In re Juul Labs, Inc. Antitrust Litigation

2021 | Cited 0 times | N.D. California | August 19, 2021

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

IN RE: JUUL LABS, INC., ANTITRUST LITIGATION

Case No. 20-cv-02345-WHO

ORDER ON MOTION COMPEL AND MOTIONS TO DISMISS Dkt. Nos: 207, 209, 210, 211

There are four motions currently pending before me: (1) defendant Juul Labs, Inc. motion to compel arbitration or strike the class claims of the Direct Purchaser Plaintiffs Dkt. No. 210; (2) f the DPPs, the Indirect Purchaser Plaintiffs (IPPs), and the Indirect Reseller Plaintiffs (IRPs), Dkt. No. 207; (3) defendants Altria Group, Inc. and Altria Enterprises, LLC motion to dismiss the consolidated class complaints of the DPPs, IPPs, and IRPs; and (4) defendants Nicholas Pritzker and Riaz Valani asserted against them. For the reasons discussed below, I GRA

claims of the three named DPPs to arbitration, stay the dismissal of the DPP for 30 days and give the DPPs leave to amend to substitute in a proposed plaintiff whose claims

against JLI would not be subject to arbitration. On the remaining motions, I dismiss a limited set of claims but otherwise deny the motions to dismiss.

BACKGROUND Three sets of plaintiffs bring antitrust and related state law claims against Altria and JLI challenging the allegedly unlawful and anticompetitive agreement Altria entered into with JLI. 1

1 Pritzker and Riaz Valani.

The heart of plaintiffs proceedings against JLI and Altria, is that Altria intentionally departed from the e-cigarette market (despite actively competing with JLI in that market) and joined forces with JLI under a non- -leading product and technology. In return, JLI (and its major investors) received billions of dollars as well as access to retail opportunities, and regulatory expertise. Altria is alleged to have started investigating investing in JLI in 2017. DPP Consolidated Class Action Complaint, Dkt. No. 134- CAC 61, 62; IPP Consolidated Class Action Complaint, Dkt. No. 131- CAC ; IRP Consolidated Class Action Complaint, Dkt. No. 133- CAC ¶ 13. 2

Valani and Pritzker were crucial f the negotiations that spanned much of 2018, intensifying in the summer of 2018 and culminating in an agreement signed on December 20, 2018 whereby Altria acquired a 35% stake in JUUL for $12.8 billion. DPP CAC ¶¶ 8, 70, 74, 86; IPP CAC ¶¶ 14, 16, 77, 82, 84.

(produced by Altria subsidiary Nu Mark) was its closest competitor to JUUL, and it had committed $100 million dollars to secure prime shelf-space for that product earlier in 2018. DPP CAC ¶ 3, 18, 125, 145; IPP CAC ¶ 7, 135. Plaintiffs allege that a key component of the JLI-Altria deal was that Altria leave the e-vaping market; they say that the JLI- to that non-compete. DPP CAC ¶¶ 79, 80, 82; IPP CAC ¶ 88. The negotiations were allegedly restarted by an October 5, 2018 email consistent with our previous discussions in the U.S. e- the transaction period during which Altria would perform services for JLI. DPP CAC ¶¶ 7, 81; IPP CAC ¶¶ 3, 14, 88. Soon after that October 2018 commitment, Altria withdrew its MarkTen Elite product from the market. IPP CAC ¶¶ 7, 14.

The alleged antitrust agreement (Agreement) is comprised of at least the October 2018

2 The allegations in the IPP and IRP Consolidated Class Action Complaints are practically identical but numbered differently.

from December 2018, from January 2020. DPP CAC ¶¶ 81, 92, 95, 96, 104; IPP CAC ¶ 3. -Compete provision, Article 3.1 of the Agreement, reads:

[Altria] shall not . . . directly or indirectly (1) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor business; (2) take actions with the purpose of preparing to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities; or (3) Beneficially Own any equity interest in any Person, other than an aggregate of not more than four and nine-tenths percent (4.9%) of the equity interests of any Person which is publicly listed on a national stock exchange, that engages directly or indirectly in the e-Vapor Business (other than (x) engagement in, or sponsorship of, research and development activities not directed toward the e-Vapor Business and not undertaken with the purpose of developing or commercializing technology or products in the e-Vapor Business) . . . . Notwithstanding the foregoing, (x) the [Altria] and its Subsidiaries and controlled Affiliates may engage in the business relating to (I) its Green Smoke, MarkTen (or Solaris, which is the non-U.S. equivalent brand of MarkTen) and MarkTen Elite brands, in each case, as such business is presently conducted, subject to Section 4.1 of the Purchase Agreement, and (II) for a period of sixty (60) days commencing on the date of this Agreement, certain research and development activities pursuant to existing agreements with third parties that are in the process of being discontinued. Article 3.2 further prohibited competition on an indirect basis with respect to any upstream affiliates of Altria. IPP CAC ¶¶ 103-104; DPP CAC ¶ 95.

Altria described the scope of its Relationship Agreement with JLI in its Form 8-K, as follows:

The Relationship Agreement generally prohibits Altria from competing, or otherwise acquiring an interest in an entity competing, in the e-vapor business for a period of at least six years from Closing [of the Transaction], extendable thereafter unless terminated by Altria. If another person were to acquire 40% or more of Altria's voting power, or 30% of Altria's voting power combined with contractual control of a majority of Altria's board of directors, that person would also be subject to certain non-compete obligations set forth in the Relationship Agreement. IPP CAC ¶ 16. Plaintiffs allege that Relationship Agreement entered into by Altria and JLI in January 2020.

On April 1, 2020, the FTC

challenging the lawfulness of both the agreements and the acquisition under Section 5 of the FTC Act (15 U.S.C. § 45), alleging that conduct violated Section 1 of the Sherman Act and Section 7 of the Clayton Act. ., Dkt. No. 9393 (F.T.C. April 1, 2020). The FTC contends that under the rule of reason analysis but does not allege a per se restraint, which all three sets of plaintiffs allege here. DPP CAC ¶ 166; IPP CAC ¶ 109; IRP CAC ¶ 106. Plaintiffs assert in three consolidated class complaints that the Agreements illegally restrained competition in the relevant market in violation of federal and state antitrust laws, unfair competition, and consumer protection laws. IPP CAC ¶¶ 19, 20; DPP ¶¶ 102, 106, 108. The three Direct Purchaser Plaintiffs are Anthony Martinez (a resident of the State of New York), Jessica McGee (a resident of the State of Minnesota), and Mallory Flannery (a resident of the State of Iowa). All allege that -System E-Vapor products, including devices and CAC ¶¶ 13-15. No other details are provided regarding the dates or timeframes of their purchases. The DPPs allege three claims against three sets of defendants JLI, Altria, and the Directors Valani and Pritzker and seek damages and equitable relief for: (1) Restraint of Trade in Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (against all defendants); (2) Restraint of Trade in Violation of Section 7 of the Clayton Act, 15 U.S.C. § 18 (against all defendants); and (3) Declaratory and Injunctive Relief for Violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. § 26 (against all defendants). 3

The Indirect Purchaser Plaintiffs are Kurt Doughty (a resident of Rhode Island), Allison Harrod (a resident of Florida), Daraka Larimore (a resident of Santa Barbara County, California), Adam Matschullat (a resident of San Diego County, California), Keith May (a resident of Florida), Dylan Pang (a resident of New York), and Kerry Walsh (a resident of Massachusetts). IPP CAC ¶¶ 26- -System E-Cigarettes indirectly

3 Ten additional individual defendants were named in the DPP CAC, but they were dismissed by stipulation on January 15, 2021. Dkt. Nos. 197-206.

from various retail Id. The IPPs assert sixteen claims against defendants JLI and Altria: (1) Violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3 (on behalf of the Nationwide Class for Injunctive Relief); (2) Violation of Section 2 of the Sherman Act - Monopolization, 15 U.S.C. § 2 (against JLI, on behalf of the Nationwide Class for Injunctive Relief); (3) Violation of Section 2 of the

Sherman Act Attempted Monopolization, 15 U.S.C. § 2 (against JLI, on behalf of the Nationwide Class for Injunctive Relief); (4) Violation of Section 2 of the Sherman Act Conspiracy to Monopolize, 15 U.S.C. § 2 (on behalf of the Nationwide Class for Injunctive Relief); (5) Violation of Section 7 of the Clayton Act, 15 U.S.C. § 18 (on beha Cartwright Act, Cal. Bus. & Prof. Code § 16700, et seq. (on behalf of the Nationwide Class for 16700, et seq.

Cal. Bus. & Prof. Code § 16700, et seq. (by plaintiffs Daraka Larimore and Adam Matschullat on

Law, Cal. Bus. & Prof. Code § 17200, et seq Damages); (10) 17200, et seq. (by plaintiffs Daraka Larimore and Adam Matschullat on behalf of the California

Class for Damages); (11) Violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201(2), et seq. (by plaintiffs Allison Harrod and Keith May on behalf of the Florida Class for Damages); (12) Violation of Mass. Gen. Laws ch. 93A § 1, et seq. (by plaintiff Kerry Walsh on behalf of the Massachusetts Class for Damages); (13) Violation of Section 340 of New York General Business Law (by plaintiff Dylan Pang on behalf of the New York Class for Damages); (14) Violation of the Rhode Island Antitrust Act R.I. Gen. Laws § 6-36-1, et seq. (by plaintiff Kurt Doughty on behalf of the Rhode Island Class for Damages); (15) Violation of the Rhode Island Unfair Trade Practice and Consumer Protection Act, R.I. Gen. Laws § 6-13-1.1-1, et seq. (by plaintiff Kurt Doughty on behalf of the Rhode Island Class for Damages); and (16) Unjust Enrichment (by plaintiffs on behalf of each State Class for Damages).

-system e-cigarette products indirectly,

IRP CAC ¶¶ 23-30. The IRPs assert eleven claims against defendants JLI and Altria for: (1) Violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3 (on behalf of the Nationwide Class for Injunctive Relief); (2) Violation of Section 2 of the Sherman Act - Monopolization, 15 U.S.C. § 2 (against JLI, on behalf of the Nationwide Class for Injunctive Relief); (3) Violation of Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2) (Attempted Monopolization Against JLI on behalf of the Nationwide Class for Injunctive Relief); (4) Violation of Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2) (Conspiracy to Monopolize) (on behalf of the Nationwide Class for Injunctive Relief); (5) Violation of Section 7 of the Clayton Act (15 U.S.C. § 18); (6) Violation of California Antitrust Statutes (on behalf of the Nationwide Class, on behalf of the Cartwright Act Class and by plaintiffs Sofijon, Rose And Fifth, Inc., B&C, Napht, Irwindale Fuel Station on behalf of the California State Class for Damages); (7) Vet seq. (on behalf of the Nationwide Class and by plaintiffs Sofijon, Rose And Fifth, Inc., B&C, Napht, Irwindale Fuel Station on behalf of California State Class); (8) Violation of the Florida Deceptive and Unfair Trade Practices Act (by Noor Baig on behalf of the Florida Class); (9) Violation of the Michigan Antitrust Reform Act (Mich. Comp. Laws § 445.771, et seq.) (by Somerset Party Store on behalf of the Michigan Class); (10) Violation of Section 340 of New York General Business Law (by Big Puff on behalf of the New York Class); and (11) Unjust Enrichment (on behalf of each State Class for Damages).

Defendants move to dismiss the class claims asserted by the IPPs, the IRPs, and the DPPs. Dkt. Nos. 207 (Altria MTD), 209 (Director MTD), 211 (JLI MTD). JLI also moves to compel to arbitration or strike the class claims asserted by the DPPs due to the arbitration

website. Dkt. No. 210 (MTC).

DISCUSSION I. ALLEGATIONS

JLI moves to compel arbitration and in the alternative to strike the class claims of plaintiffs Martinez, McGee, and Flannery. When those plaintiffs created their accounts, the JLI website through which they made their direct purchases required them to agree to arbitration and to waive their right to pursue class claims. I agree that the plaintiffs gave constructive assent to these provisions through the hyperlinked Terms and Conditions to which they agreed.

A. Background JLI asserts that during the timeframe each of the three DPPs created their JLI accounts on www.juul.com between August 2018 and July 2019 the DPPs were required to affirmatively check a box they were presented, establishing their assent to the hyperlinked Terms and Conditions that

their agreement to arbitrate claims and waive a right to pursue a class action. See Declaration of Eadon Jacobs (Jacobs Decl., Dkt. No. 210-1), Exs. 4-8 (screen shots of Log In/Sign Up pages from August 2018 and February

31, 2019, and the Log In/Sign Up page from July 2019); Exs. 10-12 Conditions as they existed: (i) between June 29, 2017 and July 17, 2019; (ii) between July 17, 2019 and November 26, 2019, and (iii) from January 13, 2020 to date). 4

Product, Identity Verification & Ecommerce, Eadon Jacobs, states 2018,

4 JLI declares that: (i) Martinez created his account on August 26, 2018 and made purchases through March 13, 2020; (ii) Flannery created her account on February 26, 2019 and made a purchase only on that date; and (iii) McGee created her account on July 19, 2019 and made a purchase only on that date. Declaration of Eadon Jacobs in Support of Motion to Compel Arbitration or Strike Class Allegations (Jacobs Decl., Dkt. No. 210-1) ¶ 3 & Exs. 1-3. Plaintiffs do not contest those dates.

website unless they affirmatively checked their agreement to the Terms and Conditions and

provides a more specific date based on his efforts to confirm that as of August 9, 2018, before the date Martinez created his account on August 26, 2018, the clickbox requirement was in place. Declaration of Eadon Jacobs in Support of Reply (Jacobs Reply Decl., Dkt. No. 236-1), ¶¶ 3-6.

JLI shows that access to the Terms and Conditions was readily available during account creation. The required clickbox was Inc. you agree to our Terms and Conditions and Privacy Policy -6. 5

By clicking on the underlined terms, the individual would be taken to the Terms and Conditions or Privacy Policy. JLI notes that on July 31, 2019, when Martinez signed in to make a purchase, he e the Log In/Sign Up screen also screen simply reminded users that by registering they agree to the hyperlinked Terms and Conditions. Jacobs Ex. 7 & ¶ 7. When Martinez logged back in on February 27, 2020, he would clickbox to proceed but disclosed, Terms and Conditions and Privacy Policy 9.

While the Terms and Conditions varied over time, JLI declares that the arbitration and class action wavier provisions at issue here remained constant. Prior to 2020, the provisions provided:

GOVERNING LAW, VENUE, AND CLASS ACTION /JURY TRIAL WAIVER [* * *] Arbitration. Read this section carefully because it requires the parties to arbitrate their disputes and limits the manner in which you can seek relief from JUUL Labs. For any dispute with JUUL Labs, you agree to first contact us via email and attempt to resolve the dispute with us

5 rom the other words in the

disclosure sentence.

informally. In the unlikely event that JUUL Labs has not been able to resolve a dispute it has with you after sixty (60) days, we each agree to resolve any claim, dispute, or controversy (excluding any claims for injunctive or other equitable relief as provided below) arising out of or in connection with or relating to these Terms, or the breach or by JAMS, under the Optional Expedited Arbitration Procedures then in effect for JAMS . . . . Nothing in this Section shall be deemed as preventing JUUL Labs from seeking injunctive or other equitable relief from the courts as necessary to prevent the actual or threatened infringement, misappropriation, or violation of our data security, Intellectual Property Rights or other proprietary rights. Class Action/Jury Trial Waiver. With respect to all persons and entities, regardless of whether they have obtained or used the Website or JUUL Labs Products or services for personal, commercial or other capacity, and not as a plaintiff or class member in any purported class action, collective action, private attorney general action or other representative proceeding. This waiver applies to class arbitration, and, unless we agree otherwise, the arbitrator may not consolidate agreement, you and JUUL Labs are each waiving the right to a trial by jury or to participate in a class action, collective action, private attorney general action, or other representative proceeding of any kind. Id. These Terms and Conditions were governed by California law. When Martinez accessed his account in February and March 2020, the provisions expressly included that covered claims included those related to the changed governing law to Delaware. Jacobs Decl., Ex. 12. In all of the versions of the Terms and Conditions, the arbitration agreement and class action waiver provisions were emphasized in a notice at the top of the page:

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GENERAL STATEMENT / WEBSITE TERM OF USE: JUUL Labs has adopted these Terms of Service to inform you of your rights and obligations when using the Website and/or when purchasing any JUUL Labs products or goods . . . . Your use of this Website, and/or your purchase of any Products constitutes your agreement to the following Terms of Service. If you do not agree to these Terms of Service you may not use the Website or purchase our Products from the websites. JUUL Labs may, and reserves the right, to from time to time modify, limit, change, discontinue, or replace the website and these Terms of Service at any time. In the event JUUL Labs modifies, limits, changes, or replaces the website or these Terms of Service, your continued use thereafter constitutes your agreement to such modification, limitation, change, or replacement.

It is your responsibility to review these Terms of Service on a regular basis to keep yourself informed of any modifications, limitations, changes, or replacements. * * * Please read these Terms of Service carefully to ensure that you understand each provision. These Terms contain a mandatory individual arbitration and class action/jury trial waiver provision that requires the use of arbitration on an individual basis to resolve disputes, rather than jury trials or class actions. Id., Ex. 10; see also id., Exs. 11-12 (materially identical).

Plaintiffs each state in declarations in support of their Opposition to the Motion to Compel that they saw a hyperlink to the Terms and Conditions on the JLI website when they created their accounts, and that they do not recall clicking or checking a box next to any disclosure of the Terms and Conditions. Declaration of Plaintiff Anthony Martinez (Martinez Decl., Dkt. No. 229-115) ¶ 4; Declaration of Plaintiff Mallory Flannery (Flannery Decl., Dkt. No. 229-16) ¶ 4; Declaration of Plaintiff Jessica McGee (McGee Decl., Dkt. No. 229-17) ¶ 4. They likewise declare that

Decl. ¶ 6; McGee Decl. ¶ 7.

August 2018. Colgate v. JUUL Labs, Inc., 402 F. Supp. 3d 728 (N.D. Cal. 2019). Considering an - lickbox and where the Terms underlined, italicized, or in any way that

the Terms and Conditions d Id. at 764-65. - , I concluded that the addition of putting the Id. at 765 66 (distinguishing

sign-in page the hyperlink to the password recovery page was displayed much differently, having been bolded, underlined, and in a larger

The facts here are different.

B. Legal Standard § 1 et seq., requires federal district courts to stay judicial proceedings and compel arbitration of claims covered by a written and enforceable arbitration agreement. [] The FAA limits the district court's role to determining whether a valid arbitration agreement Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014). To determine whether a valid arbitration agreement

exists, federal courts apply ordinary state law governing the formation of contracts, and federal determinations. Id.

assent, whe Id., 763 F.3d at 1175; see also Long v. Provide Commerce, Inc., 245 Cal.App.4th 855, 862 (2016) (relying on Nguyen and Mutual assent does not require that the consumer have actual notice of the terms of an arbitration agreement. Id. at 863. Instead, a Id.

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presented with a li Nguyen, 763 F.3d at 1175 76. As the Nguyen court explained, unlike a

clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the Id. rowsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing it exists. Id at 1176 (citing Be In, Inc. v. Google Inc., No. 12 CV 03373 LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013)). In those pure browsewrap cases,

Id. (citation omitted).

quiry notice of a browsewrap agreement, in turn, depends on the

terms of use is buried at the bottom of the page or tucked away in obscure corners of the website Id. for constructive assent where the browsewrap agreement resembles a clickwrap agreement that

is, where the user is required to affirmatively acknowledge the agreement before proceeding with Id. at 1176. This type of agreement has been characterized as a third -in wrap Snow v. Eventbrite, Inc., 3:20-CV-03698-WHO, 2020 WL 6135990, at *4 (N.D. Cal. Oct. 19, 2020); Colgate v. JUUL Labs, Inc., 402 F. Supp. 3d 728, 763 (N.D. Cal. 2019); see also Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 76 (2d Cir. 2017) (collecting cases analyzing sign-in wrap agreements).

Sign- website ton, advises the user that he or she

Peter v. DoorDash, Inc., 445 F. Supp. 3d 580, 585 (N.D. Cal. 2020) (internal quotation marks and alterations omitted); see also Zaltz v. JDATE, 952 F. Supp. 2d 439, 451 (E.D.N.Y. 2013) in order to have obtained a JDate.com account, and in order to have maintained that account through various billing cycles, plaintiff clicked the box confirming that she had both read and agreed to the website's Terms and Conditions of Service (which included the California forum selection clause), even though she does not recall the specific terms at this time. Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 838-39, 841 (S.D.N.Y. 2012) ourt concludes that Fteja assented to the Terms the contain any mechanism that forces the user to actually examine the terms before assenting

Each of the plaintiffs here accessed -in wrap type of

agreement. 6

C. Enforceability

1. Colgate Decision, Estoppel, and Evidence of Sign-In Process Plaintiffs contend that in light of my determination in the Colgate case, JLI is estopped from enforcing the arbitration provision against plaintiffs that created an account at least before August 4, 2018 using the same Log In pages I determined were unenforceable in Colgate. I agree. However, JLI has presented evidence that by the time each of the DPPs created their accounts on lickbox. Jacobs Reply Decl. ¶¶ 5-8. Absent a direct purchaser class representative who created an account on or before August 4, 2018, I need not address the impact of the pre-August 9, 2018 account creation page. of the Log In/Sign Up pages proffered by JLI as existing on the dates each named plaintiff created their account (August 26, 2018 [Martinez], February 26, 2019 [Flannery], July 19, 2019 [McGee]), is unpersuasive. At a minimum, the Jacobs Reply Declaration explaining how he ascertained the presence of the affirmative clickbox on each of those dates is sufficient. Jacobs Reply Decl. ¶¶ 5-8. While plaintiffs note that they were unable to pull from the Wayback Log In/Sign Up pages on each of the specific dates each plaintiff created their account, they and defendants have identified screen shots from immediately around those dates. While there could be some differences (other than noted below) between how the text immediately adjacent to the affirmative clickbox appeared, plaintiffs have not identified Wayback Machine screen shots from the relative time periods showing anything materially different from the screen shots proffered by JLI on this motion. found insufficient in Snow v. Eventbrite, Inc., 3:20-CV-03698-WHO, 2020 WL 6135990, at *5

-in wrap agreement as it existed in January 2016 and one as it exists

6 Plaintiffs do not dispute that the class action waiver provision rises and falls with the enforceability of the arbitration provision.

to Id appeared from 2016 to the present and that their (a representation that later proved to be untrue). Id. The major problem I identified was that

Id. Here, that information is provided by the Log In/Sign Up pages supported by the Wayback Machine searches performed by plaintiffs.

2. Enforceability JLI does not dispute each testimony that she or he did not have actual knowledge of the Terms and Conditions, much less the included arbitration and class action waiver provisions. 7 Actual knowledge, however, is not determinative. The relevant question is whether the addition of the affirmative assent clickbox in combination with the placement and design of the following disclosure containing the hyperlinks to the Terms and Conditions (and Privacy Policy) were

sufficient to establish objective constructive assent.

JLI argues that by requiring the affirmative assent to the clickbox with the Term and Conditions hyperlinked in text immediately following the box, it - agreement, also known as a sign-in wrap agreement. It points to numerous cases enforcing similar

sign-in wrap agreements where the hyperlinked Terms and Conditions are sufficiently disclosed. See, e.g., In re Facebook Biometric Info. Priv. Litig., 185 F. Supp. 3d 1155, 1165-66 (N.D. Cal. d that the closer digital agreements are to the 7

The declarations of Flannery and McGee who both created their accounts on their iPhone that

next to the disclosure before creating the accounts. Compare Jacobs Reply Decl. ¶¶ 5-8. with Flannery Decl. ¶ 4; McGee Decl. ¶ 4. That they did not recall doing so or seeing any disclosure regarding Terms and Conditions is irrelevant as long as defendant has sufficient evidence that the disclosures were in fact available. Lee v. Ticketmaster L.L.C., 817 Fed. Appx. 393, 395 (9th Cir. 2020) (unpublished) (noting plaintiffs cannot avoid the terms of online contract on the grounds (internal quotations and citations omitted)).

were available via a hyperlink to a different page and not presented immediately to plaintiffs for

hese boxes were

Holl v. United Parcel Serv., Inc., No. 16-CV-05856, 2017 WL 11520143, at *5 (N.D. Cal. Sept. 18, 2017) (compelling arbitration where enrollment La Force v. GoSmith, Inc., 17-CV-05101-YGR, 2017 WL 9938681, at *4 (N.D. Cal. Dec. 12, 2017) (enforcing arbitration agreement wh see also Snow v. Eventbrite, Inc., 3:20-CV-03698- WHO, 2020 WL 6135990, at *7 (N.D. Cal. Oct. 19, 2020) (finding adequate disclosure of arbitration agreement button, meaning that Snow had to scroll past it to press the button. It was also positioned close to

. That hyperlink is blue, while the text around it is gray. There is nothing about the text that would make it inconspicuous or non-obvious. As courts have held with respect to similar messages, a reasonably prudent user would be placed on inquiry notice by this particular sign-

JLI also relies on a series of cases where arbitration provisions in terms and conditions were enforced absent a clickbox denoting agreement to the term conditions, where the hyperlinked text was conspicuous, appeared , and consumers were warned that by proceeding to use the website, the user was agreeing to those hyperlinked terms and conditions. See, e.g., Dohrmann v. Intuit, Inc., 823 Fed. Appx. 482, 484 (9th Cir. 2020)

to agree to terms and conditions, but instead contained a disclosure below the sign in button

warning users that warning language and hyperlink to the Terms of Use were conspicuous they were the only text on the webpage in italics, were located directly below the sign-in button, and the sign-in page was

Lee v. Ticketmaster L.L.C., 817 Fed. Appx. 393, 394-95 (9th Cir. 2020) -form clickwrap agreement as California courts have construed it (because Ticketmaster does not require users to click a separate

plaintiff clicked the Sign In buttons plaintiff was conspicuously warned by proceeding he agreed to the Terms of Use that was displayed in blue font and contained a hyperlink to the terms); Allen v. Shutterfly, Inc., 20-CV- 02448-BLF, 2020 WL 5517172, at *3 (N.D. Cal. Sept. 14, 2020) (enforcing where customers were

Peter v. DoorDash, Inc., 445 F. Supp.

3d 580, ou agree to our Terms

text and were hyperlinked to the DoorDash Terms and Conditions in effect at the time. . . . see

also Meyer v. Uber Techs., Inc., 868 F.3d 6 the screen and language used render the notice provided reasonable as a matter of California law. The Payment Screen is uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account or to connect the users pre-existing PayPal account

agree to the TERMS OF SERVICE & PRIVACY POLICY, hyperlinked Terms and Conditions and Privacy Policy were directly below the buttons for registration in blue and underlined).

Plaintiffs attempt to distinguish both of these lines of cases by pointing out as I noted in Colgate that the hyperlinks for the Terms and Conditions and Privacy Policy in the post-August 9, 2018 Log In/Sign Up pages were not highlighted in a different text color or set apart from other text on the page, and were instead presented as black or dark grey text in a gray box. That is true

only for the Log In/Sign Up pages from February 2019. Jacobs Decl., Ex. 5. But Terms and Conditions is now underlined immediately following the clickbox and presented on a relatively uncluttered page. - Terms and Conditions and Privacy Policy hyperlinks because it was bolded. On each of the Log

In/Sign Up pages at issue, the required with the obviously hyperlinked Terms and Conditions. The way the Terms and Conditions were displayed on the Log In/Sign Up pages used by the three DPPs do not create a material difference between this motion and the motion in Colgate.

However, the addition of the affirmative assent clickbox, drawing attention to the text immediately following that contains the somewhat highlighted hyperlinked Terms and Conditions links, does

change the analysis. Other factors also support a finding of constructive assent. Each of the Log In/Sign Up pages was relatively clear and uncluttered. As of and after August 9, 2018, the Terms and Conditions and Privacy Policy hyperlinks were in a different shade of text and in a different font-style. 8

And by 2019, the hyperlinks following the clickbox were underlined and for part of that period also italicized. 9

Plaintiffs cases are not persuasive given the structure of the account creation pages each DPP used here. In Cullinane v. Uber Techs., Inc., 893 F.3d 53, 57 (1st Cir. 2018), the court noted the existence and location of terms and conditions: requiring users to click a box stating that they

agree to a set of terms, often provided by hyperlink, before continuing to the next screen. Instead,

8 As noted in Colgate, use of a slightly different shade of text was the only way a consumer may know she or he was agreeing to hyperlinked Terms and Conditions, and that alone was insufficient. Colgate v. JUUL Labs, Inc., 402 F. Supp. 3d 728, 765 (N.D. Cal. 2019). In the later attention and mandating affirmative attention plus the different colored, underlined and/or italicized text leads to a different conclusion. 9 following the creation of his account (where those Welcome Back screens do not require a customer who already has an account to affirmatively check again their agreement to the Terms and Conditions).

Id. 893 F.3d at 62. The court was concerned that the terms to which users were agreeing were and found that larger size,

Id. at 63 64.

Unlike the cases the DPPs rely on, the Log In/Sign Up pages here do not have the same amount of clutter and do not create a significant risk of confusion concerning what the Terms and Conditions governed. See, e.g., Long v. Provide Com., Inc., 245 Cal. App. 4th 855, 858 (Cal. to

disclosure to be conspicuous); Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016) (site actively misleads the customer. The block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It says nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted Starke v. SquareTrade, Inc., 913 F.3d 279, 294 (2d Cir.

decoupled from the transaction because it was not provided near the portion of the Amazon purchase page actually requiring anywhere on the purchase page. To provide conspicuous notice of the Post-Sale T&C, SquareTrade could have simply included a noticeable hyperlink on the Amazon

purchase page Applebaum v. Lyft, Inc., 263 F. Supp. 3d 454, 466 agree to Lyft' -sized all of which would misleading consumers even if the hyperlinked Terms of Service was easier to identify). 10

onstructive assent to the arbitration agreement and class action waiver has been demonstrated.

D. Unconscionability Plaintiffs argue that even if there is sufficient evidence of constructive assent to bind the DPPs to the Terms and Conditions, I should not enforce the arbitration agreement against the three DPPs because the Agreement is procedurally and substantively unconscionable.

Whether a contract is unconscionable is a question of law. Patterson v. ITT Consumer Fin. Corp., 14 Cal. App. 4th 1659, 1663 (Cal. Ct. App. 1993). In California, unconscionability

terms which are unreasonably favorable to t Lhotka v. Geographic Expeditions, Inc., 181 Cal. App, 4th 816, 821 (Cal. Ct. App. 2010) (citation omitted). Accordingly, Id. (citation omitted).

Procedural unconscionability occurs where a contract or clause involves oppression, consisting of a lack of negotiation and meaningful choice, or surprise, such as where the term at issue is hidden within a wordy document. Id least terms over which a party of lesser bargaining power had no opportunity to negotiate, as Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1004 (9th Cir. 2010) (superseded by statute on other grounds).

Lhotka, 181 Cal. App. 4th at 821 (citation s on the one-sidedness or overly harsh effect of the Id. at 824 825.

Both the procedural and substantive elements must be met before a provision will be

10 Plaintiffs do not dispute that their purchases through the JLI website would be covered by the arbitration Agreement and class action waiver if the Terms and Conditions are enforceable against them.

deemed unconscionable, but both need not be present to the same degree. Rath substantively oppressive the contract term, the less evidence of procedural unconscionability is

Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 114 (Cal. 2000).

1. Procedural Unconscionability Plaintiffs argue that the arbitration agreement is procedurally unconscionable because: (1) plaintiffs were addicted to nicotine when they created their accounts and purchased products to satisfy their -based products (meaning they would have had to spend more to buy a new vaping system if they did not buy pods from JLI); (2) plaintiffs had no opportunity or ability to bargain with JLI over the arbitration agreement; (3) JLI did not require plaintiffs to view or read the Terms and Conditions before allowing them to create their accounts and purchase products; and

(4) plaintiffs were not thereafter provided with a copy of the Terms and Conditions or the JAMS procedures for arbitration that governed the agreement.

Plaintiffs have not demonstrated significant procedural unconscionability. First, plaintiffs cite no authority for their position that a consumer lacks capacity to consent simply because a product is addictive and the individual plaintiffs provide no evidence that they were incompetent to enter into an agreement because of their addiction. See In re Rains, 428 F.3d 893, 901 (9th Cir. 2005) (despite claim of mental incompetency, settlement agreement enforc contained sufficient evidence to support a finding that Rains understood the nature, purpose and although the terms were unilaterally imposed, that does not make the arbitration agreement unenforceable. Murphy v. Twitter, Inc., 60 Cal. App. 5th 12, 37 (Cal. App. 1st Dist. 2021) had no opportunity to negotiate the terms of service, standing alone, is insufficient to plead a

Third and fourth, plaintiffs cite no cases requiring the immediate display or separate provision of an arbitration agreement or the rules governing the arbitration to consumers as predicates to enforceability. The availability of the Terms and Conditions in the hyperlinked text immediately next to the clickbox where the DPPs affirmatively assented to the Terms and

Conditions is sufficient for enforceability. The failure to provide consumers with a copy of the underlying rules governing the arbitration does not make the agreement or its enforcement unconscionable. See Baltazar v. Forever 21, Inc., 62 Cal. 4th 1237, 1246 (2016) (where challenge is not to unconscionability of particular element of the underlying arbitration rules, but instead

2. Substantive Unconscionability Plaintiffs argue that the arbitration agreement is substantively unconscionable because: (1) JLI retained the unilateral right to modify or change the Terms and Conditions, without notifying plaintiffs; (2) consumers are forced to bring their claims in San Francisco or (under the newer Terms and Conditions) Wilmington, Delaware and that choice of forums imposes unfair costs on consumers; (3) while consumers have to arbitrate their claims, JLI retains the right to seek om a court to protect its intellectual property, making the agreement impermissibly one-sided; (4) JLI purports to shorten the statute of limitations from four years to one; and (5) the JAMS rules are substantively unconscionable because they limit plaintiffs rights to discovery, which is particularly intensive for antitrust claims.

On the first point, there is no dispute that JLI reserved the right to modify or change the Terms and Conditions, as the Terms and Conditions explain that a consumer ed use the site constitutes your agreement to such modification Jacobs Decl., Ex. 10 at ¶ 1. argument might have some force if JLI was attempting to enforce a materially different set of Terms and Conditions that none of these plaintiffs had assented to, but that is not the situation here. Compare In re Zappos.com, Inc., Customer Data Sec. Breach Litig., 893 F. Supp. 2d 1058,

changes applicable to that pending dispute if it determined that arbitration was no longer in its

leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of ob with Ekin v. Amazon Services, LLC, 84 F. Supp. 3d 1172, 1176 (W.D. Wash. 2014) (distinguishing Zappos as a case where the

On the second point, specifying San Francisco as the location for arbitrations is not procedurally unconscionable. Plaintiffs voluntarily commenced their litigation here. They do not otherwise provide any authority that would undermine the arbitration agreement simply because it specifies a location for arbitration (San Francisco or Wilmington), considering the JAMS rules or otherwise.

On the third point, each of the three sets of Terms and Conditions that JLI contends (and plaintiffs do not dispute) existed during the operative times provides that JLI seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a [sic] our copyrights, trademarks, trade See, e.g., Jacobs Decl., Ex. 10; see also Exs. 11 & 12. These provisions arguably reserve the right to seek injunctive relief to protect JLI . This limited reservation, however, does not implicate the concern recognized by California courts in employment cases when an employer seeks to go to court on claims it would likely initiate. See, e.g., Serafin v. Balco Properties Ltd., LLC, 235 Cal. App. 4th 165, 181 (Cal. App. 1st Dist. 2015) (collecting cases); see also Carbajal v. CWPSC, Inc found an employer-imposed arbitration agreement to be substantively unconscionable when it

requires the employee to arbitrate the claims he or she is mostly likely to bring, but allows the The types of relief JLI has arguably reserved to itself to seek in court are not the type of claims that would likely be raised by consumers who used website to purchase or research products. This unilateral right at most creates only a marginal substantive unconscionability and does not make the Agreement unenforceable.

On the fourth point, plaintiffs correctly argue that the two applicable sets of Terms and Conditions (existing from June 29, 2017 and July 17, 2019 and between July 17, 2019 and

November 26, 2019) imposed a one-year statute of limitations, contrary to the four-year statute s. 10, 11 you have that arises out of or relates to these Terms of Service or your use of the Website must be brought by you within one year after the cause of action accrues. Otherwise, any such action by Relying on one case arising in the employment context, they assert that reduction in the statute of limitations is substantively unconscionable. DPP Oppo. to MTC at 21. JLI does not respond at all to this argument. I agree with plaintiffs that this provision is substantively unconscionable and will sever it, leaving the remaining provisions of the arbitration agreements enforceable. Severance is appropriate because the agreements are Serafin, LLC, 235 Cal. App. 4th at 183-84. Finally, the proportionality rule of discovery in the JAMS rules appears consistent with the proportionality of discovery required under the Federal Rules. While plaintiffs contend that the discovery deposition, which they contend is unreasonable in an antitrust case, they ignore that the one-deposition rule is a default that will be reconsidered given the complexity of the case. 11

Plaintiffs also ignore that even in arbitration they will have the benefit (provided under the Protective Order and Amended Protective Order entered in this case) of the discovery produced in the FTC action as well as discovery taken here. Plaintiffs have provided no evidence, by declaration or otherwise, substantiating their claim that they will not be able to secure or use sufficient discovery in any JAMS arbitration of their antitrust claims against JLI. In short, at most the arbitration agreements are marginally substantively unconscionable. The significantly unconscionable provision limiting the statute of limitations in two of the Agreements is readily severable. The agreements are otherwise enforceable.

11 Declaration of Kyle P. Quackenbush, Dkt. No. 229-1, Arbitration Procedure, Rule 16.2(d) side (Rule 17(b)) shall be applied by the Arbitrator, unless it is determined, based on all relevant complexity of the factual issues in dispute, etc.).

E. Unenforceable Prospective Waiver Plaintiffs also contend that the arbitration agreements contain unenforceable prospective waivers because the choice of law provisions in the agreements provide that they They also note that while the Clayton Act claims

could be pursued under the agreement governed by California law, Delaware does not have a private right of action for antitrust violations. Finally, they sole right to seek injunctive relief in court and JAMS procedures not conferring the right to award

public injunctive or other equitable relief, the agreement should not be enforced. See, e.g., McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017) (waiver of right to seek public injunctive relief in any forum was contrary to California public policy and was thus unenforceable under California law).

JLI does not dispute that federal and state law-based claims may still be raised in arbitration, even though the Terms and Conditions (the contract) will be interpreted under California or Delaware law. Defendants agree that nothing in the Terms waives any right to seek relief under any of the federal or state law claims raised by the DPPs.

As to the , plaintiffs point out only that Optional Expedited Arbitration Procedure, §§ 16.2-3, to include an award injunctive and other equitable relief Plaintiffs identify nothing in the arbitration agreements or the JAMS rules prohibiting any plaintiff from seeking public injunctive relief in the JAMS arbitration or elsewhere. 12

This court must follow DiCarlo v. MoneyLion, Inc., 988 F.3d 1148, 1158 (9th Cir. 2021), where the Ninth Circuit confirmed that

Nothing in the Terms and Conditions or the Agreements themselves constitutes an unenforceable prospective waiver.

12 The provision of the arbitration agreements allowing JLI to seek injunctive relief to protect its intellectual property rights in court does not expressly restrict or imply that a consumer does not have the right to seek injunctive relief in arbitration.

F. Individual Defendants The DPPs argue that even if their claims against JLI are subject to arbitration, their claims against the JLI Director Defendants Pritzker and Valani should not be. The Ninth Circuit has

Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1187 (9th Cir. 1986) (citations omitted). signatory to arbitrate so long as (1) the wrongful acts of the agents for which they are sued relate to their behavior as agents or in their capacities as agents [] and (2) the claims against the agents Amisil Holdings Ltd. v. Clarium Capital Mgmt., 622 F. Supp. 2d 825, 832 (N.D. Cal. 2007) (internal citations omitted).

Here there is no dispute on the second prong; the antitrust claims against the Director Defendants arise out of or relate to the Terms and Conditions that governed the terms of sale to each DPP who necessarily purchased product On the first prong, plaintiffs argue that the Director Defendants does not hinge on the acts they took as agents of JLI. They instead took in their own self-interest as major investors of JLI seeking a massive payout from the Altria investment. That distinction may have legal significance in other ways on other claims, but for the motion to compel arbitration I find that Pritzker and Valani should be covered by the arbitration agreements because they were acting as agents of JLI even if they had their own ulterior motives when conducting negotiations with Altria. Plaintiffs cite no cases in support of their position that officers or directors acting as representatives of the corporate entity fall outside the protection of the corporate arbitration agreements. Failure to cover director defendants in these circumstances could provide an easy way for plaintiffs to functionally avoid the significance of agreements to arbitrate by sending related claims against a corporation to arbitration but . There is no policy or other reason to support that result. 13

13 There are no allegations in the complaints, for example, that Pritzker or Valani were ever acting outside of the scope of their roles with JLI or acting in unauthorized ways.

G. Remedy For the foregoing reaso Martinez, McGee, and Flannery against JLI and the Director Defendants is GRANTED. The DPPs are given leave to amend to substitute a named direct purchaser plaintiff who purchased directly from JLI

purchases on or after August 9, 2018. Such amendment, if possible, shall be made within thirty days (30) of the date of this Order.

JLI asks me to either dismiss or stay the litigation of antitrust claims brought by the DPPs in their Consolidated Class Action Complaint JLI and the Director Defendants are subject to arbitration. The DPPs did not address their

preferred course of action in their opposition brief. Within thirty days of the date of this Order, the DPPs shall notify me whether they want the claims of the three named DPP plaintiffs (Martinez, McGee, and Flannery) against JLI and the Director Defendants stayed or dismissed. II.

CONSOLIDATED CLASS ACTION COMPLAINTS Defendants each move to dismiss the Consolidated Class Action Complaints filed separately by the DPPs, IPPs, and IRPs. Dkt. Nos. 207, 209, 211. While motion to compel arbitration with respect to the three currently named DPPs for the claims asserted against JLI and the Director Defendants, I have stayed the effect of that order to give the DPPs leave to amend to substitute one or more named plaintiffs whose claims might (as in the Colgate case) not be subject to an enforceable arbitration agreement. Therefore, I now consider the arguments of that nonetheless be dismissed, as well as arguments in support of dismissing the IPP and IRP claims. 14

14 The most significant arguments in support of dismissal are made by Altria in its motion and (with respect to the DPP claims). Dkt. Nos. 211, 209. I will generally address the arguments as s presented by particular defendants.

A. Antitrust Injury Defendants argue broadly that no plaintiff in any of the three CACs has adequately alleged antitrust injury plausible facts supporting an adverse impact on price, output of the products, or innovation in the market that occurred following the alleged agreement to restrain trade. Defendants note that injury is not a showing required for the FTC action, but is a key showing required of private parties. See, e.g., Pool Water Products v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001).

ded to prevent and that flows Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000) (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990)). There are four requirements generally recognized for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. Id. at 987.

The IPPs and IRPs allege harm from: (i) the lessening of choices in the market, as Altria is (IPP CAC ¶¶ 157, 158); (ii) the reduction of price competition that meant JLI could charge supracompetitive process for JUUL products (id., ¶¶ 20, 165, 265, 330); and (iii) the stifling of innovation that would have occurred had Altria stayed in the market. Id. ¶¶ 20, 107, 165. The DPPs allege similar harms, using slightly different language. They assert that as a direct and proximate result of the Agreement causing complete departure from the market from close system e-vapor products they suffered a range of antitrust injuries, including: (i) supracompetitive prices (DPP CAC ¶¶ 9, 139, 160(b), 179), (ii) reduced output (id., ¶ 139), (iii) reduced innovation (id., ¶¶ 9, 102, 139), and (iv) elimination of consumer choice (id., ¶ 139).

Defendants contend that plaintiffs cannot show antitrust injury because of a document that the IPP

and IRP plaintiffs have incorporated by reference into their CACs. It demonstrates that in

the market), market share fell by ten percentage points while other competitors made significant market share

At this juncture, the information that can be incorporated by reference does not fatally The only information from that document appropriate for consideration on these motions, as discussed later, is from the February 2019 Wells Fargo Report that these plaintiffs intended to rely on, and perhaps the actual chart from the October 2019 Wells Fargo Report that was mistakenly included. 15

Plaintiffs contend that they will develop evidence (expert and otherwise) to explain that any short-term decrease in JLI market share or output following was only a temporal situation resulting primarily from JLI withdrawing its fruit-flavored pods in response to regulatory and public pressure.

D challenges are better determined on a full record. If I were to consider product decreased in the months following the withdraw

plaintiffs still adequately allege that JLI charged supracompetitive prices despite the potential decrease in absolute prices following the increased governmental and public criticism. The departure of the second largest competitor in the closed system e-vapor market where Altria allegedly held around 8% of the market supports the plausible allegation led to supracompetitive process, reduced output, and reduced innovation.

The allegations here are not similar to those in Somers v. Apple, Inc., 729 F.3d 953, 964 (9th Cir. 2013). There, the Ninth Circuit r that of digital music right restrictions (DRM), making iTunes music files and the iPod compatible only

with each other led to overcharges as et facts alleged in her complaint. Id. at 967. In particular, the plaintiff acknowledges, under basic

15 There is some dispute as to which Wells Fargo Report the IPPs/IRPs actually relied on in their CACs. The Indirect Plaintiffs explain they intended to reference and include a chart from the February 2019 Wells Fargo Report but mistakenly included the chart from the October 2019 Report. Dkt. No. 228 at 7 n.3. As explained below, at most these two charts would be incorporated by reference, but not the remaining portions of the two Reports.

economic principles, increased competition as Apple encountered in 2008 with the entrance of Amazon generally lowers prices. [] The fact that Apple continuously charged the same price for

Id. As there was no price change in the market nor increased competition from other digital music

platforms, there could have been no competition eliminated; that case was dismissed at the pleading stage. Id.

Here, there is nothing on the face of the CACs or in facts appropriately judicially noticeable that are not subject to dispute . They allege that in the short term following the Agreement, the economic metrics in the market were impacted by s to withdraw its fruit-flavored pods and take other steps in response to the regulatory and public pressure and that they suffered from supracompetitive prices in the more concentrated market that was enabled by JLI and its most effective competitor reaching the Agreement to remove Altria from the market. 16

Finally, defendants assert th (separate from the failure to adequately allege causation argument) because plaintiffs do not allege that they will be wronged in a similar way in the future. Plaintiffs question whether the requirement to expressly allege likelihood of future injury is required in the antitrust context but do not dispute that they have not alleged possible future injury in their CACs. Assuming the need to plead that possible or likely future injury applies in this context, d are GRANTED in this limited respect. Plaintiffs are given leave to amend. Within thirty (30)

days of the date of this Order, they must file amended CACs containing (where appropriate) allegations that some or all of the named plaintiffs may suffer future injury to support the claims for equitable relief.

16 I need not reach the other injuries alleged, including reduction in innovation. But even if I -cigarette rences drawn -positioned to bring new products and innovation to the industry despite those barriers.

B. Sherman Act Claims

1. Anticompetitive Agreement Defendants argue that no plaintiff has adequately alleged a per se anticompetitive agreement in violation of Section 1 of the Sherman Act. They point out that the three written agreements identified by plaintiffs as anticompetitive the October 5, 2018 email, the Relationship Agreement (entered in December 2018) and the January 28, 2020 Amended Relationship Agreement do not expressly require Altria to leave the market. The written agreements, instead, allowed Altria to continue with its then current activities and only prevented Altria from entering the market with any new line of products, a restraint defendants characterize as reasonable as a matter of law to l property. Finally, defendants note that despite having access to over 700,000 pages of documents from the FTC production, plaintiffs do not add any more facts to support their per se theory.

Even assuming that plaintiffs had the time to review and absorb the FTC production before filing the CACs, arguments fail. Plaintiffs identify facts supporting their theory that the key - vapor market. That theory is supported by references in the IPP, IRP, and DPP CACs to facts known about the

negotiations, the parties involved, the three writings identified above, and the acts and explanations Altria contemporaneously provided to explain its actions. Although the required withdrawal of Altria from the market was not reduced to writing (which plaintiffs allege was for obvious reasons), plaintiffs have plausibly alleged that the withdrawal was key to the deal with JLI by inference supported by specifically identified facts.

Altria spends significant time in its motion and reply attempting to anchor alternative, non- antitrust explanations for its conduct. It references documents and statements identified in the CACs to claim that retail power and that Altria was only in the beginning stages of developing a product utilizing technology similar to . See Altria MTD at 27-29; Altria Reply at 14-18 (relying on In re Cent. Aluminum Co. Securities Litig., 729 F.3d 1104 (9th Cir. 2013); Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011); Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers,

795 F.3d 1124, 1130 (9th Cir. 2015). But Plaintiffs complaint may be dismissed only when defendants plausible alternative explanation is so convincing that plaintiffs explanation is implausible Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) (emphasis in original). even if ultimately may be more convincing to the jury. Id If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiffs complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiffs have alleged facts tending to exclude the possibility that the alternative explanation is true, continued large scale spending on its research and development efforts to compete with JLI right up to the withdrawal of Nu Mark from the market. See In re Cent. Aluminum Co. Securities Litig., 729 F.3d at 1108. 17

alternative explanations would require me to accept the gloss that it attempts to put on on which they rely. That is not appropriate at this juncture. For example, plaintiffs admit that Altria publicly commented (as identified in the DPP CAC) that part of the reason that it withdrew from the e-vapor market was the increasing regulatory pressure the FDA was putting on companies over youth vaping. Plaintiffs, however, contend that was a pretextual excuse. iven extensive regulatory experience that was subsequently put to use on behalf of JLI as well as its other public statements and heavy investment in its own e-vaping products throughout 2018 until it abruptly pulled its products from the market in October 2018. This is not a case where support only legitimate, non-antitrust explanations.

at a key part of the Agreement

17 In Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers, unlike here, the fully consistent with the agreement to manage internet naming rights and defendants implemented the agreement with neutral rules. Absent failed. Id., 795 F.3d at 1130.

-compete provision in the Relationship Agreement. Defendants may be correct that covenants not to compete, especially those entered in the employment context or ones otherwise intended to protect

legitimate business concerns such as preserving trade secrets and protecting investments in

Aydin Corp. v. Loral Corp., 718 F.2d 897, 900 (9th Cir. 1983). However, the intended scope of the express, written non-compete agreements in the Relationship Agreement and plaintif regarding the non-written agreement to withdraw in whole from the market need to be considered together and tested on an evidentiary basis.

Finally, whether the Agreement pro se restraint (as characterized by plaintiffs given the unwritten but otherwise expressed requirement that Altria leave the market) or (as characterized by the defendants whereby Altria was only prohibited from introducing new products into the market and part of the defendants cannot be determined at this juncture. See Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188 89 (7th Cir. 1985).

Plaintiffs have adequately alleged a per se agreement.

2. Quick Look & Rule of Reason Defendants also argue that the limited, written non-compete agreement in the Relationship Agreement intellectual property is legal as a matter of law under the rule of reason analysis, given the Relationship Agreement during the time that Altria provided critical distribution and regulatory services to JLI. Defendants go so far as to argue that but for Altria providing regulatory services to JLI, the JUUL product might not secure PMTA approval and result in lessened competition. See Altria MTD at 30. 18

But this argument

18 As the case Altria rel with broader responsibilities, the better to compete against third parties. Covenants of this type are evaluated under the Rule of Reason as ancillary restraints, and unless they bring a large market Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 189 (7th Cir. 1985). Here, plaintiffs have alleged that the express covenant was part of the larger Agreement and, in fact, resulted in JLI securing a larger market share under

unwritten pre-condition to the Relationship Agreement that Altria leave the market. As noted above, that allegation has been adequately alleged. Similarly, as noted above, the plaintiffs have adequately alleged plausible antitrust injury.

The impact of the express non-compete provisions in the Relationship Agreement must be considered in connection with the other relevant agreements including the Purchase Agreement, the Services Agreement, the Intellectual Property License Agreement, and the Voting Agreement. See, e.g., Altria Mot. at 30-31; see also DPP CAC ¶¶ 93-97. This analysis is heavily fact dependent and cannot be resolved on the pleadings. Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1152 (9th Cir. 2019) to take a

.

3. Director Defendants

a. Standard The DPPs and the Director Defendants Pritzker and Valani, named as defendants in only the DPP CAC engage in a vigorous debate over the standard required to hold corporate directors liable under the Sherman Act. The Director Defendants argue that individuals can only be under the Sherman Act per se violation based on Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd., 467 F. Supp. 841, 853 (N.D. Cal. 1979), aff'd sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981) prohibition, the often uncertain line between proper and improper conduct, and the social interest in not deterring economically useful conduct by the imposition of excessive risks all of which the Supreme Court recognized . . . make it appropriate to limit personal liability to cases of see also Hightower v. Celestron Acq., LLC, 5:20- CV-03639-EJD, 2021 WL 2224148, at *11 (N.D. Cal. June 2, 2021) Murphy

its control.

individual acts in facilitating a horizontal antitrust conspiracy sufficient); In re California Bail Bond Antitrust Litig., 511 F. Supp. 3d 1031 (N.D. Cal. 2021) (apply Murphy standard in conspiracy between various members of the California bail bonds industry to artificially inflate the price of bail bonds in violation of federal and California law, and concluding allegations against

heart of conspiracy).

The DPPs dispute whether personal conduct in support of a pro se agreement needs to be alleged. They if that is the correct standard to be applied, can arise in connection with agreements analyzed under the rule of reason. That debate does not need to be resolved now. Plaintiffs have adequately alleged both a per se violation and in it. The DPP CAC is replete with allegations that Pritzker and Valani, who were critical players in negotiating the Agreement with Altria, often a had the ultimate aim to protect their investments and enrich themselves given the size of their ownership and additional investments as recent as July 2018 in JLI. See, e.g., DPP CAC ¶¶ 19, 20, 68, 70, 71, 72, 74, 77, 79, 81, 86.

I cannot decide on the pleadings whether this Pritzker and Valani engaged in for their own enrichment and not as part of their fiduciary duties to JLI, or whether that conduct was indicative of legitimate business considerations on behalf of JLI and undertaken as part of fiduciary duties to JLI. If plaintiffs fail to prove their per se allegations, the issue of whether the individual conduct nonetheless amounts to actionable conduct under the standard may be raised again.

b. Injunctive Relief The Director Defendants also argue that they cannot be liable for equitable or injunctive relief for the antitrust claims as the series of agreements constituting the anticompetitive

Agreement were entered into by JLI and Altria and not the Director Defendants, and that the Director Defendants have no authority to compel JLI or Altria to take any action. The DPPs do

not address this argument or provide any authority showing that similarly situated directors can be required to provide the sort of injunctive relief the DPPs seek.

The DPPs claim for injunctive relief against the Director Defendants is DISMISSED without leave to amend.

4. Section 2 Conspiracy Claim Finally, Altria argues the IPPs and IRPs Section 2 conspiracy claim fails for the same reasons their Section 1 claim fails. 19

However, as noted above, the Section 1 claim survives and has been adequately alleged. As a result, the Section 2 claim likewise survives. 20

5. Section 2 Injunctive Relief JLI separately argues that the IPPs and IRPs Section 2 monopolization claims given their indirect purchaser status, they can only seek injunctive relief must be dismissed because these plaintiffs fail to plausibly plead that there is now or likely will be in the future an attempt by JLI to monopolize the closed-system E-vapor market. In support, JLI points to allegations that

This argument is derivative of the similar argument made by Altria that plaintiffs have failed to plead antitrust injury given their own allegations and the Wells Fargo Reports, addressed above. It fails for similar reasons. Even though plaintiffs rely on market data from 2018 and even though absolute prices or market shares may have fallen for JLI in the short term following the

took in response to regulatory pressure and public pressure) are not implausible or otherwise fatally undermined by their other allegations. Whether or not plaintiffs will be able to prove that an injunction is necessary to correct for and otherwise prevent a future injury related to monopolistic conduct is better tested on an evidentiary record.

19 The DPPs do not allege a Section 2 claim against any defendant. 20 I acknowledge but need not reach the IPP and IRP argument that even in absence of a Section 1 claim, the Section 2 conspiracy-to-monopolize claim could survive.

C. Clayton Act Claims

1. Altria as Actual or Potential Competitor Altria argues that the Section 7 claim must be dismissed because plaintiffs allege that by the time the Altria investment was finalized in December 2018, it had already removed its competing products from the market. DPP ¶ 137, IPP ¶ 96, IRP ¶ 93. In that circumstance, Altria contends, it was not a competitor. According to Altria, one of two theories, a .

To satisfy the actual potential competitor theory, Altria asserts that plaintiffs must show that the acquisition foreclosed Altria from future de novo entry and, but for the Agreement, Altria would have entered de novo. Plaintiffs cannot do so, Altria argues, given their admissions in the CACs regarding the high barriers to entry created by the onerous regulatory scheme required for new products and the attendant expenses to enter the market. Under the perceived potential competitor theory, Altria argues that plaintiffs must plausibly allege price, which plaintiffs have not attempted to plead.

Plaintiffs respond that in the situation here where pursuant to the alleged antitrust Agreement a competitor leaves the market traditional Section 7 actual competitor analysis. Plaintiffs point to their allegations that if the JLI deal was not effectuated, Altria was fully situated to bring and in fact made comments that it would bring the MarkTen Elite product back to the market. IPP ¶¶ 67, 83, 91 IRP ¶¶ 64, 80, 88. These allegations are plausible at this juncture and sufficient to allege the actual competitor theory.

Unlike the cases relied on by defendants that did not involve agreements that reduced the number of competitors in the market or otherwise altered concentration levels allegations are plausibly alleged in support of the Section 7 claim. 21

Altria and JLI were actual

21 See, e.g., F.T.C. v. A. Richfield Co., 549 F.2d 289, 299 (4th Cir. 1977) (recognizing that divestiture to a third party not involved in the merger could avoid an antitrust violation).

competitors at the time the alleged antitrust Agreement was made. It does not actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed. The plaintiffs also argue that an actual competitor, their allegations adequately establish that it was an actual potential competitor. They s to reenter with the MarkTen Elite product and use of -cigarettes. See IPP ¶¶ 67, 83, 91 IRP ¶¶ 64, 80, 88; see also IPP ¶ 160, IRP ¶ 157. These plausible allegations, ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds, render Altria both a potential actual competitor and a

2. Market Concentration Altria challenges plaintiffs market concentration allegations as inapposite because it was not an existing competitor to JLI when the Agreements was entered. That argument has been rejected. Altria also argues that allegations that the market became more concentrated following

share fell) and unsubstantiated (e.g., with any actual Herfindahl-Hirschman Index (HHI) calculations). As noted above, Altria overstates the significance and impact the Wells Fargo Report has at this juncture. It provides no authority for the proposition that at the motion to dismiss stage unlike where the government is attempting to enjoin a merger and evidence is required to establish

its prima facie case 22

a plaintiff must provide HHI calculations or anything similarly detailed. sufficient.

3. JLI JLI separately argues that because it did not acquire any stock, it cannot have liability under Section 7 of the Clayton Act. Plaintiffs respond that caselaw recognizes that JLI is a proper defendant to this claim because it was the seller of the acquired assets and a party to the allegedly

22 F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) establish the FTC's prima facie case that a merger is anti-comp

illegal acquisition, especially considering claim for injunctive relief to undo the anticompetitive agreement. See, e.g., Frike-Parks Press, Inc. v. Fang, 149 F. Supp. 2d 1175, 1185 (N.D. Cal. 2001) against a purchaser when the plaintiff seeks rescission or divestiture, and the court needs jurisdiction over both the buying and selling company to fashion such e JLI is appropriately named as a defendant on this claim.

In addition, plaintiffs argue that through the anticompetitive Agreement JLI acquired , -space and services from Altria, that lessened competition and falls within the broad interpretation of assets under Section 7. See Gerlinger v. Amazon, Inc., 311 F. Supp. 2d 838, 853 (N.D. Cal. 2004) (which includes and distribution rights). The determination of whether

or distribution routes that could Section 7 must be resolved on an evidentiary record. Id. at 853 (finding allegations sufficient at motion to dismiss but considering evidence and rejecting claim on summary judgment).

4. Pritzker and Valani The Director Defendants also argue that because they acquired no stock or assets in the deal, they cannot be liable to the DPPs under Section 7. The DPPs respond that they have adequately pleaded that Pritzker and Valani were the primary architects of the Agreement and, as board members whose assent would be required to undo the deal, they are necessary to provide the complete injunctive relief they seek here (the undoing of the Agreement). However, the DPPs provide absolutely no authority or apposite caselaw in support of their position that board members are appropriate defendants under a Section 7 claim seeking injunctive relief against the corporate entity. The Section 7 claim against the Director Defendants is DISMISSED with prejudice.

D. IPP State Law Claims Defendants move to dismiss the IPP state law claims asserted under (i) the antitrust laws of California, New York, Michigan, and Rhode Island and (ii) the consumer protection laws of

California, Florida, Massachusetts, and Rhode Island.

1. State Antitrust and Consumer Protection Claims Altria argues that the California, New York, Michigan, and Rhode Island antitrust claims are derivative and therefore rise and fall with the federal claims. It argues the same for the consumer protection claims asserted under California, Florida, Massachusetts and Rhode Island law, because the claims all challenge an alleged restraint in trade that caused plaintiffs to pay allegedly supracompetitive prices (the same allegations underlying the antitrust claims). 23

Even if I agreed with Altria that the state law claims are derivative, they cannot be dismissed because the federal claims survive.

2. UCL Claims and Unjust Enrichment Altria argues that there are additional reasons why the UCL and unjust enrichment claims should be dismissed. First, Altria complains that the captions in the IPP complaint for the UCL UCL claim accurately identify restitution (not damages) as the relief sought. IPP CAC ¶¶ 258,

263.

Second, Altria argues that the UCL and unjust enrichment claims must be dismissed because plaintiffs have not alleged that Altria received any funds or other benefits from plaintiffs as a result of the alleged anticompetitive arrangement prices. Altria contends that plaintiffs cannot allege this as plaintiffs admit that Altria lost billions on its investment in JLI. But even though Altria may have written down the value of its 33% ownership in JLI, ownership in JLI remain facts in dispute. Moreover, the devaluation does not mean that Altria may not still be indirectly receiving funds from consumers due to JLIs charging supracompetitive prices for its products. IPP ¶¶ 164-165, 263, 265-66; IRP ¶¶ 161-162, 233, 235, 237. 24

This

23 Altria admits that Rhode Island has not decided how closely its consumer protection claim adheres to conclusions reached on the federal antitrust claims, but argues that because Rhode (here, California, Florida, and Massachusetts) Rhode Island courts likely follow suit. 24 Altria relies on Fenerjian v. Nongshim Co., Ltd, 72 F. Supp. 3d 1058 (N.D. Cal. 2014) to argue

argument fails.

Third, Altria contends that because these plaintiffs have an adequate remedy at law, they cannot proceed on the UCL claim or on the unjust enrichment claim under California, Massachusetts, Michigan or New York law. See Sonner v. Premier Nutrition Corp., 971 F.3d 834 (9th Cir. 2020). At this juncture, plaintiffs are given leave to amend to allege that their remedies at law are inadequate to preserve their UCL claim. See, e.g., In re JUUL Labs, Inc., Mktg., Sales Practices, and Products Liab. Litig., 497 F. Supp. 3d 552, 638 39 (N.D. Cal. 2020) are given leave to amend to expressly allege that

their remedies at law are inadequate and to

e not otherwise coextensive . As with the UCL claim, plaintiffs are given leave to amend to expressly allege and provide context to their allegations that their remedies at law are inadequate under California, Massachusetts, Michigan, and New York law to preserve their unjust enrichment claims under California, Massachusetts, Michigan, and New York law.

Accordingly, UCL and unjust enrichment claims under California, Massachusetts, Michigan, and New York law is GRANTED with leave to amend so that plaintiffs can allege that their remedies at law are inadequate. 25

3. Service of IPP Complaints of Larimore, Matshullat, and May Altria contends that three IPP plaintiffs Larimore, Matshullat, and May had not (at the

that the unjust enrichment claims under Michigan and New York law must be dismissed. There, I concluded between the indirect purchaser plaintiffs and the defendants are too attenuated to state an unjust gan law or New York law. Id. at 1088, 1090. That may be that Altria does not provide I will not separately consider this argument now. Nor will I address arguments and cases raised only in reply. See, e.g., Altria Reply at 27 (relying on In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 705 (E.D. Pa. 2014) (addressing unjust enrichment claims under Florida law). 25 To the extent that plaintiffs want to add additional allegations regarding how Altria benefitted from JLI charging consumers supracompetitive prices for its products, they may do so.

time Altria filed its motion to dismiss) served Altria. It argues that this failure is significant because these IPPs are the sole representatives for some of the IPP claims. It asserts that there is no good cause that could forgive this failure, and says in reply that the service of the IPP does not cure the issue as Pretrial Order No. 1 in this case provides that filing a consolidated complaint does not, on its own, join a party to this action. ECF No. 129 at 2.

In response, plaintiffs argue that they had a good faith belief that defendants would not

agreement. Declaration of Thomas H. Burt, Dkt. No. 227-1. Nonetheless, they contend that Altria has not suffered any cognizable harm. Altria knows all of the facts on which the IPP claims are based. Given the service of the IPP CAC, it likewise knows the basis of these three IPP

There is no cognizable prejudice to Altria. The three IPPs are given leave to serve their original complaints on Altria at the same time the IPPs serve their Amended Consolidated Class Action Complaints as required by this Order.

4. Personal Jurisdiction over Altria on state law claims 26 Altria argues that even if the court has jurisdiction over Altria on the federal law claims, it lacks that jurisdiction for the state law claims.

Plaintiffs respond that because the federal claims survive, as discussed above, pendent jurisdiction exists over the state law claims despite argument that pendant jurisdiction was overruled by Bristol-Myers Squibb Co. v. Super. Ct. of California, San Francisco County, 137 S. Ct. 1773 (2017). See, e.g., Chavez v. Stellar Management Group VII, LLC, 19-CV-01353-JCS, 2020 WL 4505482, at *8 (N.D. Cal. Aug. 5, -Myers does not apply to federal courts and see also Contl. Automotive Sys., Inc. v. Avanci, LLC, 19-CV-02520-LHK, 2019

26 Altria raises two arguments, foreclosed by Ninth Circuit precedent, for purposes of preserving them on appeal: that venue is not appropriate here under the Clayton Act and that this court does not have personal jurisdiction over Altria under the federal claims. Altria Mot. at 45-46. The motion is DENIED on those arguments, and they are preserved for appeal.

jurisdiction is commonly applied wh nationwide personal jurisdiction are combined in the same suit with one or more state or federal

Even if pendent jurisdiction were not available given the posture of this case, specific jurisdiction exists. Altria allegedly negotiated the anticompetitive Agreement with a California- based on company in part by attending meetings that took place in California. IRP CAC ¶¶ 83, 84, 91, 94, 221; IPP CAC ¶¶ 86, 87, 94, 97, 224; DPP CAC ¶¶ 79, 87. It is that anticompetitive Agreement that caused the plaintiffs harm. There is jurisdiction over Altria. See also In re JUUL Labs, Inc., Mktg. Sales Prac. and Products Liab. Litig., 19-MD-02913-WHO, 2021 WL 3112460, at *21 (N.D. Cal. July 22, 2021). III. REQUEST FOR JUDICIAL NOTICE

In support of its motion to dismiss, Altria asks me to take judicial notice of fifteen exhibits, nine under the doctrine of judicial notice (Exhibits 1-7, 9, 13) and six under the doctrine of incorporation by reference (Exhibits 8, 10-12, 14-15). Request for Judicial Notice, Dkt. No. 208. Plaintiffs oppose in part. Dkt. Nos. 233, 228. I take judicial notice of the existence of the regulatory publications (Exhibits 1-3, 6-7) for the fact that they were issued and the topics they covered, but I do not take judicial notice of the disputed facts regarding the impact those pronouncements had on any party. I decline to take judicial notice of the news articles and press releases (Exhibits 4-5, 9, 13). The contents of those publications are not relevant to my determination of the motions at issue.

The exhibits Altria argues are incorporated by reference into the CACs are: letters and emails from JLI and Altria (Exs. 8, 10), the Service Agreement (Ex. 11), the October 2019 Wells Fargo Report (Ex. 12), the January 2020 Amendment to the Relationship Agreement (Ex. 14), and the February 2019 Wells Fargo Report (Ex. 15).

The IPP and IRPs object to the incorporation by reference in whole of Exhibits 11 and 14 (the Service Agreement and the Amendment), arguing that they are unauthenticated and

introduced only to suggest an alternate explanation for

27 I agree with Altria that these two segments of the alleged antitrust agreement are incorporated by reference by the repeated citation to them in the CACs. However, I cannot and do not resolve the what certain provisions in those documents mean. As noted above, the parties argue the provisions mean different things on their face or in the context of the other written and unwritten agreements and communications between the parties. Exhibits 8 and 10, correspondence between the parties, are likewise incorporated by reference, but are not considered disputes over what the assertions and provisions in those communications mean.

Exhibits 12 and 15, the Wells Fargo Reports, will not be incorporated by reference, except for the one chart specifically included in the CACs (from the October 2019 Report) and the chart the Indirect Plaintiffs thought they were including (from the February 2019 Report). The February chart is mentioned only twice in the complaints. IPP CAC ¶ 48, IRP - e- In other portions of their CACs, the indirect plaintiffs also cite an unspecified Wells Fargo report addressing market share, but plaintiffs assert that is a reference to the same exact information. See IPP CAC ¶ 151, IRP argo report on the tobacco industry based on Nielsen scanner

see also tobacco industry based on Nielsen scanner data, JLI had amassed a 72 percent market share by

Wells Fargo report, Altria began withdrawing its products from the market in October 2018. By

27 The DPPs object to incorporation of reference for each of these because defendants allegedly arguments, which is improper. Dkt. No. 233.

28

At most, therefore, the two charts and the explanatory language is subject to incorporation by reference. 29

Any other chart or information calling into question the same specific topic from the same reports might possibly fall within the incorporation by reference doctrine but defendants do not identify any other chart or information in the Reports that would meet those criteria. The incorporation by reference doctrine cannot be stretched to include the full and varied contents of both Reports, prepared by a third-party and not adequately authenticated, whose conclusions are disputed by the parties.

CONCLUSION The motion to compel the three named Direct Purchaser Plaintiff claims against JLI and the Director Defendants is GRANTED. The effect of this Order is stayed for thirty (30) days to allow the DPPs to substitute in a class representative whose claims against JLI and the Director Defendants would not be subject to arbitration and for the DPPs to notify me whether they want these claims dismissed or stayed pending arbitration.

Plaintiffs claims for injunctive relief are DISMISSED, but plaintiffs are given leave to amend to identify and include allegations that some or all of the named plaintiffs may suffer future injury to support the claims for injunctive relief.

The UCL claim and state unjust enrichment claims under California, Massachusetts, Michigan or New York law are DISMISSED, but plaintiffs are given leave to amend to plead that their remedies at law are inadequate.

The DPPs claim for injunctive relief against the Director Defendants is DISMISSED with Section 7 claim against the Director Defendants is DISMISSED with prejudice.

28 The indirect plaintiffs explain they mistakenly included the chart from the Wells Fargo October 15, 2019 analyst report (Ex. 12) in their CACs but intended to include and referred to a chart from the referenced Wells Fargo February 11, 2019 analyst report (Ex. 15). Dkt. No. 228 at 7 n. 3. 29 antitrust injury allegations.

Plaintiffs shall file their amended Consolidated Class Action Complaints by September 20, 2021.
Dated: August 19, 2021

William H. Orrick United States District Judge