaintiffs are able to amend to state UCL claims against the Other Director
 15 Defendants, I will determine how far my “broad discretion” to award restitution or injunctive
 16 relief may stretch and what restitution should be awarded or conduct be enjoined. That is more
 17 appropriately addressed on a full evidentiary record, based on evidence regarding exactly how the
 18 Officer and Director Defendants were compensated and as a result of what guarantees, metrics or
 19 other compensation structures were in place.

20 JLI, Altria, Monsees, and Bowen’s motions to dismiss the California and UCL claims are
 21 DENIED. The Other Director Defendants’ motions to dismiss are granted with respect to the
 22 UCL claims and with leave to amend. Plaintiffs are also given leave to amend to allege why their
 23 remedies at law are inadequate and why they need to preserve their requests for equitable relief.

24 **D. CLRA**

25 JLI moves to dismiss the CLRA claim for failure to file the required affidavit under Cal.
 26

27 ⁶⁸ In their opposition to the Officer and Director Defendants’ motions plaintiffs clarify they do not
 28 seek injunctive relief against Huh or Monsees who are no longer associated with JLI or Altria.
 Oppo. to Officer and Directors at 17 n.7.

1 Civ. Code § 1780(d), failure to allege a specific “transaction” (none of the California plaintiffs
2 allege a direct purchase from JLI), and failure to allege sufficient allegations of acts of deceit and
3 cognizable damages under the CLRA. The first and third issues are easily resolved. Plaintiffs are
4 given leave to amend to include the venue affidavit required by section 1780(d). The analysis of
5 the acts of deceit and damages largely overlaps with plaintiffs’ allegations on their common-law
6 fraud claims, which survive.

7 As to the transaction required under section 1770(a),⁶⁹ “the CLRA does not require a direct
8 transaction between plaintiffs and defendants.” *Johnson v. Nissan N.A., Inc.*, 272 F. Supp. 3d
9 1168, 1183 (N.D. Cal. 2017). Notwithstanding this authority, JLI contends that at least an indirect
10 transaction is required “such as through an authorized retailer.” JLI CA Reply at 13. That
11 argument is not supported. *See, e.g., McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 186 (Cal.
12 App. 3d Dist. 2010) (noting “a cause of action under the CLRA may be established independent of
13 any contractual relationship between the parties,” and allowing CLRA claims based on purchases
14 from retailers as well as “purchases from [manufacturer], from home builders, or from individuals
15 selling their homes.”).

16 JLI’s motion to dismiss the CLRA claim is DENIED, except plaintiffs are given leave to
17 amend to include the venue affidavit.

18 **E. Unjust Enrichment**

19 Defendants argue that the unjust enrichment claim under California law fails because there
20 is no separate stand-alone unjust enrichment cause of action and plaintiffs have failed to plausibly
21 plead facts showing that unjust enrichment is an appropriate remedy against specific defendants.

22 On the first point, unjust enrichment may proceed as a stand-alone cause of action under
23 California law if “it states a claim for relief as an independent cause of action or as a quasi-
24 contract claim for restitution. To allege unjust enrichment as an independent cause of action, a
25 plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff’s

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27 ⁶⁹ “The following unfair methods of competition and unfair or deceptive acts or practices
28 undertaken by any person in a transaction intended to result or that results in the sale or lease of
goods or services to any consumer are unlawful” Cal. Civ. Code § 1770(a).

1 expense.” *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016); *see also*
 2 *Snarr v. Cento Fine Foods Inc.*, 19-CV-02627-HSG, 2019 WL 7050149, at *8 (N.D. Cal. Dec. 23,
 3 2019) (allowing plaintiffs’ stand-alone unjust enrichment claim to proceed based on false
 4 advertising allegations). Plaintiffs have adequately alleged their unjust enrichment claim against
 5 (at least) JLI. CAC ¶ 699 (“Defendants requested and received a measurable benefit at the
 6 expense of Plaintiffs and class members in the form of payment for JUUL products”), ¶ 701 (“It
 7 would be inequitable, unconscionable, and unjust for Defendants to be permitted to retain these
 8 benefits because the benefits were procured as a result of their wrongful conduct.”).

9 The Officer and Director Defendants argue that even if this claim can be stated as a
 10 separate claim, it must be dismissed because there no facts alleged supporting an unjust
 11 enrichment claim against *them*. Dkt. No. 748. As with the UCL restitution issue, if any of the
 12 claims asserted against the Officer and Director Defendants survive (as a matter of pleading or
 13 thereafter), what enrichment defendants received as a result of illegal or unfair conduct and
 14 whether it would be unjust for them to keep it is better determined on a full record showing the
 15 payment each Officer and Director Defendant received from JLI as a result of what guarantees,
 16 metrics, or other compensation structures.

17 **F. Other Claims/Subject Matter Jurisdiction for Putative Subclass Claims**

18 JLI and Altria also move to dismiss the CAC causes of action asserted on behalf of 25
 19 putative subclasses and the related claims of 58 class representatives for lack of subject matter
 20 jurisdiction. JLI MTD (Dkt. No. 629); Altria MTD (Dkt. No. 632) at 39. As I indicated in the
 21 Tentative Opinions (Dkt. No. 977), I will not reach this issue now. If the parties cannot resolve it
 22 through a meet and confer process, or through plaintiffs’ limited amendment to the CAC otherwise
 23 required by this Order, the subject matter jurisdiction arguments may be raised by separate motion.

24 Similarly, I will not reach the arguments raised by the Other Director Defendants on
 25 whether the CAC fails to allege facts supporting either the consumer protection or unjust
 26 enrichment claims against them under other state laws. Dkt. No. 748. To the extent that these
 27 issues are not resolved by the limited amendments to the CAC (and plaintiffs may, if they choose,
 28 amend the allegations on these other state law claims in conjunction with the limited leave to

1 amend granted herein), the parties shall propose a briefing schedule to resolve the separate
2 challenges, ensuring that these arguments concerning each state are sufficiently raised and argued
3 in a brief rather than through *a chart* attached to a brief.

4 **G. Personal Jurisdiction over the Other Director Defendants**

5 The Other Director Defendants question whether this court has personal jurisdiction over
6 each of them with respect to the California claims for cases filed in this jurisdiction pursuant to the
7 Direct Filed Order or for cases filed in other jurisdictions and transferred here by the Judicial
8 Panel.

9 Huh argues generally that the CAC fails to allege sufficient facts establishing specific
10 jurisdiction over him in California for the California claims under consideration. Dkt. No. 748.
11 As noted above, the UCL claims against Huh are dismissed with leave to amend. Assuming that
12 plaintiffs are able to amend to allege the UCL claim against him based on his own alleged actions
13 or directions to others to act in violation of the UCL, specific jurisdiction over Huh would likely
14 be satisfied. Huh’s personal acts necessarily occurred when he served on JLI’s board in
15 California. That is sufficient.

16 The Other Director Defendants also argue that the CAC fails to allege sufficient facts to
17 establish specific jurisdiction against them “outside” of California for cases that originated (or
18 absent the Direct Filed Order would have originated) in non-California courts. They contend that I
19 need to determine whether there are sufficient “acts” taken by each Other Director Defendant
20 connected to each non-California jurisdiction where an underlying action was or would have been
21 filed, despite the transfer to or direct-filing of cases in this court, and despite the California claims
22 based on their acts taken in California or acts taken through a corporate entity based in California.
23 In particular, these defendants contend that because the CAC fails to allege that the Other Director
24 Defendants had control over any state-specific advertising, it fails to establish personal jurisdiction
25 for the other jurisdictions.

26 As the UCL claim has not yet been plausibly alleged against the Other Director
27 Defendants, for now I will not reach this argument with respect to UCL claims asserted in the
28 underlying complaints filed in or that would have been filed in jurisdictions outside of California.

1 Assuming plaintiffs can amend to state the UCL claim against Huh, Valani, and Pritzker, the
 2 jurisdictional analysis would follow what is set out below with respect to the government entity
 3 complaints.

4 **V. MOTIONS TO DISMISS GOVERNMENT BELLWETHER COMPLAINTS**

5 JLI, Altria, and the Officer and Director Defendants separately move to dismiss the claims
 6 asserted against each of them in the PECs. I resolved the RICO claims above. I now address the
 7 remaining claims, including public nuisance, negligence, gross negligence and violations of New
 8 York and Florida consumer protection statutes. I also discuss the Officer and Director
 9 Defendants' additional motion to dismiss for lack of personal jurisdiction.

10 **A. Municipal Cost Recovery Rule**

11 JLI argues that the monetary damages the government entities seek for both their nuisance
 12 and negligence-based claims are not cognizable because the municipal cost recovery rule bars
 13 them from recovering the cost of providing educational or other public community services to
 14 their constituents.⁷⁰ The rule, sometimes called the "free public services doctrine," is a common-
 15 law doctrine holding that "the cost of public services for protection from fire or safety hazards is
 16 to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates
 17 the need for the service." *City of Flagstaff v. Atchison, Topeka & Santa Fe*, 719 F.2d 322, 323
 18 (9th Cir. 1983). The Ninth Circuit in *Flagstaff* observed, however, that "[r]ecovery has . . . been
 19 allowed where the acts of a private party create a public nuisance which the government seeks to
 20 abate." 719 F.2d at 324.

21 Decisions from the opioid multidistrict litigation before the Northern District of Ohio are
 22 instructive. There, multiple tribes and counties alleged misconduct by opioid manufacturers,
 23 distributors, and pharmacies that created and maintained an opioid epidemic. They sought
 24 "damages attributable to Defendants' misconduct, including the costs of emergency, law
 25 enforcement, and criminal justice services," as well as "the expenses incurred in responding to the
 26 opioid epidemic" that were "the consequence of long-term, continuing misconduct by the

27 _____
 28 ⁷⁰ It is unclear whether school districts are considered municipalities for purposes of applying this
 rule. For purposes of evaluating JLI's argument, I assume that the rule covers school districts.

1 Defendants.” *In re Nat’l Prescription Opiate Litig. – Muscogee (Creek) Nation*, 2019 WL
2 2468267, at *8 (N.D. Ohio Apr. 1, 2019), *report and recommendation adopted in part, rejected in*
3 *part*, 2019 WL 3737023 (N.D. Ohio Jun. 13, 2019); *see also In re Nat’l Prescription Opiate Litig.*
4 *– Summit County*, 2018 WL 4895856, at *10 (N.D. Ohio Oct. 5, 2018), *report and*
5 *recommendation adopted in part, rejected in part*, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018).

6 Judge Polster determined that the municipal cost recovery rule did not bar the tribes’ and
7 counties’ claims, noting, “The current trend among state court judges’ ruling in opioid-related
8 cases around the country is that the municipal cost recovery rule does not apply when, as alleged
9 here, an ongoing and persistent course of intentional misconduct creates an unprecedented, man-
10 made crisis that a governmental entity plaintiff could not have reasonably anticipated as part of its
11 normal operating budget for municipal, county, or in this case, tribal services.” 2019 WL
12 3737023, at *1.

13 Cases considering negligence and nuisance public entity claims asserted against firearm
14 manufacturers recognize similar distinctions and decline to apply the rule. In *Cincinnati v. Beretta*
15 *U.S.A. Corp.*, the Ohio Supreme Court allowed the city of Cincinnati to recover governmental
16 costs flowing from the gun manufacturers’ ongoing conduct of marketing, distributing, and selling
17 firearms in a manner that created an illegal secondary market for firearms. 95 Ohio St.3d 416, 428
18 (2002). “Unlike the train derailment that occurred in the *Flagstaff* case, which was a single,
19 discrete incident requiring a single emergency response,” the court found that misconduct alleged
20 by Cincinnati was “ongoing and persistent,” and that the “continuing nature of the misconduct
21 may justify the recoupment of such governmental costs.” *Id.* It also noted that the distinction
22 between single, discrete incidents and ongoing or persistent conduct is consistent with the public
23 nuisance exception expressly recognized in *Flagstaff*, “that recovery by a government entity is
24 allowed ‘where the acts of a private party create a public nuisance which the government seeks to
25 abate.’” *Id.* (quoting *Flagstaff*, 719 F.2d at 324).

26 JLI points to a case from the Illinois Supreme Court that declined to follow this analysis.
27 *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 430 (2004) (“We agree with defendants
28 that when the need for emergency services in response to an alleged nuisance is ongoing, the

1 municipal cost recovery rule is stronger, not weaker, because the legislature is better able to
2 consider need for cost-recovery legislation than in cases of sudden disaster.”). This single case is
3 unpersuasive in light of the numerous courts that have allowed these public entity claims to
4 proceed where private individuals’ intentional misconduct created the sort of ongoing and
5 persistent man-made crisis that could not have been reasonably anticipated. As plaintiffs correctly
6 point out, authority in each of the five states of the seven complaints being tested here have
7 recognized the “private party created” public nuisance exception from *Flagstaff*, and some of them
8 have also found that the municipal cost recovery rule does not apply to the kind of ongoing and
9 persistent misconduct alleged here.

10 For instance, in the opioid litigation in New York, multiple counties alleged that
11 defendants’ deceptive marketing campaign fueled an opioid crisis, “causing them to spend
12 millions of dollars in payments for opioid prescriptions for employees and Medicaid
13 beneficiaries,” and “forced them to pay the costs of implementing opioid treatment programs for
14 residents, purchasing prescriptions of naloxone to treat prescription opioid overdoses, combating
15 opioid-related criminal activities, and other such expenses arising from the crisis.” *In re Opioid*
16 *Litigation*, 2018 WL 3115102, at *2 (N.Y. Sup. Ct. Jun. 18, 2018). The court found that “a review
17 of the current state law revealed no case law supporting the manufacturer defendants’ contention
18 that such rule bars recovery for municipal expenses incurred, not by reason of an accident or an
19 emergency situation necessitating ‘the normal provision of police, fire and emergency services,’”
20 but to “remedy public harm caused by an intentional, persistent course of deceptive conduct.” *Id.*
21 at *10 (quoting *Flagstaff*, 719 F.2d at 324). It held that the municipal cost recovery doctrine did
22 not bar the New York counties’ claims, and that concluding otherwise “would distort the doctrine
23 beyond recognition.” *Id.*; see also *In re Nat’l Prescription Opiate Litig. – Broward County*, 2020
24 WL 1986589, at *6 (N.D. Ohio Apr. 27, 2020) (similarly concluding that “the Florida Supreme
25 Court would find the Municipal Cost Recovery Rule inapplicable to the present case”).

26 The government entities plausibly allege damages that are not a result of a single discrete
27 incident that a government entity can reasonably expect to incur; rather, they allege damages as a
28 result of an ongoing and persistent deceptive marketing campaign and intentional targeting of

1 youth that led to expenses that municipalities and school boards could not have reasonably
 2 anticipated to incur. JLI’s misconduct allegedly forced school districts to devote and divert
 3 resources to address the youth e-cigarette crisis and incur costs related to counseling, training,
 4 educating, or disciplining students, as well as increased costs for physical modifications to schools
 5 and disposing of hazardous waste. *See* TVC ¶¶ 597–609. Santa Cruz County and its public health
 6 departments also incurred unexpected expenses arising from the crisis, including education and
 7 prevention campaigns and the development of youth-tailored cessation programs. *See* Santa Cruz
 8 ¶¶ 601–22.

9 The municipal cost recovery rule does not bar the claims of the seven government entities
 10 whose complaints are being tested on these motions from recovering the monetary damages they
 11 seek for their public nuisance and negligence claims. JLI’s motion to dismiss on this basis is
 12 DENIED.⁷¹

13 **B. Public Nuisance**

14 The government entities allege that defendants have created a public nuisance by
 15 producing, promoting, distributing, and marketing JUUL products for underage use in their school
 16 districts and counties in violation of each state’s public nuisance law. JLI moves to dismiss the
 17 claims on grounds that the government entities should not be allowed to expand public nuisance
 18 law beyond its traditional boundaries and into product liability. It also attacks the sufficiency of
 19 the allegations regarding interference with a public right, control over the nuisance-causing
 20 instrumentality, and special injury. Altria and the Officer and Director Defendants move to
 21 dismiss the claims for failure to adequately plead their role in creating and maintaining the alleged
 22 nuisance.

23
 24
 25 ⁷¹ I note that even if the doctrine prevented the government entities from recovering damages
 26 incurred to combat the alleged youth e-cigarette crisis, “it would entail only a limit on the scope of
 27 damages that the [government entities] might recover” and not mandate dismissal of their entire
 28 public nuisance or negligence claims. *See Camden Cty. Bd. of Chosen Freeholders v. Beretta*
U.S.A. Corp., 123 F. Supp. 2d 245, 265 (D.N.J. 2000), *aff’d*, 273 F.3d 536 (3d Cir. 2001)
 (“Plaintiff’s request for injunctive and equitable relief would be unaffected by this doctrine.”).

1 **1. JLI**

2 **a. Product Liability Limitation**

3 As an initial matter, JLI argues that the public nuisance claims should be dismissed
4 because they are essentially product liability claims for economic damages under the guise of
5 nuisance law. It contends that public nuisance law should not be applied here because other
6 product-based torts, like negligent misrepresentation, are better suited to address the government
7 entities' allegations.

8 Contrary to JLI's assertions, "while Plaintiff's nuisance theory concerns a product, it does
9 not sound in products liability." *In re Nat'l Prescription Opiate Litig. – Muscogee (Creek)*
10 *Nation*, 2019 WL 2468267, at *29. The allegations here do not concern the JUUL product itself,
11 but rather the alleged consequence of JLI's conduct. Put differently, the public nuisance claims
12 are premised on JLI's aggressive promotion of JUUL to teens and efforts to create and maintain an
13 e-cigarette market based on youth sales, not on any alleged defect in JUUL products. This is not,
14 as JLI contends, an attempt to stretch nuisance law to allow claims against manufacturers of
15 allegedly dangerous products or based on failures to warn in the marketing of those products. The
16 public nuisance claims alleged here are not as novel as JLI characterizes them to be; similar claims
17 have been alleged in numerous opioid and gun manufacturer cases. *See, e.g., In re Nat'l*
18 *Prescription Opiate Litig. – Muscogee (Creek) Nation*, , 2019 WL 2468267, at *29 (drawing
19 distinction between a product liability claim alleging a negligence theory and claim alleging a non-
20 product liability theory of negligence); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1210–14 (9th Cir. 2003)
21 (concluding that "[c]ontrary to the dissent's mis-characterization of this case as a products liability
22 suit, this is an action that alleges negligence and public nuisance claims; it does not allege that the
23 guns in question were defectively designed or manufactured or that the defendants failed to affix
24 an adequate warning on the guns"; rather, the public nuisance claim "rest[ed] on the defendants'
25 actions in creating an illegal secondary market for guns," conduct that plaintiffs alleged
26 "unreasonably interfered with public safety and health").

27 JLI asserts that the government entities have not shown that the relevant states (Arizona,
28 California, Florida, Pennsylvania, and New York) recognize these kinds of public nuisance claims.

1 As discussed above, California plaintiffs have been allowed to bring public nuisance claims
2 against product manufacturers and distributors as long as their claims are not premised on product
3 liability theories. *See Ileto*, 349 F.3d at 1214.⁷² The Pennsylvania and Florida decisions that JLI
4 cites “are based on the alleged facts that differ materially” from those alleged here. *See In re Nat’l*
5 *Prescription Opiate Litig. – Muscogee (Creek) Nation*, 2019 WL 2468267, at *29 (distinguishing
6 *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 910–11 (E.D. Pa. 2000),
7 *aff’d*, 277 F.3d 415 (3d Cir. 2002) and *Penelas v. Arms Tech., Inc.*, No. 99-1941 CA-06, 1999 WL
8 1204353, at *4 (Fla. Cir. Ct. Dec. 13, 1999), *aff’d*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001)).

9 JLI cites *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91 (N.Y. App. Div.
10 2003) as an example of a New York court dismissing public nuisance claims that were improperly
11 disguised product liability claims. The allegations in that case also differ from the ones here. *See*
12 *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 389–91 (E.D.N.Y. 2004) (allowing public nuisance
13 claim against gun industry whose marketing and sales led to illegal secondary gun market;
14 analogizing to Ninth Circuit’s reasoning *Ileto* and distinguishing *Spitzer* on grounds that it
15 dismissed public nuisance claims because of intervening acts of criminals using guns “but
16 specifically not[ed] facts which, if alleged, might be sufficient to state a cause of action for public
17 nuisance against members of the firearms industry”).

18 JLI points out that no Arizona court has recognized a nuisance cause of action against a
19

20 ⁷² JLI’s argument that I should not follow the Ninth Circuit’s decision in *Ileto* is unconvincing.
21 The two California Court of Appeal decisions it cites only differentiated the facts at issue in *Ileto*;
22 they did not outright reject its reasoning. In *In re Firearm Cases*, 126 Cal. App. 4th 959, 990
23 (2005), the court noted that the Ninth Circuit in *Ileto* was reviewing the grant of a motion under
24 Rule 12(b)(6), whereas “[t]his case had progressed beyond the pleadings stage.” It also
25 distinguished *Ileto* on grounds that the “negligence and nuisance theories advanced *Ileto* were
26 based on two contentions: (1) the defendants negligently created an illegal secondary market for
27 guns by selling more guns than legal purchasers can buy; and (2) the defendants thereby
28 developed distribution channels they knew would regularly provide guns to criminals.” *Id.* It
concluded that “[e]ven if [it] were to accept the *Ileto* court’s interpretation of what our Supreme
Court may decide when faced with this issue, the conclusions in that case (aside from the need to
show causation) are not applicable here, where there is no evidence of either of the contentions
underlying the causes of actions in *Ileto*.” *Id.*

Similarly, the California Court of Appeal in *City of Modesto Redevelopment Agency v. Superior Court* did not reject *Ileto*, but distinguished it. 119 Cal. App. 4th 28, 39 n.8 (Jun. 28, 2004) (“In any event, the theory in those cases was *not* that the products were defective or that the defendants failed to warn of their dangers.”) (emphasis added).

1 manufacturer of a consumer product based on sale, marketing, or distribution of that product. That
 2 is not reason enough to conclude that Arizona courts would not recognize the kind of public
 3 nuisance claims alleged here. *See In re Nat'l Prescription Opiate Litig. – Muscogee (Creek)*
 4 *Nation*, 2019 WL 2468267, at *29 (rejecting similar argument that no Oklahoma Supreme Court
 5 precedent has affirmed the viability of the kind of public nuisance claim alleged based on the case
 6 law discussed above).

7 The government entities' public nuisance claims do not stretch into product liability law.
 8 JLI's motion to dismiss on this ground is DENIED.

9 **b. Interference With A Public Right**

10 A public nuisance is generally defined as “an unreasonable interference with a right
 11 common to the general public.” Restatement (Second) of Torts § 821B (1979). This formulation
 12 of public nuisance has been adopted by courts in Arizona, New York, and Pennsylvania; Florida
 13 and California courts have applied similar principles.⁷³ Conduct that may constitute an
 14 “unreasonable interference with a right common to the general public” includes conduct “that
 15 involves a significant interference with the public health.” Restatement (Second) of Torts § 821B.
 16 Public nuisance law in each of the jurisdictions at issue here prohibits conduct that interferes with
 17 public health.⁷⁴

18 _____
 19 ⁷³ *See Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*, 148 Ariz. 1, 4
 20 (1985) (quoting section 821B for the definition of a public nuisance); *Wheeler v. Lebanon Valley*
 21 *Auto Racing Corp.*, 755 N.Y.S.2d 763 (2003) (same in New York); *Machipongo Land & Coal Co.*
 22 *v. Com.*, 569 Pa. 3, 40 (2002) (same in Pennsylvania); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th
 1090, 1104 (1997) (comparing section 821B definition to California common law and Cal. Civ.
 Code § 3479); *Thompson v. State*, 392 So.2d 1317, 1318 (Fla. 1981) (defining a public nuisance as
 a violation of public rights or an inconvenience to the public generally).

23 ⁷⁴ *See Citizens for Odor Nuisance Abatement v. City of San Diego*, 8 Cal. App. 5th 350, 358
 24 (2017) (defining nuisance as including “[a]nything which is injurious to health . . . or is indecent
 25 or offensive to the senses” and noting that “public nuisances at common law are offenses against,
 26 or interferences with, the exercise of rights common to the public, such as public health”) (quoting
 27 Cal. Civ. Code § 3479); *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001) (“[A] public
 28 nuisance may be classified as something that causes ‘any annoyance to the community or harm to
 public health.’”) (citation omitted); *Com. ex rel. Preate v. Danny’s New Adam & Eve Bookstore*,
 155 Pa. Cmwlth. 281, 285 (1993) (“One set of circumstances which support a conclusion that an
 interference with a public right is unreasonable is whether the conduct in question poses a
 significant threat to the public health.”) (citation omitted); *Armory Park Neighborhood Ass'n*, 148
 Ariz. at 10 (“[C]onduct which unreasonably and significantly interferes with the public health,
 safety, peace, comfort or convenience is a public nuisance within the concept of tort law.”); 532

1 The government entities sufficiently allege that JLI substantially interfered with public
2 health, impacting their school districts and communities.⁷⁵ JLI misconstrues these allegations as
3 flowing through the individual right to be free from alleged defective products or alleged
4 deceptive marketing. A New York court in an opioids case rejected the same argument:

5 As for the manufacturer defendants’ claim that the plaintiffs have
6 failed to plead substantial interference with a public right, it suffices
7 to note the defendants’ failure to establish why public health is not a
8 right common to the general public, nor why such continuing,
9 deceptive conduct as alleged would not amount to interference; it can
scarcely be disputed, moreover, that the conduct at the heart of this
litigation, alleged to have created or contributed to a crisis of epidemic
proportions, has affected a considerable number of persons.

10 *In re Opioid Litigation*, 2018 WL 3115102, at *22 (internal quotation marks and citation omitted).

11 JLI further mischaracterizes the allegations here as simply a “tallying” of alleged
12 individual injuries based on a significant number of people in the school districts or communities
13 being affected in a similar way. The government entity complaints adequately describe a public
14 health crisis of youth e-cigarette use and wholesale addiction of kids to nicotine. I must accept
15 these factual allegations as true at this stage.

16 JLI’s motion to dismiss the public nuisance claims for failure to plead an interference with
17 a public right is DENIED.

18 **c. Control Over Instrumentality**

19 JLI argues that the government entity complaints from Arizona, Florida, New York, and
20 Pennsylvania fail because there is no allegation that JLI controlled the instrumentality that caused
21 the nuisance. A review of the case law reveals that control is a required element for public
22 nuisance claims in Pennsylvania and Florida. The parties’ briefs do not address whether the same

23 _____
24 *Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292 (2001) (“A public
25 nuisance exists for conduct that amounts to a substantial interference with the exercise of a
26 common right of the public, thereby offending public morals, interfering with the use by the public
of a public place or endangering or injuring the property, health, safety or comfort of a
considerable number of persons.”).

27 ⁷⁵ JLI points out that the government entities allege interferences with “public health, safety and
28 the right to a public education,” TVC ¶ 631, but in their opposition, the government entities only
focus on the interference with public health and safety. *Oppo. to JLI & Altria Motions to
Dismiss* [Dkt. No. 817]11–14.

1 is true in New York and Arizona. But assuming that control is a requirement in New York and
2 Arizona, plaintiffs have sufficiently alleged it for each of the four jurisdictions.⁷⁶

3 JLI's contention that the government entities have not alleged that it controlled the JUUL
4 product as of the time the alleged nuisance occurred, as discussed above, "rest[s] upon a false
5 premise that the instrumentality of the nuisance is the [JUUL product itself]." *In re Nat'l*
6 *Prescription Opiate Litig. – Muscogee (Creek) Nation*, 2019 WL 2468267, at *30. The
7 government entity complaints include plausible allegations that JLI had control over the conduct
8 that created and maintained the youth e-cigarette crisis, such as directly and intentionally
9 marketing to youth, distributing free samples to young audiences, presenting misleading
10 information to students in schools, and preserving the availability of the popular mint flavor while
11 ostensibly removing "kid-friendly" flavors from the market. These allegations match the type of
12 public nuisance allegations that have proceeded past the pleadings stage in cases addressing
13 opioids and firearms. *See, e.g., In re Nat'l Prescription Opiate Litig. – West Boca Medical*
14 *Center*, 2020 WL 1669655, at *18 (N.D. Ohio Apr. 3, 2020) ("Defendants had control over the
15 instrumentality of the nuisance by virtue of their control over their own opioid marketing,
16 distribution, or dispensing practices."); *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d at 420
17 ("[I]t is not fatal to appellant's public nuisance claim that appellees did not control the actual
18 firearms at the moment that harm occurred," where complaint alleged that appellees "created a
19 nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a
20 manner that facilitated their flow into the illegal market"; thus the City alleged that the
21 manufacturers "control the creation and supply of this illegal, secondary market for firearms, not
22 the actual use of the firearms that cause injury").

23 At the pleading stage, I accept plaintiffs' allegations regarding JLI's level of control. *In re*
24 *Nat'l Prescription Opiate Litig. – Muscogee (Creek) Nation*, 2019 WL 2468267, at *30.

25
26 ⁷⁶ There is no control requirement under California public nuisance law. The California Court of
27 Appeal has clearly found that "[I]ability for nuisance does not hinge on whether the defendant
28 owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance;
the critical question is whether the defendant *created or assisted in the creation of the nuisance.*"
People v. ConAgra Grocery Prod. Co., 17 Cal. App. 5th 51, 109 (2017) (internal quotation marks
and citation omitted) (emphasis in original).

1 (“Whether a defendant had a requisite level of control raises questions of fact inappropriate for
2 resolution on a motion to dismiss.”). JLI’s motion to dismiss the public nuisance claims for
3 failure to plead control over the instrumentality is DENIED.

4 **d. Special Injury**

5 A plaintiff cannot recover pecuniary losses resulting from a public nuisance unless it has
6 suffered damages “different [in] kind from that suffered by the general public.” Restatement
7 (Second) of Torts § 821C. If the pecuniary loss “is common to an entire community and the
8 plaintiff suffers it only in a greater degree than others, it is not a different kind of harm and the
9 plaintiff cannot recover for the invasion of the public right.” *Id.* JLI argues that the government
10 entities’ public nuisance claims fail for the independent reason that they have not alleged an injury
11 that is cognizable through a public nuisance claim for damages.

12 The school districts provide sufficient detail in their complaints about the kinds of harms
13 caused by JLI’s conduct that is unique to schools and different in kind from that suffered by the
14 general public in their community. *See* TVC ¶¶ 597–608 (to combat widespread youth vaping, the
15 school districts had to take numerous actions, such as diverting limited resources to combat the
16 problem, creating resources and education materials, installing e-cigarette detectors and cameras
17 to discourage and detect e-cigarette use, and managing hazardous waste problem due to improper
18 disposal of e-cigarette devices and pods on school grounds). They adequately allege that JLI’s
19 conduct—including a targeted marketing campaign on social media, flavored products such as
20 mango and mint, and other actions targeting school-age youth—created and maintained an illicit
21 youth market of school-age youth addicted to nicotine, causing extreme disruption in classrooms
22 and unique harm to schools that is different in kind than the community at large.

23 Similar allegations have passed the pleadings stage in opioid cases. *See, e.g., In re Nat’l*
24 *Prescription Opiate Litig. – West Boca*, 2020 WL 1669655, at *17 (hospital plausibly pleaded
25 concrete economic losses differing in kind from the generalized injury to health suffered by the
26 general public, including “increased operational costs” to train hospital staff, provide diagnostic
27 tools to identify “pill-seekers”, and hire additional personnel to help them keep their opioids
28 secure).

1 Santa Cruz County also sufficiently pleads a special injury for its non-representative public
 2 nuisance claim.⁷⁷ It alleges that it plays a unique role as the entity required to protect the public
 3 health of its community, a responsibility not shared by the general public or even other
 4 unspecified agencies, and therefore conduct that impacts the public health of the County injures
 5 the County in a different way from the general public within the County. *See* Santa Cruz ¶¶ 602–
 6 13 (public health staff spent significant time and resources addressing youth e-cigarette use,
 7 including developing and disseminating educational campaigns). These factual allegations, taken
 8 as true, provide at least some basis for special injury that allows Santa Cruz County’s non-
 9 representative public nuisance claim to survive the pleadings stage. JLI does not provide any
 10 authority to support the broad assertion that claims brought by a county are by definition incapable
 11 of being special injuries.

12 JLI’s motion to dismiss the public nuisance claims for failure to plead a special injury is
 13 DENIED.

14 2. Altria

15 Altria separately contends that the government entities fail to allege sufficient facts
 16 regarding the role that it played in creating or maintaining the alleged nuisance. I disagree.
 17 Drawing inferences in their favor, the government entity complaints include allegations that make
 18 Altria’s participation plausible.

19 The government entities claim that JLI benefitted from Altria’s expertise in designing and
 20 marketing addictive products, and in thwarting regulation. TVC ¶ 9. Although Altria argues that
 21 its involvement with JLI began in December 2018, with its official investment in JLI, the
 22 complaints allege that the companies began coordinating their marketing efforts to expand the
 23 youth vaping marketing as early as Spring 2017 by sharing information and coordinating public
 24

25
 26 ⁷⁷ JLI concedes that Santa Cruz County is statutorily authorized to bring a representative public
 27 nuisance claim without showing special injury, and therefore challenges only the non-
 28 representative claim. *See* Santa Cruz ¶¶ 627–47 (Count One representative public nuisance claim
 brought on behalf of the People of the State of California); *id.* ¶¶ 648–69 (Count Two non-
 representative public nuisance claim).

1 marketing activities. *Id.* ¶¶ 9, 46–48, 54.⁷⁸

2 A key aspect of this early coordination was Altria’s acquisition of shelf space in 2018 “that
3 it would later provide to JLI to sustain the exponential growth of underage users of JUUL
4 products.” *Id.* ¶ 471. This ensured that, “even after public and regulatory scrutiny forced JLI to
5 stop its youth-oriented advertising, JUUL products would still be placed where kids are most
6 likely to see them—next to Marlboros, the most iconic, popular brand of cigarettes among
7 underage users—in a location they are most likely to buy them—retail establishments.” *Id.* ¶ 475.

8 Altria also utilized its lobbying muscle to maintain the youth vaping market. Both before
9 and after gaining a share of JLI, the government entities allege that Altria used its lobbying power
10 to keep mint, a popular flavor with youth, on the market for as long as possible. *Id.* ¶¶ 519–50.
11 Following investment in JLI, two key Altria executives became JLI’s CEO and head of regulatory
12 affairs and Altria agreed to assist JLI with “direct marketing; sales, distribution, and fixture
13 services; and regulatory affairs” and committed to applying “its logistics and distribution
14 experience to help JLI expand its reach and efficiency.” *Id.* ¶¶ 482, 487.

15 In addition, the government entities allege that Altria actively participated in the
16 misleading “Make the Switch” campaign, even though it knew that JUUL was not a product used
17 mostly by adults to switch but, rather, was a product widely used by youth and nicotine naïve
18 individuals. *Id.* ¶ 245. The campaign allegedly sought to convince the public that JUUL products
19 were never marketed to youth and were instead intended as smoking cessation devices, a cover-up
20 that allowed the youth e-cigarette crisis to continue and grow. *Id.* ¶¶ 582–92, 621.

21 These allegations, considered together, plausibly allege that Altria engaged in conduct
22 which created, maintained and/or contributed to the purported nuisance.⁷⁹ Altria’s attempt to

23

24 ⁷⁸ Altria requests judicial notice of Plaintiff Facts Sheets (PFSs) submitted by individual plaintiffs
25 in this litigation to show that most individuals allege that they began using JUUL products before
26 December 2018, when Altria purchased a 35% stake in JLI. Dkt. No. 739, Ex. 1. As noted above,
27 Altria’s request for judicial notice is DENIED. Even if I considered this exhibit, it would not alter
28 my analysis. The PFSs are relevant only to individual plaintiffs asserting personal injury claims
and are irrelevant as to the government entity plaintiffs. The government entities’ claims are
based on harms the entities experienced as a result of the public health crisis of escalating youth e-
cigarette use and are not derivative of harms to these individual plaintiffs.

⁷⁹ This conclusion is not in conflict with the conclusion that the RICO claim has not been

1 factually dispute these allegations is inappropriate at the pleading stage.

2 Altria’s motion to dismiss the public nuisance claims is DENIED.

3 **3. Officer and Director Defendants**

4 The Officer and Director Defendants move to dismiss the public nuisance claims against
5 them on grounds that the government entities have failed to allege their roles in creating and
6 maintaining the public nuisance of the youth vaping epidemic. The government entities respond
7 that the allegations are sufficient to establish each of the Officer and Director Defendants’
8 personal roles in the conduct, not by virtue of their status as JLI officers or directors, but because
9 each of them authorized, directed, or participated in creating and maintaining the public nuisance.

10 “A corporate officer or director is, in general, personally liable for all torts which he
11 authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the
12 corporation and not on his own behalf.” *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d
13 1001, 1021 (9th Cir. 1985) (citation omitted); *State of New York v. Shore Realty Corp.*, 759 F.2d
14 1032, 1053 (2d Cir. 1985 (holding an individual defendant personally liable for public nuisance
15 without piercing the corporate veil). The government entities cite multiple examples that show
16 that each state at issue on these motions has applied a similar individual liability theory⁸⁰ and has
17 recognized individual liability for a public nuisance tort in particular.⁸¹

18 _____
19 adequately pleaded against Altria. Allegations of Altria’s coordination with JLI and its own acts
20 undertaken to support JLI’s continued sales to youth are sufficient for the nuisance, negligence,
21 and consumer protection claims, but those allegations do not – without more – plausibly support
22 that Altria joined an existing Enterprise that was distinct from JLI’s regular business and
23 undertook conduct in support of that distinct Enterprise.

24 ⁸⁰ See *Marlyn Nutraceuticals, Inc. v. Improvita Health Prods.*, 663 F. Supp. 2d 841, 847 (D. Ariz. 2009); *Frances T. v. Vill. Green Owners Ass’n*, 42 Cal.3d 490, 508 (1986); *White v. Wal-Mart Stores, Inc.*, 918 So.2d 357, 358 (Fla. Dist. Ct. App. 2005); *Kopec v. Hempstead Gardens, Inc.*, 696 N.Y.S.2d 53, 55 (N.Y. App. Div. 1999); *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 621–22 (1983).

25 ⁸¹ See *Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Min. & Equip. Contractors Co.*, 145
26 Ariz. 204, 211 (Ct. App. 1985) (denying summary judgment on individual liability of corporate
27 officers for negligence and nuisance claims because fact issues remain “as to the extent of the
28 [individual defendants’] involvement with the torts”); *People v. Pac. Landmark, LLC*, 129 Cal.
App. 4th 1203, 1216 (2005) (applying this rule to affirm a preliminary injunction against a
corporate officer “because of his personal involvement in allowing the nuisance to persist”);
Kopec, 696 N.Y.S.2d at 55 (affirming denial of motion for summary judgment on nuisance claim
under New York law because “[c]orporate officers may be held personally liable for torts

1 Before turning to the sufficiency of the allegations, I address the legal argument raised by
2 some of the Officer and Director Defendants. They argue that although corporate officers can be
3 held personally liable for torts, there is no reason to believe that state courts would expand public
4 nuisance where abatement is impossible, given that an individual officer has no authority to take
5 action either on behalf of the corporation without the consent of the board of directors or when an
6 individual officer is no longer employed by the corporation.

7 The jurisdictions at issue here generally follow the Restatement (Second) of Torts §
8 821B's definition of public nuisance. The Restatement specifies that a person who substantially
9 participates in creating a nuisance condition remains subject to liability "even though he is no
10 longer in a position to abate the condition and stop the harm." Restatement (Second) of Torts §
11 834 comment e, at 150–51. Relying on this reasoning, the court in *Commonwealth v. Purdue*
12 *Pharma, L.P.*, 2019 WL 5495716, at *4 (Mass. Super. Oct. 8, 2019) rejected the argument of an
13 individual director of a pharmaceutical company that the public nuisance claims against him
14 should fail because he had "long since left [the company]." The court found that "although [it]
15 need not determine on a motion to dismiss precisely what relief the Commonwealth would be
16 entitled to receive, [it] would note that an abatement order in a public nuisance case could include
17 a requirement that the defendants expend the money necessary to abate the nuisance." *Id.* at *5.

18 That is precisely the relief the government entities seek here – equitable relief to fund
19 prevention education and addiction treatment. If liable, individual Officer and Director

20 _____
21 committed in the performance of their corporate duties"); *Kaites v. Com. of Pa., Dep't of Envtl.*
22 *Res.*, 108 Pa. Cmwth. 267, 276 (1987) (holding corporate officers may be personally liable but
23 finding "lack of sufficient evidence demonstrating that [individual defendant] has contributed, by
24 personal actions of neglect or misconduct, to the existing nuisance at the Bear Run complex").

25 Although the government entities were unable to point to a Florida case that has squarely
26 recognized individual liability for public nuisance, the case law suggests that Florida law is similar
27 to that in other jurisdictions that have allowed it. *See White*, 918 So.2d at 358 (plaintiff
28 sufficiently stated a negligence claim against store manager individually, where the complaint
"allege[d] more than mere technical or vicarious fault—it allege[d] that [the store manager] was
directly responsible for carrying out certain responsibilities; that he negligently failed to do so; and
that, as a result, [plaintiff] was injured"). Some cases suggest that under certain circumstances,
individuals can be sued for public nuisance. *See, e.g., Health Clubs, Inc. v. State ex rel. Eagan*,
377 So.2d 28, 30 (Fla. Dist. Ct. App. 1979) (discussing final judgment against operators of health
club to abate a public nuisance); *Health Clubs of Jacksonville, Inc. v. State ex rel. Austin*, 381
So.2d 1174 (Fla. Dist. Ct. App. 1980) (same).

1 Defendants would contribute to the abatement fund, which would be used to support various
 2 measures to address the youth vaping epidemic. An abatement fund is “not a ‘thinly-disguised’
 3 damages award”, but rather an equitable remedy designed to eliminate the nuisance. *See People v.*
 4 *ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 132 (2017) (“An abatement order is an
 5 equitable remedy, while damages are a legal remedy” and “[a]n equitable remedy’s sole purpose is
 6 to eliminate the hazard that is causing prospective harm to the plaintiff.”). Therefore, even if the
 7 government entities cannot seek injunctive relief from the Officer and Director Defendants, they
 8 can seek equitable relief in the form of an abatement fund.

9 The factual allegations concerning Monsees and Bowen’s conduct are sufficient at this
 10 stage. The government entity complaints allege that Monsees played a key role in directing JLI’s
 11 youth marketing, leading to the public health crisis at issue. Monsees admitted that he and Bowen
 12 “carefully studied the marketing strategies, advertisements, and product design revealed in
 13 cigarette industry documents that were uncovered through litigation,” describing how these
 14 companies marketed cigarettes to youth. TVC ¶¶ 68, 298–99. Monsees knew well before launch
 15 that JUUL would be attractive to youth, because in October 2014, he received results from a study
 16 of a JUUL prototype that revealed that although JUUL was “too much” for smokers, “the younger
 17 group” liked JUUL, and JUUL “might manage to make smoking cool again.” *Id.* ¶¶ 121–24.

18 In particular, Monsees set the focus on marketing to the “cool kids” and “personally
 19 reviewed images” from JLI’s “Vaporized” campaign. *Id.* ¶¶ 306, 318. “[H]e and other in the
 20 company were well aware’ that the marketing campaign ‘could appeal to’ teenagers.” *Id.* ¶ 318
 21 (quoting *New York Times* article). He also “provided specific direction on the content of the
 22 website to JLI employees.” *Id.* ¶ 370. In early July 2015, he spoke to Alexander Asseily, a JLI
 23 Director, “at length” about JLI’s marketing approach, but JLI continued to market its products to
 24 youth for years to come. *Id.* at ¶ 371.

25 The government entity complaints allege that Bowen played a large role in developing and
 26 designing the JUUL product to appeal to young users and sustain their addiction to nicotine.
 27 TVC ¶¶ 5, 98–125. He helped create a product that had features attractive to youth that was also
 28 easy to use. He personally participated in “buzz” experiments and products tests, and worked to

1 “minimize ‘throat hit’ and maximize ‘buzz’” of JUUL e-cigarettes, recognizing that
2 “[d]ramatically reducing the throat hit is not necessary for a product that is aimed at smokers,” but
3 “very effectively appeals to nonsmokers, especially youth.” *Id.* ¶¶ 103–110. He also participated
4 in studies that revealed the high amount of nicotine in prototype JUUL products and helped
5 designed the product “to deliver nicotine in larger amounts and at a faster rate than even
6 cigarettes.” *Id.* ¶¶ 110–125, 248.

7 The allegations against Pritzker, Valani, and Huh, however, are not as detailed and are not
8 sufficient. The government entities allege that Pritzker, Valani, and Huh formed an Executive
9 Committee in October 2015 and took “charge of fraudulently marketing JUUL products, including
10 to youth.” *Id.* ¶ 385. Pritzker admitted that JUUL’s branding “feels too young” and discussed the
11 JUUL approach “at length” with Valani and Board member Asseily in July 2015. *Id.* ¶ 371.
12 Asseily also sent Pritzker and Valani a follow-up email expressing his concerns about the JUUL
13 marketing strategies. *Id.* The PECs allege that “[e]ven though the directors and executives of JLI
14 knew—and explicitly stated—that what they were doing was wrong, JLI pressed ahead with its
15 youth-oriented Vaporized ad campaign through early 2016.” *Id.* ¶ 373.

16 The government entities also allege that Pritzker, Huh, and Valani through their position
17 on the JLI Board of Directors were responsible for continuing to market flavors to youth,
18 particularly mint, because they had “final say” over all of JLI’s marketing activities and
19 effectively “controlled the messaging around JUUL products.” *Id.* ¶¶ 185–86, 377. But as noted
20 above, the “final say” and “control” allegations are not sufficient for the claims asserted against
21 the Other Director Defendants for the claims in the CAC and are not sufficient for the nuisance
22 claim under the PEC.

23 The other allegations similarly do not establish that Pritzker, Huh, and Valani authorized,
24 directed, or participated in conduct that contributed to the youth e-cigarette crisis. While the
25 government entities allege that the Other Director Defendants knew about the youth-targeting
26 marketing, they do not specifically allege conduct in which the Other Director Defendants
27 personally directed, controlled, or participated. Vague allegations about exercising “final say”
28 over marketing decisions do not suffice without any specificity concerning what those decisions

1 were and how they were connected to youth-targeting in particular.

2 The allegations in the government entity complaints are sufficient to satisfy the
3 requirements under Rule 12(b)(6) that Monsees and Bowen personally participated in wrongdoing
4 that created and maintained the nuisance. The allegations are insufficient regarding the roles
5 Pritzker, Huh, and Valani played. Accordingly, Monsees and Bowens' motions to dismiss the
6 public nuisance claims are DENIED. Huh, Valani, and Pritzker's motion to dismiss the public
7 nuisance claims is GRANTED with leave to amend.

8 **C. Negligence**

9 The school districts bring claims for negligence and gross negligence. JLI challenges the
10 duty element and argues that the economic loss doctrine also bars the school districts from seeking
11 recovery. Altria and the Officer and Director Directors challenge the sufficiency of the allegations
12 with respect to duty and breach.⁸²

13 **1. JLI**

14 **a. Duty**

15 Duty is an "obligation, recognized by law, which requires the defendant to conform to a
16 particular standard of conduct in order to protect others against unreasonable risks of harm." *Delci*
17 *v. Gutierrez Trucking Co.*, 229 Ariz. 333, 335 (Ct. App. 2012) (citation omitted). In each of the
18 relevant jurisdictions, public policy factors govern whether a defendant owes a duty of care. Some
19 jurisdictions give more weight to the foreseeability of harm than others. I address duty under
20 each jurisdiction in turn.

21 _____
22 ⁸² I briefly address the gross negligence claims here. JLI does not challenge the sufficiency of the
23 gross negligence claims, but argues that some of the gross negligence claims should be dismissed
24 because California and Pennsylvania law do not permit standalone gross negligence claims
25 separate from negligence claims. Altria raises the same argument as to the remaining gross
26 negligence claims under Arizona, Florida and New York law, and also challenges the sufficiency
27 of the school districts' allegations.

28 A review of the case law reveals that at least some courts in the relevant jurisdictions consider
gross negligence as a degree of negligence and not a separate cause of action. The gross
negligence claims are therefore deemed subsumed in the school districts' negligence claims. To
the extent that Altria challenges the sufficiency of the school districts' gross negligence
allegations, whether Altria's conduct "constituted an extreme departure from the ordinary standard
of conduct" and "were a cause of [the school districts'] injuries" are "questions of fact" not
resolved at this stage. *Rosencrans v. Dover Images, Ltd.*, 192 Cal. App. 4th 1072, 1088 (2011).

1 In California, courts consider the following factors in determining whether a defendant
2 owes a duty of care:

3 (1) the extent to which the transaction was intended to affect the
4 plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree
5 of certainty that the plaintiff suffered injury, (4) the closeness of the
6 connection between the defendant’s conduct and the injury suffered,
7 (5) the moral blame attached to the defendant’s conduct and (6) the
8 policy of preventing future harm.

9 *J’Aire Corp. v. Gregory*, 24 Cal.3d 799, 804 (1979) (citing *Biakanja v. Irving*, 49 Cal.2d 647, 650
10 (1958)) (hereinafter the “*Biakanja* factors”). “[F]oreseeability of the risk is a primary
11 consideration in establishing the element of duty.” *Id.* at 806 (citation omitted).

12 The school districts allege that JLI created a product that had features to intentionally
13 appeal to young users (*e.g.*, flavors and easily disguisable), marketed it directly to youth using
14 social media, young attractive models, websites and networks frequented by teens, and even
15 marketed it directly in school through deceptive “education programs” that taught students how to
16 use JUUL and told them it was safe. *See, e.g.*, TVC ¶¶ 74–75, 111–18, 143-51, 161, 219–23, 303–
17 05, 315–19, 325–27, 336–43, 361–62, 441–45. This alleged conduct hooked millions of teenagers
18 onto vaping with an addictive product that is easily concealed in schools, and foreseeably caused a
19 multitude of problems for the school districts, including, but not limited to, the need to devote
20 substantial staff time to addressing the crisis, financial costs from new equipment to detect e-
21 cigarette use, and handling hazardous waste on school grounds. *Id.* at ¶¶ 597–609.

22 These allegations sufficiently plead that JLI’s actions in marketing JUUL directly to teens
23 placed the school districts in the “foreseeable zone of risk.” Applying the *Biakanja* factors, the
24 school districts adequately allege that: (1) JLI’s scheme was intended to “affect” school children,
25 which necessarily caused harm on school district property; (2) the harm was foreseeable, as
26 discussed above; (3) the certainty of their injuries must be accepted as true at this stage; (4) there
27 is a close connection between JLI’s conduct that created the youth vaping market and the harms
28 suffered by the school districts; (5) there is strong “moral blame” attached to JLI’s conduct in
targeting school children with a dangerous product; and (6) there is also a strong policy in favor of
preventing future harm and curbing teen vaping. *See Iletto*, 349 F.3d at 1197 (policy factors
weighed in favor of imposed legal duty on gun manufacturer, where shooting victims sufficiently

1 alleged that manufacturer created an illegal secondary market for guns that exposed them to an
2 unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser).

3 In Florida, “[t]he touchstone for determining whether a duty exists is foreseeability.”
4 *Sewell v. Racetrac Petroleum, Inc.*, 245 So.3d 822, 825 (Fla. Dist. Ct. App. 2017) (internal
5 quotation marks and citation omitted). Where a person’s conduct is such that it creates a
6 “‘foreseeable zone of risk’ posing a general threat of harm to others, a legal duty will ordinarily be
7 recognized to ensure that the underlying threatening conduct is carried out reasonably.” *Id.*
8 The Florida Supreme Court has identified four sources that help determine whether a duty arises.
9 As relevant here, the school districts rely on the “general facts of the case” as the source for JLI’s
10 common-law duty. *McCain v. Fla. Power Corp.*, 593 So.2d 500, 503 n.2 (Fla. 1992)

11 The school districts’ allegations here are analogous to the foreseeable harms at issue in the
12 opioid multidistrict litigation. For example, West Boca Medical Center brought claims as a non-
13 user of a product that suffered substantial harms due to a public health crisis caused by the
14 defendants in the form of treating patients with minimal or no compensation and additional
15 operational costs to combat the crisis. *See In re Nat’l Prescription Opiate Litig. – West Boca*
16 *Medical Center*, 2020 WL 1669655, at *4–5. It asserted that “its injuries were within the
17 ‘foreseeable zone of risk’ created by Defendants’ manufacturing, distributing, and dispensing
18 activities, because: (a) if not conducted with a requisite level of care, these activities could (and, in
19 fact, did) foreseeably allow opioids to be diverted in large quantities into West Boca’s service
20 area; (b) this diversion could (and, in fact, did) foreseeably lead to widespread injury to people’s
21 health, creating a public health crisis; and (c) hospitals are necessarily and foreseeably on the
22 “front lines” of any and all health crises.” *Id.* at *28.

23 Applying Florida law and accepting the allegations as true at the motion to dismiss stage,
24 Judge Polster concluded that West Boca sufficiently pleaded a duty of care because its “asserted
25 injuries plausibly fall within the foreseeable zone of risk created by Defendants’ manufacturing,
26 distributing, and dispensing activities related to opioid drugs.” *Id.*; *see also In re Nat’l*
27 *Prescription Opiate Litig. – Broward County*, 2020 WL 1986589, at *9 (concluding Broward
28 County sufficiently alleged a claim of common law negligence under Florida law for the same

1 reasons stated in *West Boca*, where the County alleged that the opioid crisis forced it to incur
2 substantial costs in order to protect the health and welfare of its community); *In re Nat'l*
3 *Prescription Opiate Litig. – Summit County*, 2018 WL 6628898, at *18; *id.* at *19 (“It is also
4 foreseeable that local governments will be responsible for combatting the creation of that [black]
5 market and mitigating its effects.”)

6 The school districts’ allegations are sufficient under Florida law for the same reasons.
7 They have plausibly alleged injuries that were within the “foreseeable zone of risk” created by
8 JLI’s conduct. Its youth-targeted marketing created a surge in youth e-cigarette use, particularly in
9 schools where the product was easily disguisable, and the rampant use foreseeably led to
10 widespread injury to schools that are foreseeably on the “front lines” of the crisis.

11 In Pennsylvania, “[t]he determination of whether a duty exists in a particular case involves
12 the weighing of several discrete factors which include: (1) the relationship between the parties; (2)
13 the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the
14 harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public
15 interest in the proposed solution.” *Althaus ex rel. Althaus v. Cohen*, 562 Pa. 547, 553 (2000).
16 Here, the need for prevention of youth vaping is unquestionable and social utility weighs in favor
17 of imposing a duty on JLI to exercise reasonable care in promotion of its product. The school
18 districts have not only alleged that their harm was foreseeable, but also targeted. These factors
19 outweigh the concerns against imposing a duty.

20 Although foreseeability is not an essential factor in finding duty under Arizona and New
21 York law, the public policy factors weigh in favor of finding duty in those states as well.
22 *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (N.Y. 2001) (“Foreseeability, alone, does
23 not define duty – it merely determines the scope of the duty once it is determined to exist.”);
24 *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 564 (2018) (“[F]oreseeability is not a factor to be
25 considered by courts when making determinations of duty.”).

26 In New York, courts “fix the duty point by balancing factors, including the reasonable
27 expectations of parties and society generally, the proliferation of claims, the likelihood of
28 unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public

1 policies affecting the expansion or limitation of new channels of liability.” *Hamilton*, 96 N.Y.2d
2 at 232. In *Hamilton*, the court found that a gun manufacturer that simply supplied a product had
3 no duty to victims of gun violence. *Id.* at 240. JLI argues that the school districts’ claims fail for
4 the same reason set forth in *Hamilton* because JLI did not have control over the student consumers
5 who caused their injuries.

6 *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 399 (E.D.N.Y. 2004), another case applying
7 New York law, demonstrates why JLI’s reliance on *Hamilton* is misplaced and why the school
8 districts have sufficiently pleaded a duty that comports with public policy. There, the court
9 explained that *Hamilton* “was, in part, predicated on the inability in that case to determine whether
10 a high incidence of traces was attributable to irresponsible conduct on the part of certain members
11 of the gun industry.” *Id.* at 400. By contrast, the plaintiff in *Johnson* plausibly pleaded that gun
12 manufacturers played a disproportionate role in supplying the illegal gun-trafficking market and
13 “state[d] facts that establish a duty on the part of gun companies to exercise reasonable care in the
14 marketing and sales of their product.” *Id.* The duty did not depend on controlling the actions of
15 third parties that misused guns, but rather on the gun manufacturers’ business practices.

16 The same logic applies here. Contrary to JLI’s mischaracterization of the allegations, the
17 school districts do not simply contend that JLI manufactured a dangerous product that caused
18 them downstream harm. Rather, they allege that JLI’s lack of reasonable care in the marketing
19 and sales of JUUL created an illicit youth market and the heavy promotion of JUUL to teen users
20 caused the school districts reasonably predictable harm.⁸³ This supports finding a duty under New

21

22 ⁸³ JLI’s contention that the negligence claims must be dismissed for failure to allege a “special
23 relationship” is based on a similar mischaracterization of the case; the government entities are not
24 seeking to impose a duty on JLI to control the actions of third parties, but rather a duty to use
25 reasonable care in its own marketing and sales of JUUL products. *See Cincinnati v. Beretta*
26 *U.S.A. Corp.*, 95 Ohio St. 3d 416, 417 (2002), where the city alleged that defendants marketed and
27 distributed their firearms in such a way as to “ensure the widespread accessibility of the firearms
28 to prohibited users” thereby fostering criminal misuse and an illegal aftermarket. The Ohio
Supreme Court held that the “special relationship rule [was] not determinative” because the city
was not alleging a duty to control third persons. *Id.* at 422. Instead, “the issue [was] whether
appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a
way that creates an illegal firearms market that results in a foreseeable injury.” *Id.*; *see also In re*
Nat’l Prescription Opiate Litig. – Summit County, 2018 WL 4895856, at *37 (N.D. Ohio Oct. 5,
2018), *report and recommendation adopted in part, rejected in part*, 2018 WL 6628898 (N.D.
Ohio Dec. 19, 2018) (“Plaintiffs’ do not assert a duty to prevent the actions of third persons, but

1 York law.

2 In Arizona, duties are created either by “special relationships or relationships created by
3 public policy.” *Quiroz*, 243 Ariz. At 565. The primary source for identifying a duty based on
4 public policy is based on Arizona state statutes. *Id.* at 566; *see, e.g., Brannigan v. Raybuck*, 136
5 Ariz. 513, 516–17 (1983) (statutes barring minors from consuming alcohol create a duty
6 prohibiting liquor licensees from furnishing alcohol to minors). The school districts allege that
7 JLI’s conduct violates Arizona’s public policy against marketing e-cigarette products to minors.
8 Tucson ¶ 629 (citing A.R.S. § 13-3622(a), which prohibits the sale or furnishing of vapor
9 products, instruments, or paraphernalia, to a minor, and A.R.S. § 13-3622(b), which prohibits
10 minors from buying, possessing, or knowingly accepting vapor products, instruments, or
11 paraphernalia).

12 The school districts sufficiently plead that JLI violated the policy interests behind these
13 Arizona statutes by marketing an addictive product to school-age children, leading to an epidemic
14 of youth vaping and corresponding harms to schools. JLI does not convincingly refute these
15 public policy considerations.

16 Altogether, the school districts do not seek to impose a duty on JLI as members of the
17 general public. Their specific allegations answer JLI’s concerns about limitless or unbounded
18 liability. The factors considered above and ordinary principles of tort law such as proximate
19 causation discussed below “are fully adequate to limit recovery without the drastic consequence of
20 an absolute rule which bars recovery in all such cases.” *J’Aire*, 24 Cal. 3d at 808. The policy
21 considerations “place a limit on recovery by focusing judicial attention on the foreseeability of the
22 injury and the nexus between the defendant’s conduct and the plaintiff’s injury.” *Id.* As Judge
23 Polster emphasized in finding that West Boca sufficiently pleaded a duty of care owed by the
24 opioid manufactures, “[a]t this stage in the case, a complaint need only set forth a plausible claim
25 for relief and should not be dismissed unless it is clear that *no relief* could be granted under any set
26

27 rather a duty owed by Defendants to Plaintiffs to use reasonable care in, for example, marketing,
28 monitoring, reporting, and selling their opioids. The wrongful conduct alleged is that of
Defendants, and not of third persons.”).

1 of facts that could be proved consistent with the allegations.” 2020 WL 1669655, at *28 (citations
2 omitted) (emphasis added).

3 The school districts adequately allege that JLI owed them a duty of care under Arizona,
4 California, Florida, Pennsylvania, and New York law because their harms were foreseeable and
5 public policy supports imposing a duty. JLI’s motion to dismiss the negligence claims on this
6 basis is DENIED.

7 **b. Economic Loss Doctrine**

8 JLI argues that the economic loss doctrine in all states but Arizona require dismissal of the
9 school districts’ negligence claims because they seek economic losses without plausible
10 allegations of physical injury or property damage. The school districts contend that their losses
11 are not “purely economic” because they have also suffered physical property damage in the form
12 of hazardous waste, removal of bathroom doors, and other alterations to school property. JLI
13 responds that even if hazardous disposal of JUUL pods qualified as property damage, that would
14 be the limit of the school districts’ negligence claims.

15 The gravamen of the school districts’ complaints clearly involves economic losses—for
16 example, the alleged need to spend money on additional instruction, counseling, student
17 discipline, and monitoring—and these economic losses do not flow from their alleged physical or
18 property damage. The question, then, is whether the economic loss doctrine in Florida, New
19 York, Pennsylvania, and California would bar their negligence claims regarding these economic
20 losses untethered to physical or property damage.

21 Florida and New York courts only apply the economic loss doctrine in cases involving
22 contracts or product liability, which are not claims alleged by the Florida and New York
23 government entity plaintiffs. *See Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Companies,*
24 *Inc.*, 110 So.3d 399, 407 (Fla. 2013) (“[W]e now take this final step and hold that the
25 economic loss rule applies only in the products liability context.”); *In re Opioid Litigation*, No.
26 400000/2017, 2018 WL 3115102, at *27 (N.Y. Sup. Ct. Jun. 18, 2018) (economic loss doctrine
27 did not bar New York counties from recovering expense incurred in combatting opioid crisis
28 because they did not assert a “cause of action against the manufacturer defendants for breach of

1 contract or an alleged defect in the product produced by said defendants”). The school districts’
2 negligence claims are therefore not barred by the economic loss doctrine in Florida and New York.

3 The doctrine is less straightforward in Pennsylvania and California. Pennsylvania courts
4 follow a “‘reasoned approach’ to applying the economic loss doctrine that ‘turns on the
5 determination of the source of the duty plaintiff claims the defendant owed.’” *Dittman v. UPMC*,
6 649 Pa. 496, 525 (2018) (quoting *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa.
7 454, 483 (2005)). The economic loss doctrine “is concerned with two main factors: foreseeability
8 and limitation of liability.” *Azur v. Chase Bank, USA, Nat. Ass’n*, 601 F.3d 212, 222 (3d Cir.
9 2010).

10 In *Dittman*, university medical center employees sued the university for negligence when
11 their personal and financial information was accessed and stolen from the university’s computer
12 systems. The Pennsylvania Supreme Court found that the case “involve[ed] application of an
13 existing duty to a novel factual scenario” and held that the employees plausibly pleaded a
14 common-law duty in those circumstances. 649 Pa. at 513–14. It rejected the university’s
15 interpretation of Pennsylvania’s economic loss doctrine, finding that “those cases do not stand for
16 the proposition that the economic loss doctrine, as applied in Pennsylvania, precludes *all*
17 negligence claims seeking solely economic damages.” *Id.* at 525 (emphasis added).

18 Although the employees’ claim did not squarely fit in the “negligent misrepresentation”
19 exception to the economic loss doctrine previously delineated by the court, it found that negligent
20 misrepresentation is simply “one among many tort claims in Pennsylvania for which the economic
21 loss doctrine does not act as a bar for recovery of purely economic losses.” *Id.* at 526 (citing *Bilt-*
22 *Rite Contractors, Inc. v. The Architectural Studio*, 581 Pa. 454, 479 (2005)). Because the
23 employees plausibly pleaded that the university breached its common-law duty to act with
24 reasonable care, and that duty “exist[ed] independently from any contractual obligations between
25 the parties, the economic loss doctrine [did] not bar [e]mployees’ claim.” *Id.* at 528.

26 The analysis in *Dittman* indicates that Pennsylvania courts would not bar the school
27 districts’ negligence claim. As discussed above, the school districts plausibly plead a common-
28 law duty that arises independently from any contractual obligations, and finding a duty comports

1 with foreseeability and public policy factors.

2 There is no bright-line rule barring all negligence claims for purely economic losses in
3 California either. Instead, the economic loss doctrine is part of the “duty” analysis and “[d]eciding
4 whether to impose a duty of care turns on a careful consideration of the sum total of the policy
5 considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors.” *S.*
6 *California Gas Leak Cases*, 7 Cal. 5th 391, 401 (2019).

7 JLI heavily relies on the *Gas Leak Cases* to foreclose the school districts’ negligence
8 claims in California under the economic loss doctrine. In that case, residents in a Los Angeles
9 suburb were forced to relocate due to a leak at a major natural gas storage facility, and the local
10 economy was devastated as a result. *Id.* at 395–96. Business entities in the area sued for
11 economic losses resulting from the loss of business previously generated by the relocated
12 residents. *Id.* at 396. The California Supreme Court rejected the plaintiffs’ contention that the gas
13 company had a tort duty to guard against purely economic losses. *Id.* 403–08. It noted that courts
14 across the country, “[c]oncerned about line-drawing problems and potentially overwhelming
15 liability,” have “rejected recovery for purely economic losses stemming from man-made
16 calamity.” *Id.* at 403; *see, e.g., 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96
17 N.Y.2d 280, 290 (2001) (declining to hold “that a landowner owes a duty to protect an entire
18 urban neighborhood against purely economic losses,” where business entities sought
19 compensation for the income they lost from tower collapse in midtown Manhattan). “Based on
20 concerns about limitless liability and unending litigation,” the court concluded that plaintiffs’
21 negligence claim for pure economic losses was barred. *Gas Leak Cases*, 7 Cal. 5th 391 at 403.

22 The circumstances in that case, involving a massive environmental disaster, are materially
23 different from the school districts’ claims here. The school districts are not simply incidental
24 victims; they plausibly plead that they were uniquely targeted by JLI’s misconduct, who took its
25 marketing scheme directly into schools. As discussed above, they sufficiently allege a common-
26 law duty that comports with the *Biakanja* factors considered by California courts and involves
27 “more than mere foreseeability.” *Gas Leak Cases*, 7 Cal. 5th at 401. Giving them their day in
28 court does not run into same unlimited liability concerns at issue in the *Gas Leak Cases*. *Id.* at

1 407–08 (distinguishing cases with “weak or absent” concerns about unlimited liability and finding
2 “in this case, as in the mine run of man-made disaster cases, those rationales apply with full
3 force”).

4 At the hearing on these motions, JLI drew a distinction between the “contracting” and
5 “non-contracting strangers” line of cases within the economic loss doctrine and argued that the
6 “non-contracting strangers” line of cases in Pennsylvania and California bar the school districts’
7 negligence claims. But the “non-contracting strangers” line of cases is not as broad as JLI paints it
8 to be, nor is it applicable here.

9 One basis for applying the “stranger rule” to bar negligence claims for pure economic harm
10 is the concept that tortious acts causing pure economic harm are traditionally dealt with under the
11 rules of specific or named economic torts that were developed to address particular kinds of
12 economic harm cases. Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts*,
13 Chapter 48 § 608 (2d ed.). In an ordinary negligence action, the “stranger rule” may bar pure
14 economic loss “that results solely because of negligence to another person.” *Id.* However, the
15 treatise JLI relies on for the “stranger rule” states that “under some circumstances, a defendant
16 may owe a tort duty to persons with whom the defendant has no contract, and when that occurs, he
17 is of course subject to liability for breach of that duty.” Those are the circumstances here.

18 There is no issue of a specific economic tort, like interference with a contract, that could
19 better redress the school districts’ alleged harm. Nor is this a situation where the school districts
20 are “strangers” claiming economic harm based on JLI’s negligence towards other people. Instead,
21 the school districts plausibly plead that JLI directly owed them a common-law duty given the
22 foreseeability and public policy considerations. Dobbs § 608 (cautioning that “it may be
23 important to recognize that relationships of the parties may be neither clear-cut, direct-contract
24 relationships nor total stranger relationships”); *id.* § 612 (cautioning that “a measured and careful
25 delineation of the stranger rules and careful attention to the exceptions and other limitations is
26 especially desirable”). The rationale behind the “non-contracting strangers” cases “involve
27 concerns about unpredictable and limitless liabilities,” *id.* § 608, which are not at play in this case,
28 or, at the very least, are not enough to warrant dismissal of the school districts’ claims at the

1 pleadings stage.⁸⁴

2 JLI's motion to dismiss the school districts' negligence claims based on the economic loss
3 doctrine is DENIED.

4 **2. Altria**

5 The same considerations regarding foreseeability and public policy discussed above apply
6 to Altria as well. It contends that it could not have assumed a duty or breached a duty to the
7 school districts because it did not market the product until it gained a 35% share of JLI in
8 December 2018, and because it did not design, research, or manufacture the product at any time.

9 This argument ignores allegations that the government entities offer to explain how Altria
10 helped to expand and maintain JLI's youth vaping market by, for example, acquiring shelf space
11 to make room for JUUL in stores. TVC ¶ 472; *see also id.* ¶¶ 524–43 (Altria used its lobbying
12 power to maintain “mint” as an available JUUL flavor while knowing that mint was a popular
13 favor among teens); *id.* ¶¶ 46–47, 51 (Altria aligned its interests with JLI as early as Spring 2017
14 and worked together on expanding the youth e-cigarette market, long before Altria officially
15 purchased 35% of JLI for \$12.8 in December 2018); *id.* ¶¶ 224–27, 555 (Altria collaborated on the
16 “cover-up” “Make the Switch” campaign to portray JUUL as a smoking cessation device for adult
17 smokers and divert public attention from Altria's and JLI's true motive to maintain the valuable
18 youth market).

19 As it did for the public nuisance claim, Altria's attempt to dispute these factual allegations
20 is inappropriate at the pleading stage. Read together, these allegations plausibly allege that Altria
21 placed the school districts in the “foreseeable zone of risk” by aiding JLI's marketing and public
22 relations efforts and, thereby, increasing the availability of JUUL products pods for youth,

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24 ⁸⁴ The treatise also identifies *Excavation Techs., Inc. v. Columbia Gas Co. of Pennsylvania*, 604
25 Pa. 50 (2009) as the “leading non-contracting case.” Dobbs § 608. In that case, a contractor that
26 sustained purely economic loss as a result of utility company's failure to properly mark location of
27 underground gas lines could not bring a negligent misrepresentation claim because “public policy
28 weigh[ed] against imposing liability.” *Excavation*, 604 Pa. at 57. Therefore, the “stranger”
economic loss rule was not applied categorically, but rather in light of public policy concerns. *See*
also Dittman, 649 Pa. at 526 (“[T]he *Excavation Technologies* Court did not hold that the
economic loss doctrine barred *Excavation Technologies*' claim. Rather, it held that *Excavation*
Technologies failed to state a viable claim for negligent misrepresentation under Section 552 of
the Restatement in the first instance.”).

1 including to the school districts’ students. JLI may have created the JUUL product, but the school
 2 districts plausibly allege that Altria helped to deliver it to more children from 2017 on, leaving
 3 them to bear the consequences a youth e-cigarette epidemic. *See In re Opioid Litigation*, No.
 4 4000002017, 2018 WL 4827862, at *16 (N.Y. Sup. Ct. July 17, 2018) (having determined that the
 5 allegations in New York counties’ complaint “are sufficient to state a negligence cause of action
 6 against the manufacturer defendants, [their] claims of concerted action suffice to state a basis to
 7 support the existence of yet another breach of duty by the distributor defendants”). The public
 8 policy factors that govern the duty inquiry support concluding that Altria owed a duty to the
 9 school districts.

10 Additionally, the government entities sufficiently allege that Altria breached its duty of
 11 care by failing to act reasonably. They allege that Altria was fully aware of the problem of youth
 12 vaping created by JLI and its flavored pods yet pressed on to expand JUUL sales. Whether such
 13 conduct comports with a reasonable standard of care is an issue of fact not appropriate for
 14 determination on a motion to dismiss. *See, e.g., Gipson v. Kasey*, 214 Ariz. 141, 143 (2007)
 15 (describing the breach issue as “an issue of fact that turns on the specifics of the individual case”);
 16 *L.A. Fitness Int’l, LLC v. Mayer*, 980 So.2d 550, 557 (Fla. Dist. Ct. App. 2008) (“[W]hether a
 17 defendant exercised reasonable care under a given set of facts is generally an issue for the jury to
 18 decide.”).

19 On balance, given the allegations regarding Altria’s involvement in helping JLI protect and
 20 expand the youth e-cigarette market, the school districts plausibly plead that Altria owed them a
 21 duty of care and that it breached that duty. Altria’s motion to dismiss the negligence claims is
 22 DENIED.

23 3. Officer and Director Defendants

24 Each Officer and Director Defendant argues that he owed no duty to the school districts,
 25 and some argue that the allegations of breach are also insufficient. For similar reasons discussed
 26 above, the school districts’ allegations about personal participation and the laws of each relevant
 27 state support the negligence claims against Monsees and Bowen, but not Pritzker, Huh, and
 28 Valani.

1 As with public nuisance, the school districts contend that corporate officers and directors
2 may be liable in negligence where they “authorized, directed or participated in the allegedly
3 tortious conduct.” *Frances T.*, 42 Cal.3d at 508.⁸⁵ They plausibly allege that Monsees and
4 Bowen’s actions created an illicit market for a product and marketed that product to a group that
5 regularly convenes on the school districts’ property, such that it foreseeably caused substantial
6 harm to them. Their personal participation put the school districts in the foreseeable zone of risk,
7 and the policy factors in the relevant states weigh in favor of finding a duty given the allegations
8 in the government entity complaints.

9 The school districts also adequately allege breach. They contend that Monsees and Bowen
10 knew the harmful effects of nicotine on youth, the unparalleled potency of JUUL products, and
11 that youth were buying JUUL products in droves. TVC ¶¶ 126–36; 391–411. Nonetheless, they
12 coordinated efforts to greatly expand JUUL products’ reach. As discussed above, the school
13 districts sufficiently describe what Monsees and Bowen did, in terms of marketing and/or product
14 development, to target youth. Whether such conduct comports with a reasonable standard of care
15 is an issue of fact not appropriate for determination on a motion to dismiss.

16 Although the school districts plausibly allege that Pritzker, Huh, and Valani, also knew
17 about the youth-targeted marketing, they have not alleged enough to establish what negligent acts
18 each did, whether individually or collectively, to create or support the youth e-cigarette crisis. At
19 the hearing, the school districts emphasized that they do not seek to hold the entire Board of
20 Directors liable for misconduct, but they fail to explain why these three Directors in particular
21 should be part of the case.

22 Monsees and Bowen’s motions to dismiss the negligence claims are DENIED. Pritzker,
23 Huh, and Valani’s motion to dismiss the negligence claim is GRANTED with leave to amend.

25 ⁸⁵ Pritzker, Valani, Huh, and Monsees rely on *U.S. Liability Insurance Co. v. Haidinger-Hayes,*
26 *Inc.*, 1 Cal.3d 586, 595 (1970), for the proposition that California courts have long refused to
27 allow negligence actions seeking economic damages against officers and directors. But, “recent
28 California law demonstrate[s] a shift away from *Haidinger-Hayes* and that an employee, working
within the scope of their employment, could be held liable in tort for pecuniary losses.” *Nasrawi*
v. Buck Consultants, LLC, 776 F. Supp. 2d 1166, 1177 (E.D. Cal. 2011) (citing *Bear Valley*
Family v. Bank Midwest, N.A., 2010 WL 3369600, at *4 (E.D. Cal. Mar. 8, 2011)).

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D. Proximate Causation

JLI and Altria challenge the government entities' public nuisance and negligence claims for failure to allege a sufficiently close connection between their conduct and the alleged harms to show proximate causation. The parties evaluate proximate causation based on a "substantial factor" analysis and agree that the analysis is the same for both negligence and public nuisance. Dkt. No. 740 at 28–29 (arguing "[p]roximate causation generally requires that the defendant's acts substantially brings about the plaintiff's injury" and that the government entities' injuries are "too attenuated"); Dkt. No. 817 at 46 (arguing proximate causation is sufficiently alleged because "Defendants were each a substantial factor in causing them harm").

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It appears that some courts conduct the substantial factor analysis in evaluating factual causation, not proximate or legal causation. *See People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51, 101 (2017) ("The parties agree that the causation element of a public nuisance cause of action is satisfied if the conduct of a defendant is a substantial factor in bringing about the result.") (citation omitted); *id.* at 104 ("[P]roximate cause is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.") (internal quotation marks and citation omitted); *but see Eckroth v. Pennsylvania Elec., Inc.*, 12 A.3d 422, 428 (Pa. Super. 2010) ("Proximate causation is defined as a wrongful act which was a substantial factor in bringing about the plaintiff's harm.") But regardless of the correct label for the analysis, the dispute here primarily focuses on whether the government entities' injuries are too attenuated or remote from the alleged conduct to plausibly plead proximate cause for their negligence and public nuisance claims.⁸⁶

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1. JLI

JLI contends that the government entities' injuries are too attenuated because their injuries

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⁸⁶ To the extent that defendants argue that factual causation is also lacking for the public nuisance claims, the government entities point out that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical," and that a defendant play "at least 'a minor' role in creating the nuisance that now exists." *ConAgra*, 17 Cal. App. 5th at 102; Dkt. No. 817 at 23 n.9 (citing cases from each of the five jurisdictions that apply a similar standard). As discussed above, the government entities sufficiently plead how each of the defendants, except for the three Other Directors, contributed to the youth e-cigarette epidemic.

1 derive from students’ addiction to nicotine and runs through several links in a chain that include at
2 least two intervening events (adult purchasers or retailers who gave JUUL to students and students
3 who deliberately used them at school). This contention is based on a mischaracterization of the
4 claims as sounding in product liability.⁸⁷

5 The government entities do not seek to recover costs expended by students or any other
6 third party. Nor do they seek compensation for any damages or personal injuries suffered by
7 students who used JUUL. Rather, they allege injuries as a result of a public health crisis in their
8 school districts and communities that JLI created and sustained through its negligent and nuisance-
9 causing conduct, *i.e.*, by developing a product with features that appeal to youth and then directly
10 targeting youth with its marketing. The government entities suffered direct harm in combatting
11 the crisis through multiple forms of costs and damages. TVC ¶¶ 597–609. The injuries caused by
12 JLI were not only foreseeable, they were an intended consequence of JLI’s conduct. *Id.* ¶¶ 77, 94,
13 583. Even if, as JLI contends, students deliberately using JUUL products at schools were
14 intervening acts to the government entities’ injuries, those intervening acts were reasonably
15 foreseeable given JLI’s alleged youth-targeting conduct and do not undermine proximate cause.

16 JLI cites distinguishable cases brought by hospitals seeking damages for unreimbursed
17 medical expenses related to tobacco use. *See Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228
18 F.3d 429, 435 (3d Cir. 2000); *Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d
19 696 (9th Cir. 2001). Judge Polster’s discussion of these cases in the opioid multidistrict litigation
20 is instructive. Although he was skeptical that West Boca Medical Center would be able to recover
21 “unreimbursed charges for treatment of patients with opioid conditions,” as those were similar to
22 the attenuated damages sought in *Allegheny* and *Ass’n of Wash. Pub. Hosp. Dists.*, he found that
23 those cases were ultimately distinguishable because West Boca “presented sufficient factual
24 allegations that at least some of their asserted injuries are a foreseeable result of the Defendants’
25 purported failures that allegedly created the opioid crisis,” including [i]ncreased operational costs
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27 ⁸⁷ Monsees and Bowen incorporate JLI’s argument that proximate causation is not met because of
28 intervening events. Dkt. No. 772 at 16; Dkt. No. 779 at 11. Their argument fails for the same
reasons stated above.

1 for: (a) providing more and more-complicated care to opioid addicts, and (b) dealing with “pill
2 seekers.” *In re Nat’l Prescription Opiate Litig. – West Boca Medical Center*, 2020 WL 1669655,
3 at *8.

4 The government entities allege similar injuries in the form of operational costs that were
5 directly borne by them, not passed on by any intermediate party. *In re Nat’l Prescription Opiate*
6 *Litig. – Summit County*, 2018 WL 6628898, at *5 (county sufficiently alleged proximate causation
7 for RICO claims, where they alleged that they were forced to expend substantial and unexpected
8 resources “to attempt to stop the flow of the excess opioids into local communities and to bear the
9 costs associated with cleaning them up”); *In re Opioid Litigation*, 2018 WL 3115102, at *26– 27
10 (New York counties “adequately pled[ed] that the alleged breach of the manufacturer defendants’
11 duty [] was a proximate cause of their injuries,” where they alleged spent “extraordinary amounts
12 [] to combat the opioid crisis allegedly caused by the deceptive marketing campaign”); *see also id.*
13 at *21 (finding defendants’ argument regarding lack of proximate causation for public nuisance
14 claim was also unpersuasive).

15 JLI’s proximate causation argument is insufficient to warrant dismissal at this stage. *See*
16 *id.* at *27 (“Generally, issues of proximate cause are for the fact finder to resolve.”). The
17 government entities plausibly allege a reasonably close causal connection between the alleged
18 conduct (which created the youth e-cigarette epidemic) and the resulting injury (in combatting the
19 youth e-cigarette epidemic).

20 Even if the more stringent RICO proximate causation standard were not satisfied, which it
21 is *see supra*, the government entities’ state law claims still survive. *City and County Of San*
22 *Francisco, v. Purdue Pharma. L.P.*, 2020 WL 5816488, at *42 (N.D. Cal. 2020) (“Unlike RICO,
23 courts place great emphasis on ‘foreseeability of harm’ in determining whether a public nuisance
24 claim sufficiently alleges proximate cause.”); *Sheperd v. Am. Honda Motor Co. Inc.*, 822 F. Supp.
25 625, 633 n.1 (N.D. Cal. 1993) (noting that even if RICO claims are dismissed, parties “remain free
26 to pursue common law or statutory state law claims.”); *see also City of Everett v. Purdue Pharma*
27 *L.P.*, 2017 WL 4236062, at *6 (W.D. Wash. Sept. 25, 2017) (finding proximate causation was
28 sufficiently pleaded for negligence claim because the alleged injury was foreseeable and finding

1 *Ass'n of Wash. Pub. Hosp. Dists.* inapposite as it “applied a proximate cause standard from RICO
2 law” and although it “appears to have applied the same standard to a state law negligence claim,
3 no Washington state court has subsequently applied this standard to tort or [state consumer
4 protection] claims”). JLI’s motion to dismiss on this basis is DENIED.

5 **2. Altria**

6 Altria’s proximate causation argument similarly misconstrues the gravamen of the case and
7 attempts to litigate the merits of the government entities’ claims. As discussed above, the
8 government entity complaints sufficiently describe Altria’s participation in sustaining and
9 worsening the youth e-cigarette epidemic. Altria’s attempt to rewrite the allegations by insisting
10 that its alleged misconduct is narrow in both time and scope raise factual disputes that cannot be
11 resolved on a motion to dismiss. For now, the government entity complaints sufficiently allege
12 that Altria’s conduct was a proximate cause in maintaining the public health crisis of youth e-
13 cigarette use, resulting in numerous harms to the school districts and local governments. Altria’s
14 motion to dismiss for failure to plead proximate causation is DENIED.

15 **E. Statutory Consumer Protection**

16 Some of the school districts bring additional statutory consumer protection claims. Three
17 Village brings claims under New York’s consumer protection statute, sections 349 and 350 of the
18 New York General Business Law (“GBL”), and Broward and Escambia bring claims under
19 Florida’s consumer protection statute, the Florida Deceptive and Unfair Trade Practices Act
20 (“FDUTPA”). It is clear that both the New York and Florida consumer protection statutes allow
21 non-consumers to bring claims. *In re Nat’l Prescription Opiate Litig. – West Boca Medical*
22 *Center*, 2020 WL 1669655, at *20 (“This Court chooses to follow the majority of recent opinions
23 from Florida’s District Courts of Appeal concluding that, ‘in amending the Act, the legislature
24 intended to give non-consumers standing.’”) (collecting cases); *Blue Cross & Blue Shield of N.J.,*
25 *Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 205 (2004) (the New York consumer protection
26 statute does not limit recovery only to consumers, rather “any person who has been injured by
27 reason of any violation of this section may bring an action”).

28 The parties dispute whether I should apply Rule 9(b)’s heightened standard for pleadings

1 claims sounding in fraud or the more permissive pleading standards of Rule 8(a) to the New York
2 and Florida statutory consumer protection claims. New York courts do not apply the Rule 9(b)
3 standard to GBL claims and Florida courts are split as to whether it applies to FDUTPA claims.
4 *See Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 957 (C.D. Cal. 2012) (citing cases).
5 But I am bound to apply Ninth Circuit precedent, which requires claims based on fraudulent
6 conduct to be pleading with particularity. *See id.* (following *Kearns v. Ford Motor Co.*, 567 F.3d
7 1120, 1125 (9th Cir. 2009) and applying Rule 9(b) to GBL and FDUTPA claims). As discussed
8 below, Three Village, Broward, and Escambia have sufficiently pleaded with particularity for
9 certain defendants but not others.

10 **1. New York Consumer Protection Law**

11 Section 349 of New York General Business Law makes unlawful “[d]eceptive acts or
12 practices in the conduct of any business, trade or commerce or in the furnishing of any service in
13 this state.” N.Y. Gen. Bus. Law § 349(a). Section 350 prohibits “[f]alse advertising in the
14 conduct of any business.” N.Y. Gen. Bus. Law § 350. To state a claim for deceptive practices
15 under either section, a plaintiff must show: (1) that the act, practice or advertisement was
16 consumer-oriented; (2) that the act, practice or advertisement was misleading in a material respect,
17 and (3) that the plaintiff was injured as a result of the deceptive practice, act or advertisement.
18 *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 524–25 (S.D.N.Y. 2003). The standard for
19 assessing claims under Sections 349 and 350 are essentially the same. *Cline v. TouchTunes Music*
20 *Corp.*, 211 F. Supp. 3d 628, 635 (S.D.N.Y. 2016).

21 JLI argues that Three Village fails to allege actual damages for its GBL claim. Altria and
22 the Officer and Director Defendants contend that Three Village fails to allege that they engaged in
23 a deceptive act in violation of statute.

24 **a. JLI**

25 When analyzing whether a plaintiff has standing to commence a private action pursuant to
26 subsection 349(h), the New York Court of Appeals has confined its analysis to determining the
27 nature of the alleged injury and whether it is sufficiently connected to the asserted unlawful
28 conduct. *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 622–24 (2009); *Blue*

1 *Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 206–08 (2004). In this
2 regard, the court has stated that plaintiffs “must . . . plead that they have suffered actual injury
3 caused by a materially misleading or deceptive act or practice.” *Smokes-Spirits*, 12 N.Y.3d at 623.
4 Recognizing that the statute only permits recovery by one injured “by reason of” a deceptive
5 business practice, the court has refused to “presume an intent to include recovery for derivative
6 injuries within the scope of the statute in the absence of a clear indication of such intent from the
7 Legislature.” *Blue Cross*, 3 N.Y.3d at 207. The court has made it clear that “allegations of
8 indirect or derivative injuries will not suffice.” *Smokes-Spirits*, 12 N.Y.3d at 623.

9 In *Blue Cross*, plaintiff was one of several healthcare plans that commenced an action
10 against tobacco companies alleging that they engaged in deceptive practices that misled the public
11 regarding the harmful effects of smoking. 3 N.Y.3d at 203. The health plan sought to recover
12 from the tobacco companies the cost of services that it had provided to plan subscribers as a result
13 of those subscribers being harmed by the effects of smoking. *Id.* The New York Court of Appeals
14 concluded that the health plan had “no standing to bring [the] action under General Business Law
15 [section] 349 because its claims [were] too remote.” *Id.* at 208.

16 Four years later, in *Smokes-Spirits*, the City of New York sued out-of-state entities and
17 persons engaged in the business of selling cigarettes over the internet. 12 N.Y.3d at 618. The
18 City alleged that defendants’ websites misrepresented that their internet cigarette sales were tax
19 free, and that their customers did not have to pay cigarette taxes. *Id.* at 620. The City claimed that
20 it was injured by defendants’ deceptive acts “in an undetermined amount of unpaid cigarette
21 taxes.” *Id.* The New York Court of Appeals concluded that the City lacked standing to assert an
22 action premised on violations of section 349 because the City’s claimed injury was “just as
23 indirect as the insurer’s was in *Blue Cross*.” *Id.* at 622.

24 In both *Smokes-Spirits* and *Blue Cross*, the court reached its conclusion based on the
25 finding that the injuries alleged by each of the plaintiffs were “entirely derivative of injuries . . .
26 suffered by misled consumers.” 12 N.Y.3d at 622; 3 N.Y.3d at 207. The rule derived from these
27 cases is as follows: a plaintiff lacks standing to bring an action pursuant to General Business Law
28 section 349(h) when the claimed loss “arises solely as a result of injuries sustained by another

1 party.” *Blue Cross*, 3 N.Y.3d at 207.

2 Three Village’s complaint includes numerous examples of direct pecuniary harm sustained
3 in combating the youth vaping epidemic allegedly created by JLI’s conduct. These alleged
4 injuries do not rely upon injuries sustained by any other individual, such as the damages or injuries
5 suffered by student users of JUUL. The alleged injuries were incurred in fulfilling independent
6 duties as educators and caretakers. Three Village claims that it was compelled to respond to the
7 crisis by, for instance, diverting limited resources, devising educational campaigns, spending
8 funds on monitoring systems, and incurring costs to alter the health curriculum. *See* TVC ¶¶ 597–
9 609.

10 Similar allegations of actual damages were found sufficient by the court in *In re Opioid*
11 *Litigation*, 2018 WL 3115100, at *6. In that case, multiple New York counties identified “forms
12 of direct pecuniary harm incurred by the counties that correlate with the growth of the opioid
13 epidemic.” *Id.* The complaint listed, among others, “direct financial losses the counties
14 allegedly incurred in having to increase their expenditures on social services, drug addiction
15 treatment and diversion programs, additional policing and criminal justice costs, as well as
16 expenditures associated with the purchase of [opioid overdose reversal drug] and the
17 implementation of programs to train the public and public personnel in its use.” *Id.* The court
18 found the alleged harms were not “derivative in nature, as such harm was directly incurred by the
19 counties because they bore independent duties, whether as municipalities constitutionally and
20 statutorily mandated to protect the welfare, safety, and public health of their citizens or as self-
21 funded health and workers’ compensation insurance providers, to make the expenditures necessary
22 to meet such obligations.” *Id.*

23 Drawing inferences in Three Village’s favor, the complaint sufficiently alleges actual
24 damages that directly flow from responding to the youth vaping epidemic created by JLI’s
25 deceptive conduct. These independent injuries are unlike the derivative injuries at issue in *Blue*
26 *Cross* and *Smokes-Spirits*. The health care plan’s injuries in *Blue Cross* were derivative because
27 had the plan subscribers not suffered smoking illnesses due to their consumption of the product,
28 then the plans would not have incurred costs in reimbursing their medical expenses. New York

1 City’s damages in *Smokes-Spirits* were dependent on the deceived consumers’ purchase of the
 2 product because “had the allegedly deceived consumers not been improperly induced to purchase
 3 defendants’ cigarettes then the City would have no claim to lost tax revenues.” By contrast,
 4 Three Village is not seeking to recoup the costs incurred by JUUL users, nor are its injuries solely
 5 dependent on any transaction between JLI and JUUL users.

6 In reply, JLI argues that if the students had not been deceived into using JUUL products,
 7 then Three Village would not have to incur any of the alleged costs in responding to the students’
 8 rampant use of JUUL products. This argument is unconvincing. The deception of the students is
 9 a harm that occurred independent of the harm suffered by Three Village. *See M.V.B. Collision,*
 10 *Inc. v. Allstate Ins. Co.*, 728 F. Supp. 2d 205, 217–18 (E.D.N.Y. 2010) (distinguishing *Blue Cross*
 11 *and Smokes-Spirits* and finding vehicle repair shop had standing to bring GBL claims because “not
 12 only was the customer the victim of a deceptive practice, but Mid Island also suffered a loss of
 13 business or other injury” that was not derivative because it was not “solely as a result of injuries
 14 sustained by another party”). JLI’s motion to dismiss Three Village’s GBL claim is DENIED.

15 **b. Altria**

16 Altria moves to dismiss the GBL claim on grounds that Three Village fails to identify what
 17 it did that was deceptive. In response, Three Village points to two particular sets of allegations: (i)
 18 Altria assisted in the deceptive “Make the Switch” ad campaign; and (ii) deceived regulators to
 19 ensure that mint JUUL pods remained on the market. TVC ¶¶ 224–259, 470–503, 517–50.

20 Altria attempts to litigate the merits of Three Village’s GBL claims by arguing that these
 21 actions were not in fact deceptive and did not contribute to the underage e-cigarette crisis. It
 22 argues that its dissemination of JUUL’s “Make the Switch” advertisements was not a deceptive act
 23 because the statement that JUUL products are “alternatives” to cigarettes is undeniably true. This
 24 misses the point. Three Village is not arguing that the campaign was deceptive because JUUL
 25 products are not actually alternatives to cigarettes, but rather that the campaign was a misleading
 26 “cover-up” to convince the public that JUUL was always aimed at adult smokers and never
 27 marketed to youth, which in turn allowed the youth e-cigarette crisis to continue to grow. TVC ¶¶
 28 582–592, 621.

1 Altria’s challenge to the second set of allegations regarding mint is also unpersuasive. As
2 stated earlier, it is plausible that Altria was trying to convince the FDA to allow mint-based
3 products to remain on the market, knowing its popularity among young users. TVC ¶¶ 518–550
4 (describing how JLI coordinated with Altria to pursue a fraudulent scheme to convince the FDA
5 into leaving the mint flavor on the market).⁸⁸

6 Whether Altria’s conduct was actually deceptive is a merits question that will not be
7 resolved at the pleadings stage. *Buonasera v. Honest Co.*, 208 F. Supp. 3d 555, 566 (S.D.N.Y.
8 2016).⁸⁹ At this juncture, Three Village has adequately identified the actions by Altria that were
9 plausibly deceptive. *See, e.g., In re Opioid Litigation*, 2018 WL 4827862, at *8 (New York

10

11 ⁸⁸ Altria also argues that the letters to FDA and Congress are not actionable for the same reasons
12 set forth in their separate motion to dismiss to class action complaint [Dkt. No. 632] at 21-22. As
13 noted above, even if these statements are not independently actionable, they are evidence
14 supporting a scheme to defraud.

15 ⁸⁹ Altria does not challenge whether the alleged acts were consumer-oriented (first element of a
16 GBL claim), but rather whether the alleged acts were deceptive (second element of a GBL claim).
17 It cites to *Kantrowitz v. Allstate Indem. Co.*, 853 N.Y.S.2d 151, 152 (N.Y. App. Div. 2008) as an
18 example of claims that were dismissed because the second element was not met where “plaintiff
19 failed to allege that the defendants engaged in deceptive acts or practices.” However, the full
20 quote from the case reveals that the court dismissed the claim for failure to allege the first element,
21 consumer-oriented conduct: “With respect to the fourth cause of action to recover treble damages
22 against the appellant pursuant to General Business Law [section] 349, the plaintiff failed to allege
23 that the defendants engaged in deceptive acts or practices *that had a broad impact on consumers*
24 *at large.*” *Kantrowitz*, 853 N.Y.S.2d at 152 (emphasis added). *Kantrowitz* relied on *New York*
Univ. v. Cont’l Ins. Co., 87 N.Y.2d 308 (1995), which explains that “parties claiming the benefit
of [section 349] must, at the threshold, charge conduct that is *consumer oriented*” and “[i]f a
plaintiff meets this threshold, its prima facie case may then be established by proving that
defendant is engaging in an act or practice that is deceptive in a material way and that plaintiff has
been injured by it.” *Id.* at 320 (citation omitted) (emphasis added). Therefore, *Kantrowitz* did not
dismiss claims solely because plaintiff failed to allege deceptive acts, as Altria insinuates, but
because plaintiff failed to allege deceptive acts that were consumer-oriented. Plaintiffs in *Cont’l*
Ins. Co. did not meet that threshold requirement because the defendant insurance company’s “acts
in selling this policy and handling the claim under it do not constitute consumer-oriented
conduct.” 87 N.Y.2d at 321. *Kantrowitz* and *Cont’l Ins. Co.* are not in contradiction with
numerous other courts that have found that whether an act is deceptive is a factual question that
must be decided beyond the pleadings stage.

25 Altria’s other citations are also unconvincing because those cases were concerned with whether a
26 certain label was plausibly misleading. *Axon v. Citrus World, Inc.*, 354 F. Supp. 3d 170, 183
(E.D.N.Y. 2018), *aff’d sub nom. Axon v. Florida’s Nat. Growers, Inc.*, 813 F. App’x 701 (2d Cir.
2020) (recognizing the question of whether a reasonable consumer would be deceived by a
27 “natural” label is not typically resolved at the pleadings stage but dismissing GBL claims because
it was “not plausible to allege that a reasonable consumer would interpret the brand label
28 “Florida’s Natural” as meaning that the product contains no traces of glyphosate”); *Parks v.*
Ainsworth Pet Nutrition, LLC, 377 F. Supp. 3d 241, 247 (S.D.N.Y. 2019) (similar).

1 counties' sufficiently pleaded GBL claim against distributor defendants by alleging that "the
2 distributor defendants, acting in concert with the manufacturer defendants, made and disseminated
3 statements . . . that misrepresented the risks of opioid addiction and falsely portrayed prescription
4 opioids as a preferred treatment option for chronic pain"). Altria's motion to dismiss Three
5 Village's GBL claim is DENIED.

6 **c. Officer and Director Defendants**

7 The Officer and Director Defendants argue that they cannot be held personally liable under
8 the GBL. New York courts have found individual defendants liable under GBL if the plaintiff has
9 either sufficiently alleged the individual defendants' participation in the alleged misconduct or has
10 alleged sufficient facts to pierce the corporate veil. *See Reynolds v. Lifewatch, Inc.*, 136 F. Supp.
11 3d 503, 526 (S.D.N.Y. 2015). Because Three Village focuses on the former, the relevant inquiry
12 is whether it has sufficiently alleged the Officer and Director Defendants' individual participation
13 in the alleged misconduct.

14 "[A] corporate officer who participates in the commission of a tort may be held
15 individually liable, regardless of whether the officer acted on behalf of the corporation in the
16 course of official duties and regardless of whether the corporate veil is pierced." *Reynolds*, 136 F.
17 Supp. 3d at 526. In *Reynolds*, plaintiff sued a medical alert device company and two individual
18 defendants, the president and vice president of the company, alleging that they engaged in
19 deceptive practices to induce customers to buy their products in violation of the New York
20 consumer protection law. *Id.* at 508. The court dismissed the GBL claims against the two
21 individual defendants. *Id.* at 521, 527. It found that the allegations that president and vice
22 president of company controlled day-to-day operations, and were aware of, or should have been
23 aware of, the improper business practices were conclusory and insufficient to establish individual
24 participation. *Id.* at 526. It noted that "[i]n cases where courts have found individual defendants
25 to have participated in the misrepresentations at issue, the complaints specifically alleged personal
26 participation, rather than mere awareness or control." *Id.* at 526 (citing cases).

27 One of the cases *Reynolds* discussed was *Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d
28 685, 690 (S.D.N.Y. 2015), where plaintiffs alleged that a debt-buying company, a law firm, and

1 associated individuals orchestrated a scheme to fraudulently obtain and enforce consumer debt
2 judgments. The court denied the individual defendants’ motion to dismiss, finding that plaintiffs
3 “sufficiently pleaded the individual Defendants’ personal participation in deceptive business
4 practices prohibited by the GBL,” by alleging, among other things, that they personally signed and
5 submitted fraudulent affidavits in pursuit of consumer debt actions and harassed consumers with
6 legally improper interrogatories and notices. *Id.* at 701.

7 Three Village’s allegations against Bowens and Monsees are more aligned with the
8 specificity in *Mayfield* than *Reynolds*. It alleges more than mere knowledge or control by offering
9 multiple examples about Monsees’ and Bowen’s personal and direct participation in the deceptive
10 scheme at issue. For instance, it alleges that: Monsees and Bowen carefully studied the marketing
11 strategies of the cigarette industry and developed the deceptive youth-focused marketing campaign
12 for JUUL (TVC ¶¶ 68, 370–80); Monsees “personally reviewed images” from the “Vaporized”
13 campaign and provided “specific direction on the content of the website (*id.* ¶¶ 318, 370); Bowen
14 designed a highly addictive product that appealed to young users (*id.* ¶¶ 103–10; 143, 244);
15 Bowen engineered test results consistent with the deceptive messaging (*id.* ¶¶ 194 – 201); and
16 both had input and control over specific advertising, including flavor-driven and viral social media
17 advertising, despite knowledge about the health risks and high nicotine concentration designed to
18 addict (*id.* ¶¶ 377–80).

19 These factual allegations are sufficient at the pleadings stage to establish Monsees and
20 Bowen’s personal liability under the GBL.⁹⁰ Their motions to dismiss Three Village’s GBL claim
21 are DENIED.

22 However, as discussed above, the allegations concerning Pritzker, Huh, and Valani are
23 insufficient. New York courts require more than “mere awareness or control” to establish
24 individual participation. *Reynolds*, 136 F. Supp. 3d at 526; *Steven Madden, Ltd. v. Jasmin Larian,*
25 *LLC*, 2019 WL 294767, at *6 (S.D.N.Y. 2019) (granting dismissal of GBL claim because party’s
26

27 ⁹⁰ Monsees raises the same arguments as JLI regarding cognizable damages under GBL. This
28 argument is rejected for the same reasons addressed above. Three Village sufficiently alleges that
it incurred non-derivative actual damage due to the deceptive scheme.

1 “conclusory and vague allegations in the Counterclaims, which frequently refer to the
2 Counterclaim Defendants collectively, fail to describe Madden’s specific role in the purported
3 infringement.”). The Other Director Defendants’ motions to dismiss Three Village’s GBL claim
4 are GRANTED with leave to amend.

5 2. Florida Consumer Protection Law

6 Broward and Escambia allege claims under the FDUTPA, Florida’s consumer protection
7 law. Broward ¶¶ 716-722; Escambia ¶¶ 703-709. The FDUTPA is intended to “protect the
8 consuming public and legitimate business enterprises from those who engage in unfair methods of
9 competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or
10 commerce.” Fla. Stat. §§ 501.202(2) and 501.204. A successful claim for damages under
11 FDUTPA contains three elements: (1) a deceptive act or unfair practice in the course of trade or
12 commerce; (2) causation; and (3) actual damages. *See Carriuolo v. Gen. Motors Co.*, 823 F.3d
13 977, 983–84 (11th Cir. 2016). The Florida legislature specifically provided that the FDUTPA
14 “shall be construed liberally.” Fla. Stat. § 501.202(2); *see also State Farm Mut. Auto. Ins. Co. v.*
15 *Performance Orthopaedics & Neurosurgery, LLC*, 315 F. Supp. 3d 1291, 1307 (S.D. Fla. 2018)
16 (“when considering whether a defendant’s actions support a finding of ‘unfair methods of
17 competition, unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or
18 commerce,’ courts have regarded the concept as ‘extremely broad’”).

19 The arguments against the FDUTPA claims are similar to those raised as the GBL claims
20 discussed above. JLI argues that Broward and Escambia fail to allege actual damages. Altria and
21 the Officer and Director Defendants argue that Broward and Escambia fail to allege that they
22 engaged in a deceptive act.

23 a. JLI

24 Proof of actual damages is necessary to sustain a FDUTPA claim. “Actual damages are
25 limited to compensatory damages; consequential damages are not available under the Act.” *In re*
26 *Nat’l Prescription Opiate Litig. – West Boca Medical Center*, 2020 WL 1669655, at *25 (citing
27 *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 824–25 (Fla. Dist. Ct. App. 2010)). In
28 addition, the FDUTPA affords civil private causes of action for equitable relief in the form of a

1 declaratory judgment or an injunction. *Id.* (citing *Nazario v. Prof'l Account Servs., Inc.*, No.
2 216CV772FTM99MRM, 2017 WL 1179917, at *4 (M.D. Fla. Mar. 30, 2017)).

3 JLI argues that Broward and Escambia have not adequately alleged a claim for damages
4 under the FDUTPA because they: (i) do not allege that they were party to any transaction by
5 which they were harmed; and (ii) do not seek to recover the difference in price between what they
6 paid for JUUL products and what they received (which has been recognized as actual damages
7 under FDUTPA). First, as clarified in the beginning of this section, “[a] plaintiff need not be party
8 to any consumer transaction to bring a FDUTPA claim.” *In re Nat’l Prescription Opiate Litig. –*
9 *West Boca Medical Center*, 2020 WL 1669655, at *20 (analyzing Florida law). Second, as Judge
10 Polster explained when rejecting a similar argument, the difference in market value of a product or
11 service is not the only type of actual damages cognizable under FDUTPA. *Id.* at *25. The
12 amounts necessary “to compensate adequately an injured party for losses sustained as the result of
13 a defendant’s wrongful or negligent action” are also “easily recognized as actual damages.” *Id.*
14 (quoting *Diamond v. Porsche Cars N. Am., Inc.*, No. 06-10592, 2012 WL 6837916, at *4-5 (Cir.
15 Ct. Fla. Sept. 28, 2012)). This is precisely the kind of damages Broward and Escambia seek to
16 recover here.

17 The alleged damages here are similar to those asserted by Broward County in the opioid
18 case that Judge Polster found sufficient in *In re Nat’l Prescription Opiate Litig. – Broward*
19 *County*, 2020 WL 1986589, at *9. There, Broward County asserted thirteen categories of costs
20 incurred as a result of the opioid epidemic, including costs associated with emergency response.
21 costs for providing mental-health counseling, costs associated with law enforcement and public
22 safety relating to the opioid epidemic, costs associated with increased burden on judicial systems,
23 and losses caused by the decrease in funding available for public services for which funding was
24 lost because it was diverted to other public services designed to address the opioid epidemic. *Id.*
25 Here, in responding to the youth e-cigarette crisis created by JLI’s misconduct, not only did
26 Broward and Escambia have to divert their limited resources to combat the problem of e-cigarette
27 use among students, but they also incurred costs in, among other things, purchasing e-cigarette-
28 detection devices and cameras, paying for in-school and afterschool programs, and altering the

1 health curriculum. *See* Broward ¶¶ 603–13; Escambia ¶¶ 598–604. These costs do not depend
 2 upon any particular student’s damages or injuries; they flow from the independent losses caused
 3 by alleged deceptive conduct.

4 JLI’s motion to dismiss Broward’s and Escambia’s FDUTPA claims is DENIED.

5 **b. Altria**

6 Altria argues that Broward and Escambia fail to identify what it did that was deceptive
 7 under the Florida consumer protection statutes. This argument is unconvincing for the same
 8 reasons stated above concerning the GBL claim. *See* Broward ¶¶ 521–54 (Altria coordinated with
 9 JLI to deceive regulators to ensure that mint JUUL pods remained on the market); Escambia ¶¶
 10 517–50 (same); Broward ¶¶ 226 –61 (Altria assisted in the deceptive “Make the Switch” ad
 11 campaign); Escambia ¶¶ 224–59 (same). Altria’s attempt to litigate the merits of these allegations
 12 is inappropriate at this stage. *State Farm Mut. Auto. Ins. Co. v. Performance Orthopaedics &*
 13 *Neurosurgery, LLC*, 278 F. Supp. 3d 1307, 1316 (S.D. Fla. 2017) (“Whether [specific] conduct
 14 constitutes as unfair or deceptive trade practice [under FDUTPA] is a question of fact for the jury
 15 to determine.”) (citation omitted). Altria’s motion to dismiss the FDUTPA claim is DENIED.

16 **c. Officer and Director Defendants**

17 The Officer and Director Defendants argue that Broward and Escambia do not allege that
 18 they personally participated in any violation of the FDUTPA. In order to proceed against an
 19 individual for a violation of FDUTPA, a plaintiff must allege that the individual was a “direct
 20 participant” in the dealings. *Aboujaoude v. Poinciana Dev. Co. II*, 509 F. Supp. 2d 1266, 1277
 21 (S.D. Fla. 2007); *Rollins, Inc. v. Heller*, 454 So.2d 580, 582 (Fla. Dist. Ct. App. 1984) (it is
 22 unnecessary to pierce the corporate veil because individual defendant was a direct participant in
 23 the dealings).

24 Broward and Escambia offer the same allegations about Monsees and Bowen’s individual
 25 participation in the alleged misconduct as Three Village; these allegations are sufficient for the
 26 same reasons discussed above. They are unlike the conclusory allegations Florida courts have
 27 found insufficient to plead individual liability under FDUTPA. *See, e.g., Aboujaoude*, 509 F.
 28 Supp. 2d at 1277 (plaintiffs “made general allegations against [the president of the company]” and

1 “[did] not specify his individual actions and how they constitute a violation of FDUTPA”).

2 But, like Three Village, Broward and Escambia fail to sufficiently describe how Pritzker,
3 Huh, and Valani were “direct participant[s]” in the alleged misconduct. *SIG, Inc. v. AT & T*
4 *Digital Life, Inc.*, 971 F. Supp. 2d 1178, 1195 (S.D. Fla. 2013) (dismissing individual claims
5 because complaint included a single conclusory allegation that individual defendants “participated
6 directly in the violations”).

7 Monsees and Bowen’s motions to dismiss the FDTPA claims are DENIED. Pritzker, Huh,
8 and Valani’s motion to dismiss is GRANTED with leave to amend.

9 **F. Personal Jurisdiction**

10 The Officer and Director Defendants move to dismiss complaints filed outside of their
11 respective home states for lack of personal jurisdiction. In MDL actions such as this one, the court
12 is entitled to exercise personal jurisdiction over each defendant only to the same degree that the
13 original transferor court could have. *In re Dynamic Random Access Memory (Dram)*, No. C 02-
14 1486 PJH, 2005 WL 2988715, at *2 (N.D. Cal. Nov. 7, 2005). Accordingly, I must evaluate the
15 nature of the Officer and Director Defendants contacts in the relevant forum states with regard to
16 the long-arm statutes of those states. Since Arizona, California, Florida, New York, and
17 Pennsylvania all have long-arm statutes that authorize the exercise of personal jurisdiction to the
18 fullest extent authorized by constitutional due process, personal jurisdiction is to be assessed with
19 regards to federal due process. “And since federal law accordingly controls, this court will look to
20 its own circuit as the source for federal law.” *Id.* (citation omitted).

21 The plaintiff bears the burden of demonstrating that the court has jurisdiction. *Harris*
22 *Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128–29 (9th Cir. 2003).
23 However, the plaintiff must make “only a prima facie showing of jurisdictional facts to withstand
24 the motion to dismiss.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). For the purposes
25 of deciding whether a prima facie showing has been made, “the court resolves all disputed facts in
26 favor of the plaintiff.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).

27 Due process is determined under either a general or specific jurisdiction analysis. Bowen,
28 Monsees, Pritzker, and Valani concede that they are subject to general jurisdiction in California,

1 but claim that they are not subject to personal jurisdiction in any of the cases filed outside of
2 California: Central Bucks (Pennsylvania); Escambia (Florida); Broward (Florida); Three Village
3 (New York); and Tucson (Arizona). Huh concedes that he is subject to general jurisdiction in
4 Florida, where he currently resides, but claims that he is not subject to personal jurisdiction in any
5 of the cases filed outside of Florida: Central Bucks (Pennsylvania); Santa Cruz (California);
6 Livermore Valley (California); Three Village (New York); and Tucson (Arizona).

7 The government entities argue that there is specific personal jurisdiction over each of their
8 claims, and alternatively that there is pendent personal jurisdiction. As such, the relevant inquiry
9 is whether they have made, or can make, a factual showing that warrants the exercise of specific
10 personal jurisdiction under the standards espoused by the Ninth Circuit.

11 1. Specific Jurisdiction

12 Specific jurisdiction arises when a defendant's specific contacts with the forum give rise to
13 the claim in question. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–16
14 (1984). “A court exercises specific jurisdiction where the cause of action arises out of or has a
15 substantial connection to the defendant's contacts with the forum.” *Glencore Grain Rotterdam*
16 *B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002). The Ninth Circuit
17 employs a three-part test to determine whether there is specific jurisdiction over a defendant:

- 18 (1) the non-resident defendant must purposefully direct his activities
19 or consummate some transaction with the forum or resident thereof;
20 or perform some act by which he purposefully avails himself of the
21 privilege of conducting activities in the forum, thereby invoking the
22 benefits and protections of its laws;
23 (2) the claim must be one which arises out of or relates to the
24 defendant's forum-related activities; and
25 (3) the exercise of jurisdiction must comport with fair play and
26 substantial justice, i.e., it must be reasonable.

27 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

28 The plaintiff bears the burden of satisfying the first two prongs of the test. *Id.* at 802. If
the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the
forum state. *Id.* If the plaintiff succeeds in satisfying both of the first two prongs, the burden then
shifts to the defendant to “present a compelling case” that the exercise of jurisdiction would not be
reasonable. *Id.*

a. Purposeful Direction

To determine whether a defendant's acts have had the requisite effects, courts assess whether the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Levi Strauss & Co. v. J. Barbour & Sons Ltd.*, No. 3:18-CV-03540-WHO, 2019 WL 1117533, at *4 (N.D. Cal. Mar. 11, 2019). As the Ninth Circuit has explained, "purposeful availment is satisfied even by a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a foreign act having effect in the forum state." *Schwarzenegger*, 374 F.3d at 803 (internal quotation and citation omitted).

The government entities allege that Monsees, Bowen, Pritzker, Huh, and Valani developed the marketing strategy to target teens and then pushed for aggressive implementation of that strategy nationwide. *See, e.g.*, TVC ¶¶ 1-3, 35-38, 44, 95-96, 156, 501-02. Those defendants allegedly directed and intended their actions at each of the forum states and nationwide.

The marketing strategy included control over messaging, particularly on JLI's website. TVC ¶ 678. The website directly offers JUUL products for sale throughout the United States, and JUUL products are directly shipped to online purchasers throughout the United States, including in the forum states. *See id.* ¶¶ 204-08, 413-39. The age-verification function on the JUUL website requires users to identify their state of residence. *Id.* ¶¶ 418 (government identification required), 432 (describing auto-ship function). The website includes a "store locator" feature that allows users to find JUUL retailers throughout the country. *Id.* ¶ 358. The marketing strategy also relied heavily on social media posting, which actively sends messages to JUUL social media followers throughout the United States, as well as in-person events and presentations throughout the country. *Id.* ¶¶ 343, 361-69, 394, 441, 444, 569-72.

The Officer and Director Defendants' alleged authorization of and participation in tortious conduct, namely the youth-targeted conduct, can create jurisdictional contacts with respect to themselves as individuals:

If acts taken by a corporate officer subjects the officer to personal liability (i.e., the corporate officer authorized, directed or participated in tortious conduct), and those acts create contact with the forum state, such acts are not only acts of the corporation but also acts of the individual, and may be considered contacts of the individual for

1 purposes of determining whether long-arm jurisdiction may be
exercised over the individual.

2 *Chunghwa Telecom Glob., Inc. v. Medcom, LLC*, No. 5:13-CV-02104-HRL, 2016 WL 5815831, at
3 *6 (N.D. Cal. Oct. 5, 2016) (citation omitted); *see also Quiksilver, Inc. v. Quick Sports Int'l B.V.*,
4 2005 WL 8157305, at *5 (C.D. Cal. May 11, 2005) (where defendants were directly involved
5 product marketing, it would be it would be “erroneous” to grant a motion to dismiss on
6 jurisdiction grounds); *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520–23 & n.10 (9th Cir. 1989)
7 (finding “mere association with a corporation that causes injury in the forum state” is not enough
8 to exercise jurisdiction over an individual employee, but individuals can be liable when they are
9 the “guiding spirit” or “central figure” in the wrongful conduct, and exercising jurisdiction over
10 individual defendant shareholders).⁹¹

11 As noted above, the government entities have sufficiently alleged Bowen and Monsees’
12 role in the alleged youth-targeted misconduct. These allegations regarding Bowen and Monsees’
13 involvement in the development and implementation of the challenged nationwide marketing
14 campaign and its intended effects in the forum states satisfy the first prong of the jurisdictional
15 analysis.

16 The allegations about Pritzker, Huh, and Valani’s involvement are insufficient. But

18 ⁹¹ Bowen argues that the “corporate shield” doctrine or the “fiduciary shield” doctrine prevents
19 personal jurisdiction over him outside of California. As the government entities correctly point
20 out, the laws of all the states at issue here do not apply these doctrines when the employee
21 developed, implemented and/or supervised the wrongful conduct at issue that was intended to
22 cause harm in the foreign state. *See, e.g., Calder v. Jones*, 465 U.S. 783, 790 (1984) (finding
23 jurisdiction over non-resident defendants where they were “primary participants in an alleged
24 wrongdoing intentionally directed at a California resident”); *In re Oreck Corp. Halo Vacuum &*
25 *Air Purifiers Mktg. & Sales Practices Litig.*, No. ML 12-2317 CAS JEMX, 2012 WL 6062047, at
26 *5–6 (C.D. Cal. Dec. 3, 2012) (rejecting application of fiduciary shield doctrine under Florida
27 long-arm statute where employee was one of the key participants in the allegedly fraudulent
28 national marketing campaign); *FFR SE, LLC v. Sanborn*, No. CIV.A. 14-5439, 2015 WL
3970923, at *6 & n.10 (E.D. Pa. Jun. 30, 2015) (corporate shield not applicable to company’s
president and owner who was a “key player in the corporate structure”) (citation omitted);
Belabbas v. Inova Software Inc., No. 16 CIV. 7379 (LGS), 2017 WL 3669512, at *3 (S.D.N.Y.
Aug. 24, 2017) (explaining that corporate shield doctrine does not exist under New York law
which “does not distinguish actions taken in a defendant’s personal capacity from actions taken in
his ‘corporate’ capacity” because N.Y. C.P.L.R. 302 “confers jurisdiction over individual
corporate officers who supervise and control an infringing activity”) (citation omitted); *Scott v.*
Kemp, 248 Ariz. 380, 387 (Ct. App. 2020) (finding fiduciary shield doctrine inconsistent with
Arizona long-arm statute and instead looking at the actions undertaken by the defendant directed
at the forum).

1 assuming the government entities are able to add sufficient allegations on amendment, the first
 2 prong would also be satisfied as to them. *See, e.g., Commonwealth v. Purdue Pharma, L.P.*, No.
 3 1884CV01808, 2019 WL 5617817, at *8 (Mass. Super. Oct. 8, 2019) (concluding “the exercise of
 4 jurisdiction against the individual defendants on the facts alleged is reasonable and foreseeable,”
 5 where plaintiffs alleged that “the individual defendants, who held positions of control over [the
 6 pharmaceutical company’s] activities, reasonably were aware that [the company] had sales
 7 operations based in Massachusetts” and also alleged that each of the individual defendants either
 8 “tacitly or explicitly approved sending tailored marketing materials to Massachusetts doctors” or
 9 knowingly engaged in other conduct aimed at Massachusetts that is alleged to be unfair and
 10 deceptive).

11 **b. Claims Arise Out Of Contacts**

12 Claims “arise out of” forum-related contacts when those contacts are the “but for” cause of
 13 a plaintiff’s claims. Thus, courts ask whether the plaintiff would have been injured “but for” the
 14 conduct directed at the forum state. *See Levi Strauss*, 2019 WL 1117533, at *6 (citing
 15 *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

16 The government entities allege that “but for” the Officer and Director Defendants’ efforts
 17 to develop and maintain a nationwide youth nicotine market—by creating the product to appeal to
 18 youth, by marketing that product to youth nationally (including in the forum states), by
 19 establishing a nationwide distribution network, by establishing a website that offered JUUL for
 20 sale nationwide, and by taking orders and shipping products nationwide (including in the forum
 21 states)—they would not have been injured. The second prong of the jurisdictional analysis is
 22 satisfied, at least as to Monsees and Bowen, because the claims directly arise out of and relate to
 23 their forum-related contacts.

24 **c. Reasonableness**

25 With the first two factors established, the burden shifts to the Officer and Director
 26 Defendants to present a “compelling case” establishing that the exercise of jurisdiction over them
 27 is unreasonable. *Levi Strauss*, 2019 WL 1117533, at *4 (citation omitted). The factors to be
 28 considered in determining reasonableness include: “(1) the extent of the defendant’s purposeful

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1 interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the
2 extent of the conflict with the sovereignty of the defendant’s state, (4) the forum state’s interest in
3 adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the
4 importance of the forum to the plaintiff’s interest in convenient and effective relief, and (7) the
5 existence of an alternative forum.” *Levi Strauss*, 2019 WL 1117533, at *4 n. 4 (citing *In re W.*
6 *States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 745 (9th Cir. 2013)).

7 The Officer and Director Defendants have not satisfied their burden of making a
8 “compelling case” for denying jurisdiction. As discussed above, the government entities have
9 sufficiently alleged that each defendant, except the three Other Director Defendants, purposefully
10 availed themselves to the forums at issue. The forum states therefore have a significant interest in
11 remediating the youth e-cigarette crisis created by the alleged misconduct. On the other hand, the
12 Officer and Director Defendants make no particularized argument that litigating cases outside of
13 their home states would pose a hardship or other burden on them. Exercising personal jurisdiction
14 in these circumstances comports with fair play and substantial justice.

15 Monsees and Bowen’s motions to dismiss for lack of personal jurisdiction are DENIED.
16 The Other Directors’ motion is GRANTED with leave to amend.⁹²

17
18 **CONCLUSION**

19 The motions to dismiss or stay under the primary jurisdiction doctrine are DENIED. Dkt.
20 Nos. 626, 750.

21 The motions to dismiss based on federal preemption are DENIED. Dkt. Nos. 627, 750

22 The motions to dismiss the RICO claims are GRANTED and with leave to amend. Dkt.
23 Nos. 628, 632, 645, 647.

24 The motions to dismiss the California claims are GRANTED in part and with leave to
25 amend. Dkt. Nos. 629, 632, 748, 751, 752/778.

26 The motions to dismiss the Government Entity Complaints are GRANTED in part and

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28

⁹² The government entities’ alternative pendent jurisdiction argument fails due, as explained
above, to the insufficient RICO allegations as to which leave to amend has been granted.

1 with leave to amend. Dkt. Nos. 738, 740, 771, 772, 773/779.

2 **IT IS SO ORDERED.**

3 Dated: October 23, 2020



William H. Orrick
United States District Judge

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