UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

IN RE ALTRIA GROUP, INC. DERIVATIVE LITIGATION	Civil Action No. 3:20-cv-772 (DJN)

THEODORE H. FRANK'S OBJECTION TO THE AMENDED SETTLEMENT

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INTRODUCTION

The parties' Settlement—approved without adequate notice and at the direction of this Court—further harms Altria shareholders, the victims of the defendants' alleged mismanagement, by requiring Altria to pay $100 million of corporate funds to third parties that directly undermine Altria's business. The Settlement had the support of the alleged wrongdoers (who let themselves off the hook), plaintiffs' counsel (who were awarded $15 million under the Settlement), of an Independent Monitor (contracted to receive up to $10 million dollars to administer the Settlement), and of named plaintiffs (who each received $15,000). As a result, it had little opposition or even scrutiny—in fact, the only objectors wish to inflict *more* harm to the corporation, a fact they do not disguise. The Settlement beneficiaries obliged them, to the further detriment of shareholders.

Plaintiffs presented the underlying lawsuit as a tool to rectify mismanagement by Altria's board, whose alleged breach of their fiduciary duties in acquiring a substantial stake in Juul, Inc. (recently sold for nearly a total lost) cost shareholders billions of dollars. ECF No. 110 at 111. But the Settlement doesn't remedy this alleged injustice nor does it prevent it from recurring; instead, it causes *more* fiscal harm to shareholders. Altria's shareholders pay, through their ownership, $100 million to third parties, an astonishing $10 million—or 10%—fee for disbursing this money, and $15 million to plaintiffs' attorneys' who negotiated a largely-illusory Settlement, which the Court found "reeked" of collusion. ECF No. 171 at 7.

While the Court appropriately rejected the original settlement, which was a cynical vehicle to obtain attorneys' fees, the modified Settlement should also be rejected for the simple reason that neither the corporation nor shareholders benefit from it. To the extent the company was victimized by its board, the Settlement compounds the injury.

BACKGROUND

The Settlement releases shareholder claims against Altria board members, Juul Labs, Inc. ("Juul"), and Juul's directors, all of which allegedly breached duties they owed to Altria. Settlement, ECF No. 140-1 ¶¶ I(v)–I(bb), I(kk), 3.4, 5.1, 5.2, and 5.3. But not one defendant pays a penny toward reimbursing the corporation. All settlement costs, expenses, plaintiffs' attorneys' fees, service awards, and the funding commitments for $100 million in programing are paid by Altria. No other party "shall have any responsibility" for covering any costs. *Id.* ¶¶ 1.2, 2.2, 4.3.

Plaintiffs alleged that the "[t]he Altria Defendants proceeded to make this massive investment in JUUL despite increasing public scrutiny, regulatory actions, and civil lawsuits over JUUL's youth-targeted marketing and misleading claims about the safety of its products." ECF No. 110 at ¶ 9. As a remedy, plaintiffs sought: (1) to recoup the monetary losses to Altria that occurred as a result of these various transgressions from both the Altria Defendants and the JUUL Defendants; and (2) an order "[d]irecting Altria to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect Altria and its shareholders from a repetition of the damaging events described herein[.]" *Id.* at 114.

The Settlement recovers none of the alleged unjust enrichment from any defendant. Instead, the Settlement primarily requires "Funding Commitments" for Altria—not the directors—to pay up to $117 million to programs designed to prevent and/or aid in the cessation of underage use of tobacco. ECF No. 140-1 at 20-21. Pursuant to the Funding Commitment, Altria will be required to deploy $100 million to fund independent third-party programs "designed to prevent and/or aid in the cessation of underage use of tobacco and existing or newly developed tobacco delivery system products." ECF 140-1, Ex. A at ¶ 4.

Although the Settlement commits over $100 million of corporate funds to purposes largely antagonistic to Altria's interests, the parties agreed that no direct notice would be provided to shareholders about the Settlement, only publication and SEC-filed notice. ECF No. 140-1 at 22.

A supplemental agreement was reached with a prior objection, which followed the Court's suggestion of discounting programs funded since January 20, 2020. ECF No. 173-2 at 2. The Independent Monitor and Objectors filed in support of the supplemental agreement. ECF Nos. 174 and 175.

Although the supplement amended a term defendants' counsel found "material," no notice of any kind—direct or indirect—was sent to shareholders regarding it. Final approval was granted to the Amended Settlement on February 17, 2023, four days after the amendment was filed. ECF No. 180 (entered February 20).

ARGUMENT

The Settlement in this case is flawed from top to bottom—from its deficient notice, to its relief, and to its fees. For one, the entire Settlement is a metaphorical "fruit of the poisonous tree" as the parties' failure to give adequate notice ensured it escaped adequate scrutiny from shareholders like Frank. Second, the Settlement is the product of parties who do not adequately represent Altria shareholders and is marred by the exact derivative issues identified in *Robert F. Booth Trust v. Crowley*. 687 F.3d 314 (7th Cir. 2012). Third, the Settlement does not benefit the shareholders or the corporation, which is the very point of derivative litigation. And finally, the fees awarded to plaintiffs' counsel appear excessive or at least insufficiently documented. Accordingly, the Settlement should be vacated under Rule 60(b)(6).

I. The district court has a fiduciary duty to the absent shareholders.

"One of the risks flowing from shareholders' difficulty in monitoring derivative litigation is that plaintiffs' counsel and the defendants will structure a settlement such that the plaintiffs'

attorneys' fees are disproportionate to any relief obtained for the corporation." *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993). To guard against this danger, a district court must act as a "fiduciary" "with a jealous regard to the rights of those who are interested in the fund' in determining what a proper fee award is." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (cleaned up).[1] It must hold the settling proponents to their burden of demonstrating compliance with Rule 23.1 and the fairness of the settlement. *1988 Trust for Allen Children v. Banner Life Ins. Co*., 28 F.4th 513, 520-21 (4th Cir. 2022).

Frank's objection invokes the "duty" of this Court to protect the class from the Settlement and class counsel's excessive fee award. *Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1306 (4th Cir. 1978). At the fee-setting stage, the relationship between counsel and their putative client and its shareholders turns directly and unmistakably adversarial because counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class's interest in securing the largest possible recovery for its members." *Id*. Nor can a mediator be relied on to guarantee that the fee request is reasonable; "[t]hey are masters in the art of what is negotiable." *Kakani v. Oracle Corp*., No. C 06-06493 WHA, 2007 WL 179377, at *31 (N.D. Cal. Jun. 19, 2007). "Such a mediator has no fiduciary duty to anyone, much less those [absent shareholders] not at the table" who will ultimately be paying derivative counsel's fees. *Id.* Further, no individual shareholder has the financial incentive to object to an exorbitant fee request either; "[h]is gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The district court (and good-faith public-minded

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[1] This and several cases discussed below involve Rule 23 class action suits. Such "cases interpreting Rule 23 may be effectively utilized in analyzing the requirements of 23.1." *G.A. Enters., Inc. v. Leisure Living Cmtys, Inc.*, 517 F.2d 24, 26 n.3 (1st Cir. 1975).

objectors) serve as the last line of defense against settlements that harm shareholders and overreaching fee requests.

II. Notice to shareholders was constitutionally deficient.

Rule 23.1(c) requires that "[n]otice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." But any permissible court order is constrained by due process. In the context of class action and derivative settlements, absent class members' due process rights include the right to constitutionally sufficient notice and adequate representation. *E.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Accordingly, this Court made a material mistake of law when it held the parties' proposal for notice—comprising a singular ad in the *Wall Street Journal*, an 8-K filing with the SEC, and an online post on Altria's investor relations page—was adequate. *Kemp v. United States*, 142 S. Ct. 1856, 1864 (2022); ECF No. 143 at 4-5. Settlement notice must be direct whenever practical. *See Mullane v. C. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315, 317-19 (1950). And in the age of e-mail, direct notice is always practical to the extent shareholders are known because contacting them via e-mail is cheap and easy. Publication alone is not a "reliable means of acquainting interested parties of the fact that their rights are before the court." *Id.* at 315. The shoe-string approach to notice the parties took in this case did not channel an "actual[] desire[] to inform" nonparty shareholders like Frank of the Settlement. *Jones v. Flowers*, 547 U.S. 220, 229 (2006). Because Frank and many other Altria shareholders never got the notice he is entitled to as an Altria shareholder, the Settlement should be vacated.

Unsurprisingly, inexpensive direct notice is the "standard" practice in securities litigation settlements under Rule 23.1. *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191137, at *42 (E.D.N.Y. 2007); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). The "absence

of such affirmative notice to interested parties fails to provide sufficient due process to comply with Rule 23.1." *In re Davita Healthcare Partners, Inc. Derivative Litig.*, No. 12-cv-2074-WJM-CBS, 2014 WL 13024782, at *4 (D. Colo. Dec. 3, 2014). This is especially so when the amount of money at stake is as large as it is here, since the adequacy of notice is a function of "the individual interest sought to be protected" against "the interest of the State." *Mullane*, 339 U.S. at 315. As the size of a *cy pres* settlement like the Funding Commitment increases, so does the interest individual shareholders' interest in scrutinizing it. Altria shareholders should have been notified of the Settlement directly given its largess, rather than being sent on a fishing expedition through SEC 8-K filings or stumbling upon a singular *Wall Street Journal* advertisement.

Moreover, even if publication notice of the original settlement could suffice, the parties provided *zero* notice of the "material" final amendment to the settlement terms even though "material alterations" demand supplemental notification and an opportunity to object. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 n.10 (3d Cir. 2013).

Accordingly, the parties' contravention of due process and Rule 23.1 stripped this Court of its ability to lawfully approve the Settlement.

III. No party represented typical shareholder interests.

As fiduciaries, federal courts may only approve derivative settlements "reached as a result of good-faith bargaining at arm's length, without collusion[.]" *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). The fundamental demand of Rule 23.1 is that named plaintiffs must "adequately represent the interests of [other] shareholders" in a derivative suit. Fed. R. Civ. P. 23.1. But this case betrays the Rule. Here, plaintiffs and defendants locked arms to negotiate a settlement that (a) does not prevent the corporate negligence at issue from reoccurring, (b) spends $117 million of corporate funds on expenditures against the corporation's interest, and (c) enriches the lawyers and an independent monitor at shareholder expense.

None of the actors who endorsed it adequately represented shareholder interests. While the named plaintiffs own Altria stock, any individual interest they have in saving the corporation over $100 million amounts to a rounding error compared to their $15,000 service awards. *See* ECF No. 140-1 (Settlement), ¶ 4.4. The monetary cost of the Settlement is about 6.5 cents per share given the 1.8 billion shares outstanding. This means that plaintiff Gilbert, who appears to own the most shares of the Federal Plaintiffs with 1200 (ECF No. 110-2 at 10), has a total exposure of about $78 to the Settlement—much less than his $15,000 service award. The other Federal Plaintiffs own less than $15,000 *total* in Altria stock. And the plaintiffs aren't rewarded by how good a deal they negotiate for the shareholders they represent—indeed, their super-compensatory awards "provide[] a *disincentive*" for the named plaintiffs to care about what fellow shareholders recover. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013).

As far as the defendants, if the funding commitment really benefitted the corporation, a faithful board would have engaged in it on its own. At the least, the board would have done so instead of first agreeing to an illusory financial commitment that the Court was concerned signaled "collusion" between the settling parties. ECF No. 171 at 7. Nor would the Court need to praise the unallocated $7 million from the Settlement as an "incentive" for Altria to meet the demands of the agreement. *Id.* at 16. If the board is so confused about Altria's corporate interests that the Settlement must reserve money to cover potential misbehavior, then its opinions on the settlement necessarily cannot represent the best interests of shareholders.

A. The Settlement should be rejected under *Robert F. Booth Trust v. Crowley*.

In *Robert F. Booth Trust v. Crowley*, the shareholder-plaintiffs claimed two director-defendants of the public corporation Sears Company—who simultaneously served on the boards of Sears competitors—exposed Sears to antitrust liability. 687 F.3d at 316-17. After the district court allowed the "notoriously costly" antitrust accusation embedded in the derivative claim to

proceed, the parties reached a settlement: Sears would pay $925,000 to the plaintiffs' attorneys in return for *one* of the two defendant-directors resigning from the board. *Id.* at 317-18. Frank—a Sears shareholder—moved to intervene and object to the Settlement in that suit, noting it "cost [Sears] cash out of pocket plus a director the shareholders had re-elected in 2009, without eliminating the risk of a later § 8 [antitrust] suit by someone else (since one of the two directors would remain)." *Id.* at 318. The Seventh Circuit agreed with Frank while noting a litany of errors with the *Crowley* settlement—flaws that are paralleled by the Altria Settlement. *Id.* at 318-320. While *Crowley* does not directly bind this Court, its logic and analysis of derivative settlements apply in this Circuit and others. *Shelton*, 582 F.2d at 1305 (discussing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949)); *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957).

The Settlement exemplifies the primary legal concern reflected in *Crowley*, that "self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id.* at 318. This is particularly concerning where named plaintiffs "voluntarily accept[] a fiduciary obligation towards the members of the putative class they thus have undertaken to represent." *Shelton*, 582 F.2d at 1305. And that obligation may not be abandoned to finalize a Settlement if "prejudice to the members of the class they [] represent would result or if they have improperly used the class action procedure for their personal aggrandizement." *Id.*

Here, the named plaintiffs first proposed a Settlement which allocated one hundred million dollars to "tobacco-sponsored youth cessation programs," which drained directly from Altria's corporate treasury. ECF No. 170 at 2. This funding commitment deprives Altria of money that otherwise—through the direction of the board—could be reinvested to improve company performance, used to pay down debt and other obligations, or returned directly to the shareholders as a dividend. Regardless of the board's choice, those who own the company—shareholders like

Frank—stood to benefit from these funds. *See United Gas Pipe Line Co. v. FERC*, 618 F.2d 1127, 1136 (5th Cir. 1980) ("a corporation does not earn money for its 'own' benefit, but to repay its creditors and then for the benefit of its owners, the shareholders."); *Hutchins Mut. Ins. Co. of D.C. v. Hazen*, 105 F.2d 53, 57 (D.C. Cir. 1939) ("in the case of a stock company the purpose of organization is primarily to earn money for the stockholders."). But the Settlement strikes the shareholders of this possibility to the tune of nine figures—while the named plaintiffs all get paid $15,000 for their purported service to the class. *Crowley*, 687 F.3d at 318; *Shelton*, 582 F.2d at 1305.

Finally, the prior objectors—all ideological activists "lack[ing] a strong interest in Altria's success"—made the Settlement even worse for shareholders. ECF No. 170 at 2. Their objection forced Altria to earmark twenty million in *new* corporate funds—replacing existing commitments already attributed in the Settlement. *Id.* at 2-4. This is money that otherwise would have been spent, in some capacity, to benefit the shareholders. *Hazen*, 105 F.2d at 57. Thus, this case extends *Crowley*'s core finding, too: Shareholders must be worried not only about "self-appointed investors" as named parties spurning the defendant-corporation and its shareholders' interests, but other objectors, too. *Crowley*, 687 F.3d at 318.

B. The small number of objectors should not weigh in favor of the Settlement.

As in *Crowley*, the Settlement "deprive[s]" the Altria shareholders of their own agency. 687 F.3d at 320 (noting the settlement "depriv[ed] Sears of directors whom its investors freely elected."). In justifying the Settlement, the Court erroneously equated "99.995% of Altria's shareholders[']" failure to object with "approval" of the Settlement. ECF No. 170 at 1-2. But "[t]he practical realities of class actions" demand that courts be "considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995); *see*

also In re Corrugated Container Antitrust Litig., 643 F.2d 195, 217-28 (5th Cir. 1981). Thus, the Court attributed a viewpoint to the shareholders that is not inferable from their silence, and which is contradicted by Frank's existing efforts to intervene and object plus the presence of the existing objectors. And the Court did so when most shareholders had no notice of the Settlement, due to the inadequate approach the parties took to informing Altria shareholders of the preliminary agreement. *See supra* II.

Even worse, the Court's entire conclusion is premised on bad math. In asserting near-unanimity toward the Settlement, it conflates share *ownership* with share*holders*. The Court observes "the Shareholder Objectors collectively *own* .005% of Altria's shares," before immediately inferring that "99.995% of Altria's *shareholders* have signaled their approval." ECF No. 170 at 1-2. The distinction is important: Retail and institutional investors alike typically own more than one share in each stock they purchase, so the number of possible shareholders who can object to the Settlement is significantly less than the total shares outstanding. This simple fact immediately increases the objector ratio. When the Court's near-unanimity claim is normalized for the fact that many shareholders—like Frank—did not receive notice, the total approving shareholders must shrink further. Even more so if one considers that the inertia of class action suits favors inaction by class members, who are unlikely to object or even read a settlement agreement unless the stakes are high enough. *See, e.g.*, *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 383 n.1 (S.D.N.Y. 2017) (noting class members are far more likely to do nothing and remain in a class rather than opt into a class).

And, "a significant percentage" of class action settlements are approved without *any* objection. Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 435 (2003). The fact that this case now has two groups

of objectors (including Frank), attacking the Settlement from completely different angles, suggests it has serious defects and disagreement from Altria shareholders. Accordingly, this Settlement, if allowed to stand, "deprive[s]" the Altria shareholders of complete and adequate input on its legitimacy—yet another flaw *Crowley* warned about. 687 F.3d at 320.

Ultimately, "[i]t is impossible to see how the investors [in Altria] could gain from" this Settlement. *Id.* at 319. The Settlement spends $117 million dollars of company funds on external organizations while making few corporate changes to prevent a Juul redux and securing even fewer guarantees to prevent litigation and regulation risk. The winners here are the lawyers, the Independent Monitor, and youth non-profits receiving money from the Funding Commitment—not the shareholders or Altria corporation. *Crowley* rejects this approach for a clear, bright-line rule that is consistent with existing understanding of modern corporate law: Derivative settlements must serve the interests of the corporation (ultimately the investors) and, because of the relationship between the parties, "self-appointed investors" acting as plaintiffs can be "poor champions" for doing so. *Id.* at 318; *see also Shelton*, 582 F.2d at 1305. This case is a textbook example of how. *Crowley*'s universal logic compels that this Settlement be disapproved.

IV. The purported relief under the Settlement does not benefit shareholders.

Crowley reveals several deficiencies with the Settlement, but its issues go beyond *Crowley*: It inappropriately seeks to cure problems that are irrelevant to the harm alleged by the plaintiffs. This case arose when plaintiffs sued defendants for "breach[ing] their fiduciary duties in connection with [Altria's] multi-billion dollar investment" in Juul, whose value evaporated after the government took regulatory action against the company for allegedly marketing to minors. ECF No. 140-1 at 16. But the Settlement acts as a commitment of *cy pres* spending alongside a smorgasbord of corporate minutiae masquerading as both remedy and consideration. The

Settlement does a lot to address underage smoking, and next-to-nothing to prevent similar transactions in the future or cure the shareholders' losses from the Juul deal.

A. The purported relief does not cure the harm alleged by plaintiffs, and thus is not a proper or lawful use of this Court's authority.

Professor James Cox writes that the role of courts in supervising class action and derivative settlements is to act as "norm engineers" who provide new standards that will prevent the alleged harm from reoccurring. James D. Cox, *How Understanding the Nature of Corporate Norms Can Prevent Their Destruction by Settlements*, 66 DUKE L.J. 501, 514 (2016). Thus, "the terms of the settlement" should be responsive to "meaningfully address[ing] the misconduct alleged in the suit." *Id.* at 533 (discussing *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016)). And "to the extent a proposed settlement includes an injunctive component,"—as the one here does, ECF No. 140-1, Ex. A at 1-8—the "change in the defendant's conduct should address the problems complained of in the plaintiffs' pleading." Howard M. Erichson, *Aggregation As Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 907 (2016).

This Settlement violates these principles. The very plaintiffs who complained of the defendants "breach[ing] their fiduciary duties" now celebrate that the Settlement "will mitigate the impact of JLI's youth targeted business practices; restore the credibility of Altria's commitment to underage use prevention; reduce the risks of damaging regulatory action and litigation; prevent transactions that damage Altria's reputation and waste capital; and lay the necessary foundation for restoring the value of Altria's investment in JLI." ECF No. 140 at 24. These alleged benefits are simply unproven and repackaged conclusions derived from the significant funds Altria is forced to spend, under the Settlement, on youth tobacco prevention. *That* goal—cessation of youth

smoking—is the crux of the Settlement's relief, and it has nothing to do with the purported fiduciary breach by the Altria Board in acquiring Juul.

And with derivative settlements, the federal courts are not limited to a mere ministerial duty like they have in approving settlements for simple contract or tort disputes. Instead, the Courts are full fiduciaries to the shareholders with a diligent and impactful role in the settlement negotiations. *1988 Tr. for Allen Child..*, 28 F.4th at 521, 525; *Greenspun v. Bogan*, 492 F.2d 375, 378 (1st Cir. 1974); *see also* Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 24-27 (1979). An exemplary fiduciary would not allow Altria to spend significant treasury funds on youth fitness and anti-smoking programs because these programs are disconnected from the relevant harm plaintiffs raised, the breach by the directors.[2] ECF No. 140-1 at 16. This Court should not either.

Separately, the Settlement's "Corporate Governance Commitments"—while superficially relevant to the harm alleged—do not salvage the Settlement, either. *Id.*, Ex. A at 6. These "commitments" include (a) Altria promising to "maintain its management level Disclosure Committee," (b) amending the Finance Committee charter, and (c) new transaction diligence requirements for the company. *Id.*, Ex. A at 6-7.

None of these promises can sustain the Settlement because they do not constitute valid consideration. *Sager v. Basham*, 241 Va. 227, 229-230 (1991) (defining consideration); *Byrum v.*

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[2] Many of the Settlement's youth tobacco prevention provisions are no more substantive than the provisions that the Court accurately labelled a "façade." ECF No. 131 at 4. For example, the Settlement requires compliance with an existing court order. This adds nothing. "Altria has been subject to the MSA since 1998 and has never once violated it." ECF No. 165 at 19. Similarly, the Settlement requires Altria to share its underage tobacco use survey with the FDA, but it has done so for years. https://sciences.altria.com/library/underage-tobacco-use-survey

Even if these provisions were directed to the harms pleaded by plaintiffs, they are utterly vacuous, illusory commitments that provide no benefit to *anyone*, let alone shareholders.

Bear Inv. Co., 936 F.2d 173, 175 (4th Cir. 1991) (noting settlements are contracts). A promise to "continue to maintain" the Disclosure Committee is not induced by the settlement, as continued maintenance suggests Altria *already* established and was utilizing the Committee. ECF No. 140-1, Ex. A at 6. This is simply past consideration, which is invalid. *See United States v. Reg.*, 717 F. Supp. 2d 517, 525 (E.D. Va. 2010). In derivative settlements, such relief bears no value. *Scott v. Weig,* 2018 WL 2254541, at *14 (S.D.N.Y. May 17, 2018) (no benefit in defendant's agreement to "maintain its extant Code of Ethics" and to "continue its practice of having all employees read the Code of Ethics."); *In re Wells Fargo & Co. S'holder Derivative Litig*., 445 F. Supp. 3d 508 , 521 (N.D. Cal. 2020) (refusing to "include in the common fund the value of measures that Wells Fargo would have taken even absent this litigation"). The promise to amend the Finance Committee charter so that it can "review[] the company's strategy" and make a "report[] to the full Board" fails because it is illusory. ECF No. 140-1, Ex. A at 7*; see Howard v. King's Crossing, Inc.*, 264 F. App'x 345, 347 (4th Cir. 2008) (explaining what an illusory promise is). The board is not required to take any action from the report. Further, the Finance Committee includes seven of the twelve members of Altria's board. Requiring a majority of the board to consider and report findings *to itself* is akin to requiring a subcommittee of wolves to recommend whether the whole pack raid a chicken coop. While these "governance reforms" at least pretend to remedy the breach of fiduciary duty alleged by plaintiffs, they are hollow promises in name only.

Further, the new transaction diligence requirements are something "that [Altria] is already legally obligated to do" and thus invalid preexisting consideration. *Bojorquez-Moreno v. Shores & Ruark Seafood Co.*, 92 F. Supp. 3d 459, 468 (E.D. Va. 2015) (cleaned up). The requirements read like a laundry-list of duties that existing law demands of Altria for any acquisition. *See Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 620-21 (2005) (citing *Skouras v. Admiralty*

Enters., Inc., 386 A.2d 674, 682 (Del. Ch. 1978)). Directors "have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). That the directors violated this principle is why, for example, we are all here today. Whether the Settlement exists or not, the Altria Board must investigate essentially the same information they are promising to do now for any future transaction and may be sued if they fail to investigate. Accordingly, this promise is invalid consideration, too. All of these provisions have not changed from the originally-proposed settlement, about which the Court correctly remarked "your corporate governance commitments are, essentially, window dressing. … To me, there's no value there whatsoever." ECF No. 131 at 4.

But even if this Court now disagrees and finds, *arguendo*, that these promises are valid consideration, the Settlement still must fail. This is because the only material term in the Settlement is the Funding Commitment, not these ancillary corporate governance promises. The governance terms are nominal, included only as an illusory connection in the remedy to fiduciary breach. *See Sfreddo v. Sfreddo*, 59 Va. App. 471, 490-92 & n.9 (2012) (describing nominal consideration as "trivial"). "A settlement agreement may be enforceable despite the omission of certain terms so long as those terms are not material." *Beverly v. Abbott Lab'ys*, 817 F.3d 328, 334 (7th Cir. 2016). But the Funding Commitment cannot stand, since it seeks to remedy a harm—youth smoking—that is not alleged by plaintiffs' suit and it was ratified without providing sound notice to shareholders to object. Erichson, 92 NOTRE DAME L. REV. at 907; *supra* II. And if the Funding Commitment is unsupported by law, the entire Settlement must fall, too—regardless of whether the corporate governance promises are valid consideration. *Beverly*, 817 F.3d at 334.

Finally, foundational constitutional principles complicate the Court's use of its equity powers in and endorsement of the Settlement. Article III limits this Court's equity powers to remedying an actual "case or controversy." *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Date v. Sony Elecs., Inc.*, 2009 WL 435289, at *33 (E.D. Mich. Feb. 20, 2009) (rejecting a settlement which "does not remedy the injury alleged by the class members). The conclusions by Professors Cox and Erichson—that a derivative settlement must address the harm alleged—flow naturally from Article III, since otherwise the federal courts' injunctive powers would address issues beyond the scope of the "case or controversy" before the court. *O'Shea*, at 493; Cox, 66 DUKE L.J. at 501 at 533; Erichson, 92 NOTRE DAME L. REV. at 907; *see also* Redish *et al*, 62 FLA. L. REV. 617, 641-49. Equitable "remed[ies] must ... be limited to the inadequacy that produced" the asserted injury. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). And "as with any equity case, the nature of the violation determines the scope of the remedy." *Vecchione v. Wohlgemuth*, 80 F.R.D. 32, 41-42 (E.D. Pa. 1978) (*citing Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)). If the plaintiffs sought this Settlement as a remedy in federal court, this Court plainly could not issue an order that included the Funding Commitment because it does not redress the fiduciary duty harm they allege. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106–107 (1998) (discussing redressability, the idea that federal court remedies must cure only the harm complained of in suits).

Of course, federal courts often stamp privately negotiated settlements with approval—even those with obscure or unrelated consideration—as part of their ministerial duties arising out of legitimate federal cases. *See, e.g.*, *United States v. Miami*, 664 F.2d 435, 441 (5th Cir. 1981). But these cases do not directly implicate the federal courts' Article III powers like derivative settlements do. In derivative suits, the courts play a supervisory role in negotiations, they have a

fiduciary duty to the shareholders, and their injunctive powers are often directly implicated by the settlements, like here. *See* ECF No. 140-1 at 16. The attenuation between the courts and the private parties that exists for traditional civil suits is inverted for derivative suits, where the courts have duties to absentees and final say on propriety. Accordingly, the federal courts must be careful about endorsing a settlement that does not address the underlying claim due to Article III's limits on their equitable jurisdiction. *See Lewis*, 518 U.S. at 357; *Cf. Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1257 (11th Cir. 2023) (vacating final approval of settlement where plaintiffs could not demonstrate Article III standing for injunction provided by the settlement agreement). "[*C*]*y pres* payments are not a form of relief" either in law or in equity. *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting).

Because the Settlement largely commits remedies that are unassociated to the harm alleged by plaintiffs, it should be voided.

B. To the extent that the removal of litigation risk is treated as a shareholder benefit, *Crowley* appropriately precludes crediting this paradoxical reward.

The parties also suggest that the Settlement benefits shareholders by removing the risk of litigation. ECF No. 140 at 24. But both this risk and benefit are manifestations of the plaintiffs' suit. This case exemplifies the same "do as I say, not as I do" hypocrisy that *Crowley* called out as "feeble" litigation brought only to "move money from the corporate treasury to the attorneys' coffers." 687 F.3d at 319-20. As *Crowley* expounded:

> Plaintiffs say that investors still can gain from this suit, because removing interlocking directors from the board will eliminate any chance that the United States will file a § 8 suit to remove them. We don't get it. In order to avoid a risk of antitrust litigation, the company should be put through the litigation wringer (this suit) with certainty!? How can replacing a 1% or even a 20% chance of a bad thing with a 100% chance of the same bad thing make investors better off?

Id. Just as in *Crowley*, the plaintiffs here justified suing Altria and its directors to "reduce the risks of damaging regulatory action and litigation." ECF No. 140 at 5-6, 24. But the plaintiffs cannot

"anomalously count[] it as a benefit that [they] exposed the corporation to litigation expense and notoriety in an effort to erase the risk that others might do the same thing." *Schectman*, 244 F.2d at 540; *accord Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171, 176-177 (3d Cir. 2001) (similar).

Now, the company must spend $117 million dollars out of its own coffers on anti-smoking prevention. *Crowley*, 687 F.3d at 319. And because the Settlement forces Altria to spend money on programs that refute the company's business model, the $117 million dollar funding commitment is a *floor*, not a *ceiling* to shareholder liability here—the total cost absorbed from this Settlement will only increase as future customers never materialize because of these third-party programs.

Just as in *Crowley*—where the illusory settlement left one allegedly conflicted board member in her position—here the Settlement does not actually foreclose the material risk from future suits. *Id.* at 318-19. The funding commitment is instead a mere PR play designed to purchase goodwill from potential litigants, with shareholders footing the bill. Frank does not believe this PR approach will work and doubts its legality, *see supra* V.B, but it is consistent with Altria's existing efforts to "emphasize … the breadth of their [ancillary] social justice initiatives" rather than corporate profits or their products, as a means of currying favor with preferred customers and investors. Aaron Sibarium, *How Tobacco Companies Are Crushing ESG Ratings*, THE FREE BEACON (June 13, 2023) https://tinyurl.com/altriaesg. And yet critically, the Settlement does not—outside of related derivative claims to this litigation—foreclose any legal liability to Altria. *See* ECF No. 140-1 at 26 (noting only "Shareholder Releasors" are relinquishing claims). Angry parents and their manipulated children, as well as state and local governments, are still free to seek remedies from Altria due to Juul's past practices in marketing to minors. And a one hundred-million-dollar payout to third-party non-smoking groups hardly guarantees they will not do so.

Just as in *Crowley*, the Settlement here doesn't prevent any litigation due to the Juul acquisition except from shareholders—and this suit is the *only* example of shareholders intending to bring such a claim on that transaction. 687 F.3d at 318-19.

V. The Settlement provides no benefit to shareholders and in fact harms them.

The purpose of a corporation is "primarily to earn money for the shareholders." *Hazen*, 105 F.2d at 57; *see also United Gas Pipe Line*, 618 F.2d at 1136. And the board of directors for these corporations must work in "the[ir] best interests." *Izadpanah v. Boeing Joint Venture*, 243 Va. 81, 83 (1992). Giving money from the corporate treasury to third party groups instead of the shareholders normally does not earn them money. That is especially so when the groups receiving these funds work to directly prevent future Altria customers. Any settlement compromise that does not serve the company and the shareholders' best interests—like this one—is not appropriate. *Zimmerman v. Bell*, 800 F.2d 386, 391 (4th Cir. 1986).

A. The Funding Commitment is an improper *cy pres* mechanism that does not benefit the shareholders, creates perverse incentives for all participants in litigation, and spends shareholder money on inappropriate causes.

The crux of the Settlement is a gigantic $117 million dollar reward, nearly all of which siphons money directly from Altria's corporate treasury to fund "independent third-party programs" that implement "positive youth development" and "help[] kids make healthy decisions." ECF No. 140-1, Ex. A at 1. This Funding Commitment is essentially *cy pres*, meaning the Settlement bequeaths money to third party interest groups as a public tradeoff—but not a remedy—for the harm caused by the defendant. This "inferior" action "only imperfectly serve[s] the purpose of the underlying cause[] of action—to compensate class members" for their injuries. *Baby Prods. Antitrust Litig.*, 708 F.3d at 167. The Settlement erroneously embraces *cy pres* as the solution to the claims brought by plaintiffs and as a result, the purported relief disincentivizes thorough negotiations, inhibits shareholder interests, and constitutes an ill-suited expenditure.

1. *Cy pres* relief manifests perverse incentives for participants in derivative litigation to negotiate inadequate, corrupted, or otherwise flawed settlements.

Unlike direct relief, *cy pres* awards create and incentivize interests beyond that of the plaintiffs seeking relief before the Court.

Cy pres rewards give plaintiffs' attorneys a mechanism to demand higher fees for a negotiated settlement, even though that relief does not actually remedy their clients' injuries. Courts that award fees for *cy pres* relief "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 661 (2010). This Court did exactly that: While taking issue with the structure and independence of the proposed Funding Commitment, the Court nevertheless pointed to Altria's Commitment as a substantial factor in plaintiffs' attorneys' substantial fees—even while noting the Settlement only "came with the healthy assistance" of the Court. ECF No. 179 at 7. And as noted above, here the shareholders are not even benefitted *indirectly*. Instead, the shareholders will see a significant portion of Altria's corporate treasury be reallocated to interest groups which actively seek to reduce future Altria customers. *See* ECF No. 140-1, Ex. A at 1.

Relatedly, when *cy pres* awards are treated like direct relief, plaintiffs' lawyers are incentivized to elevate the interests of named plaintiffs or designated nonprofits over the amorphous pool of anonymous shareholders. The lawyers get paid the same regardless, but they get more in control, certainty, and notoriety by handing out big checks to civic organizations versus tracking down unnamed class members for relief. *See* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. PENN. L. REV. 1463, 1484 & n.114 (2015). To protect this power, plaintiffs' lawyers necessarily must skirt or shortcut legal responsibilities to the class like providing adequate notice, which happened here. *See supra* II. The Funding Commitment's

convenience meant protecting it from objection, which is why the parties chose a half-baked approach to notice to avoid concerns like Frank's rather than give shareholders real notice through direct e-mail and mail, which would have been convenient and relatively inexpensive. *See Mullane*, 339 U.S. at 315, 317-19.

Cy pres also perpetuates the appearance of impropriety by district court judges, by forcing them to play benefactor and make decisions with other people's money. *See* Adam Liptak, *Doling Out Other People's Money*, THE N.Y. TIMES (Nov. 26, 2007); *In re EasySaver Rewards Litig.*, 906 F.3d 747, 761-62 (9th Cir. 2018). Normally, the chief concern with judges and *cy pres* arises when district courts steer money toward organizations to which they have ties. *See*, *e.g.*, Jeremy Kidd & Chas Whitehead, *Saving Class Members from Counsel*, 58 SAN DIEGO L. REV. 579, 613–14 (2021) (noting a *cy pres* reward to a charity where the judge's spouse sat on board); *In re Google Buzz Privacy Litig.*, No. C 10-00672, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011) (redirecting, without giving notice and *sua sponte*, *cy pres* relief to a local university where the judge taught as visiting law professor). That happened here, with this Court nominating attorney Michael S. Dry as the Independent Monitor for the Funding Commitment because "I know Mr. Dry … having supervised him when I previously worked in the U.S. Attorney's Office." ECF No. 144 at 15. Mr. Dry was, to Frank's knowledge, appointed to the position of Monitor without any formal or competitive interview process, and this Court ordered his compensation upon the parties by directing "[Dry] is provided with a $2 million annual budget from the settlement" for five years. ECF No. 144 at 16. Further, this Court took an extremely active role in shaping the *cy pres* Commitment—something it has reiterated. ECF No. 179 at 7-9; ECF No. 131 at 8-12. To protect the integrity of the settlement process in derivative suits, this Court should not endorse *de facto cy pres* awards like this Settlement.

2. *Cy pres* settlements normally do not benefit the shareholders harmed in derivative suits and the Funding Commitment illustrates this problem.

A derivative class suit is a procedural device for aggregating common claims across company shareholders to remedy harms to their company from poor corporate decision-making—not a legal device for creating a charitable trust. *Cf. Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). While *cy pres* has found its way into some circuits as a means for relief in class settlements—but only when the *cy pres* "benefits the class," *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036, 1040 (9th Cir. 2011)—*cy pres* was never intended as a remedy for class suits. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting).

This case shows why, as the shareholders and Altria plainly do not benefit from the relief. Instead, a massive sum of money will be transferred out of Altria's treasury to the coffers of third-party interest groups—meaning lost dividends, investments, and debt payouts for investors. And these interest groups are devoted to ensuring today's generation of kids do not become smokers. ECF No. 140-1, Ex. A at 1. Regardless of whether this is a noble societal goal, it tends to undermine the profitability of a company like Altria. *But see* ECF No. 170 at 2 (noting atypical shareholders like the objectors who "lack a strong interest" in Altria's success, but own shares to exploit political and legal rights in scenarios like these settlement negotiations). Aggregate litigation is not supposed to make the principals worse off. *See* 28 U.S.C. § 1713.

The Court purported to remove this contradiction by finding that Altria "benefit[s]" through fulfillment of the "company's corporate goals, especially as it relates to Altria's underage use standards." ECF No. 144 at 14. But there is no "case or controversy" here arising from fulfillment (or lack thereof) of the company's corporate goals. U.S. Const., art. III. The plaintiff's entire complaint does not advance any cause of action which directly impugns Altria's corporate goals; instead, it alleges breaches of fiduciary duty by the board in acquiring Juul and the waste of

corporate assets. *See* ECF No. 179 at 2 (describing the Consolidated Complaint, ECF No. 110). Any concern with the corporate commitment to youth smoking is an ancillary concern, only related to liability which arose from the botched Juul transaction. if plaintiffs do not state a specific cause of action alleging a violation or breach of Altria's pertinent corporate goals, how can the Settlement remedy this unmentioned harm? Of course, it cannot.

The "function of any remedy is to cure the violation to which it is addressed." *Milliken v. Bradley*, 418 U.S. 717, 806 (1974). But *cy pres* in class action settlements enable the opposite. As demonstrated here, the parties and their lawyers will throw money to disinterested groups to buy public goodwill, avoid the tough questions required to develop substantive and direct relief, and ensure a quick settlement. Such an approach betrays the class and the corporation for which a shareholder derivative suit is brought.

3. Due to both the parties' and this Court's actions, the Settlement inappropriately requires Altria to fund organizations that in tension with its business interests.

While "distributions to social agencies may be a laudable goal," *cy pres* does not enable the Court or the parties to "use monies from the class settlement to propagate their own brand of social justice." *Sourovelis v. City of Phila.*, 2021 WL 298703, at *342 (E.D. Pa. 2021). But that's exactly what happened here. First, the parties decided that the best way to remedy poor fiduciary decision-making by the Altria board was to spend substantial company funds on third party interest groups dedicated to youth wellbeing and stopping youth smoking. Then, this Court—after objectors successfully made Altria spend *more* money on such causes—stepped in and required an Independent Monitor to ensure the money sufficiently addressed the specific goal of stopping youth smoking. ECF No. 131 at 9-10.

Both steps are problematic under *Sourvovelis*: The parties decided to "propogate their own brand of social justice" when they made youth smoking prevention the centerpiece of a settlement in a case about fiduciary breach. 2021 WL 298703, at *342. And then the Court, by requiring the Independent Monitor, signaled that the parties virtue-spending wasn't good enough—it had to directly undercut Altria's future customer base in order to qualify as independent. *See* ECF No. 131 at 9-10. *Cy pres* settlements are already inadequate because they never directly cure the shareholders' injury and rarely benefit them indirectly, *see* Redish, 62 FLA. L. REV. at 661—permitting these awards to elevate preferred social values or causes only exacerbates their impropriety.

Further, *cy pres* rewards are often preferred by major corporate defendants liable for wrongdoing because they "reap goodwill" from the court of public opinion as a result. *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009). From the Funding Commitment, Altria will now be able to parade big checks in front of local crowds and press—not a bad punishment for incinerating billions of shareholder funds on the Juul investment. While Frank believes any reputational injury remains uncured, *see infra* V.B, even if he is wrong, *cy pres* remains inappropriate here. This is because Altria prefer[s] [the] award ... for the public relations benefit," which further stains the settlement with the stench of collusion and rewards director defendants with a collateral windfall for their wrongdoing. *Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (Kleinfeld, J., dissenting).

Accordingly, this Court should deny settlement approval.

B. The Funding Commitment provides no benefit to shareholders through improved "reputation."

This Court rationalized the Funding Commitment by explaining it "benefits the corporation, particularly their reputation." ECF No. 181 at 7. But this conclusion is *ipse dixit* and

unsupported by evidence provided by the settling parties responsible for demonstrating shareholder benefit under the Settlement. Moreover, Wall Street research agencies which monitor corporate alignment with socially responsible behaviors through environmental, sustainability, and governance ("ESG") scores suggest otherwise. If the Settlement materially benefitted the reputation of Altria, then its ESG scores from top financial analysts should have risen. Instead, Altria's ESG scores since the settlement have largely remained stagnant or gotten worse:

ESG Rating Agency	Pre-Settlement	Post-Settlement
Morningstar Sustainalytics ESG Risk Rating (lower is better)	24.0 circa Aug. 15, 2022[3]	24.2 updated May 26, 2023[4]
Refinitv ESG Company Score (higher is better)	88 circa March 21, 2021[5]	88 current score[6]
MSCI ESG Rating (AAA is best)	BBB rated August 2021	BBB unchanged since 2021[7]
S&P Global ESG (higher is better)	42 rated October 21, 2022[8]	39 rated June 16, 2023[9]

[3] The historical Altria score is archived by the Internet Archive. *See* Company ESG Risk Ratings, Philip Morris International, Inc., MORNINGSTAR (archive), available at: https://web.archive.org/web/20220815221709/https://www.sustainalytics.com/esg-rating/philip-morris-international-inc/1014447427 (last visited August 2, 2023).

[4] Company ESG Risk Ratings, Altria Group, Inc., MORNINGSTAR (archive), available at: https://archive.ph/J5YTE (last visited August 2, 2023).

[5] Could not locate historical Refinitv scores from archives of their website, but a blog post listed its score. *See* Are You Trying To Make Money Or Save The World?, Steve Strazza (March 21, 2021), available at: https://allstarcharts.com/save-world-or-make-money/ (last visited August 2, 2023).

[6] Refinitiv ESG company scores, Altria Group Inc, REFINITIV (archive), available at: https://archive.ph/PZGXg (last visited August 2, 2023).

[7] ESG Ratings & Climate Search Tool, Altria Group, Inc., MSCI (archive), available at: https://web.archive.org/web/20230612212747/https://www.msci.com/our-solutions/esg-investing/esg-ratings-climate-search-tool/issuer/altria-group-inc/IID000000002157019 (last visited August 2, 2023).

[8] Altria Group, Inc. ESG Score, S&P GLOBAL (archive), available at: https://archive.ph/0bPLz (last visited August 2, 2023).

[9] Altria Group, Inc. ESG Score, S&P GLOBAL (archive), available at: https://archive.ph/SXVTN (last visited August 2, 2023).

As this table highlights, ratings from Morningstar, MSCI, and Refinity have not improved in reaction to the Funding Commitment. In fact, the only changes have been modest *declines*.

But the complexities of any supposed reputational benefits to Altria don't stop there, since—as a tobacco company—it is extremely unpopular with most of the American public already. For example, a recent YouGov survey found that Big Tobacco had the worst approval rating out of 39 American industries—with a whopping 43-point difference between those who disapproved versus approved of the industry. Taylor Orth, *Americans' most and least favored industries*, YOUGOV (November 21, 2022) https://tinyurl.com/5n924usz. Thus, Altria and its investors are not in business for the good reputation. Many shareholders who own the stock do so because, despite poor public perception, tobacco companies offer a solid return on investment. *Why Tobacco Stocks Outperform (Why Tobacco Stocks Are A Great Investment)*, QUANTIFIED INVESTMENTS (May 8, 2023) https://tinyurl.com/42zeayr9.

Accordingly, the reputational benefits argument for the Funding Commitment fails for two reasons. First, Altria's post-Settlement ESG ratings fail to demonstrate any perceived PR benefit from the funding commitment. "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *Haaland v. Brackeen*, 599 U.S. __, __ (2023) (slip op., at 32). That this Court asserts reputational benefits for Altria from the settlement does not make it so, and Altria's static ESG ratings indicate the relief lacked redressability here. Second, because Altria is already vastly unpopular, any *additional* alleged reputational injury to the company from the Juul acquisition is too "abstract" to cure. *L.A. v. Lyons*, 461 U.S. 95, 101 (1983). Identifying specific reputational harm to Altria here is akin to quantifying how much one individual *day* of Dan Snyder's ownership damaged the Washington Commanders. Given Altria's existing unpopularity and business model, the Funding Commitment

attempt is a poor use of Court authority and waste of shareholder resources since any Juul-specific reputational damage is ultimately indiscernible and *de minimis*.

C. The corporate governance reforms and various "measurables" provide no new or material benefit to the shareholders.

All the purported governance reforms existed in the parties' originally-proposed settlement verbatim (ECF No. 125-1 at ¶¶ 3-23), which the Court correctly called a "façade." ECF No. 131 at 4. The Settlement requires Altria to maintain a pre-existing management-level Disclosure Committee (ECF 140-1, Ex. A at ¶ 26),[10] and amend the Finance Committee's Charter to have the authority to review strategy regarding mergers. *Id.* at ¶ 27. Separately, the Settlement requires Altria to engage in "transaction diligence," where every potential transaction involving tobacco products "shall be evaluated for all risks relating to underage use." *Id.* at ¶ 29. Finally, the Settlement requires the creation of a "Underage Usage Steering Committee," with requirements for staffing it and reporting to other committees and the board. *Id.* at 5-6. None of these "commitments" provide a benefit to Altria shareholders.

For starters, the board's promise to "continue to maintain" the Disclosure Committee it already has and uses asks for credit on work already done. *Id.* at 6; *see Reg.*, 717 F. Supp. 2d at 525. Then, its promise to have the Finance Committee charter "review[] the company's strategy" and make a "report[] to the full Board" is—quite literally—all talk, no action. ECF No. 140-1, Ex. A at 7; *Howard*, 264 F. App'x at 347. That the Finance Committee has significant overlap with the Altria Board—seven of twelve directors serve on Finance—advances a bureaucracy, not a benefit.

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[10] Altria's "Disclosure Committee" has never been mentioned in an Altria SEC filing, nor apparently on Altria's website. If it is identical to the "Disclosure Controls Committee" it allegedly "oversees Altria's disclosure controls and procedures for financial reporting and reviews the company's financial filings and disclosures." https://www.altria.com/About-Altria/Corporate-Governance/Financial-Accountability/. No public information seems to exist about who sits on this committee or who it reports to.

The "Underage Usage Committee" merges both flaws, too: It is advisory-only while creating a new bureaucratic body—all while federal and State tobacco laws already require Altria to comply with certain business practices to prevent underage usage. Finally, the new transaction diligence requirements proposed by Altria mirror the very duties and obligations Altria has under Virginia merger law. *See Bojorquez-Moreno*, 92 F. Supp. 3d at 459; *Stockbridge*, 269 Va. at 620-21.

The Settlement also included five "Measurables": (1) compliance with the 1998 Master Settlement Agreement ("MSA") entered into by Philip Morris; (2) director training; (3) marketing training; (4) reporting of survey data to the FDA; and (5) distribution of *WeCard* signage. ECF No. 140-1, Ex. A at ¶ 9. While the Independent Monitor oversees implementation of these commitments, "[t]he amount of time required for the education and the content of the education will be determined by Altria Client Services' Senior Vice President for Corporate Citizenship in consultation with the Independent Monitor, and may include instruction on reducing risk associated with merger and acquisition activity." *Id.* at ¶ 9(b).

What the Settlement does not do is what this Court insisted would be of significant value: "I think it's good for the public to find out exactly what Altria and Juul and their executives were up to here in what you allege to be quite serious allegations of fraud." ECF No. 131 at 5. Without certainty as to how the Juul transaction happened—and whether there was fraud—it is significantly more difficult to craft corporate changes that concretely reduce the future odds of another botched Altria transaction. The Court's own advice to the parties was brushed aside for a settlement that buries, rather than remedies, the corporate wrongdoing *or* negligence that led to the Juul transaction. And that makes the parties' agreement an abject failure.

VI. The attorneys' fee award appears excessive.

Courts "have an independent obligation to ensure that the [attorney fee] award, like the Settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re*

Bluetooth Headset Products Liability Litig., 654 F.3d 935, 941 (9th Cir. 2011). As compensation for their representation, the plaintiffs' attorneys were awarded $15,000,000 dollars in non-reimbursed pay by this Court, approximately 15% less than the $17,500,000 they requested. ECF No. 179 at 1. In evaluating the reasonableness of the award, the Court engaged in both the eight-factor balancing test for common fund fees laid out in *Singleton v. Domino's Pizza*, *LLC*, and the lodestar method to gage an appropriate award for counsel. 976 F. Supp. 2d 665, 682, 688 (D. Md. 2013); ECF No. 179 at 4-6. While the Court's analysis was thorough, it is premised on fundamental errors that caused the Court to erroneously award attorneys' fees against shareholder interests.

A. The Funding Commitment's value should not factor into the fee award.

It is improper to include the purported value of the Funding Commitment in the denominator for purposes of calculating a fee award. "The issue of the valuation of…a settlement must be examined with great care to eliminate the possibility that it serves only the 'self-interests' of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). The value of injunctive relief is "easily manipulable by overreaching lawyers," so "parties ordinarily may not include an estimated value of undifferentiated injunctive relief in the [] common fund for purposes of determining an award of attorneys' fees." *Staton v. Boeing Co*., 327 F.3d 938, 946, 974 (9th Cir. 2003). As discussed above, the value of the Funding Commitment to shareholders is negligible if not negative. "[O]nly in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include" it in the common fund "for purposes of applying the percentage method of determining fees." *Id.* at 974; *see also In re Anthem Inc. Data Breach Litig.*, 2018 WL 3960068, at *92-93 (N.D. Cal. Aug. 17, 2018) (following *Staton*). Injunctive relief "'expert valued' at some fictitious figure, together with arrangement to pay plaintiffs' lawyers their fees" is a "classic manifestation" of the collective

action agency problem in class litigation. *In re Oracle Secs. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990). Derivative counsel is not entitled to common fund credit for either the funding commitment or the governance reforms.

B. Counsel's fee request does not adequately demonstrate specific and unique work in service of shareholders.

The Court ultimately awarded fees based on purported lodestar billing, but it is impossible to estimate the appropriate lodestar because plaintiffs' counsel failed to provide sufficient detail in their billing summaries. *See Newport News Shipbuilding & Dry Dock Co. v. Holiday,* 591 F.3d 219, 230 n. 12 (4th Cir. 2009) ("an attorney has the burden to establish the reasonableness of … the hours aspect of the lodestar analysis."). "[P]roper documentation is the key to ascertaining the number of hours reasonably spent on legal tasks." *Guidry v. Clare*, 442 F. Supp. 2d 282, 294 (E.D. Va. 2006). "Without [records specifying date, task and attorney], it is impossible to assess duplication of effort or unproductive time." *Boyd v. Coventry Health Care*, 299 F.R.D. 451, 468 (D. Md. 2014). The lodestar "serves little purpose as a cross-check if it is accepted at face value." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013).

Instead of providing sufficient lodestar detail, class counsel employs a "just trust us" approach, which is unacceptable in class action proceedings. *Dennis*, 697 F.3d at 869. It "is essential" to allow "class members an opportunity to thoroughly examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported." *Mercury Interactive*, 618 F.3d at 994.

Fortunately, this Court can consult the earlier and related *Klein* litigation as dispositive evidence the fee request here is outrageous. In *Klein v. Altria Group, Inc.*, plaintiffs' counsel took on a fresh case and organically completed seventy depositions, reviewed thirty million pages of documents, and conducted twenty-four interviews—resulting in a $14.3 million dollar lodestar.

No. 3:20-cv-00075-DJN (E.D. Va. 2022), ECF No. 311 at 4. Here, plaintiffs' counsel analyzed only two million documents, "reviewed" rather than conducted depositions, and seemingly conducted *zero* interviews with new witnesses. ECF No. 149 at 13-14. The *Klein* lawyers also "successfully opposed Defendants' four motions to dismiss," "briefed Plaintiffs' motion to amend the Complaint," and "briefed Plaintiffs' motion for class certification"—all of which carried substantial risk for their clients which did not present in this case. *Klein*, No. 3:20-cv-00075-DJN, ECF No. 311 at 4. Without litigating these motions or taking a single deposition, plaintiffs allegedly racked up an $11.6 million dollar lodestar. But while this Court recognized most of the hard work was done in *Klein*, ECF No. 179 at 13, it still excluded the case from its comparative fee analysis. *Id.* at 12. "Duplicating work" from an previous lawsuit is not compensable, and the comparison to *Klein* reveals a lack of billing judgment on the face of the request here. *Landwehr v. AOL Inc*., 2013 WL 1897026, at *9 (E.D. Va. May 1, 2013).

And, by permitting six different firms to work as plaintiffs' counsel, the Court rewarded duplicate efforts and overstaffing. *Id.* at 3 n.5; *see also Lane v. Wells Fargo Bank, N.A.,* 2013 WL 3187410, at *15 (N.D. Cal. 2013) ("One firm is usually best for the class because it eliminates the inefficiency in keeping a multiplicity of law firms up to speed."). As a fiduciary to the class, the Court must ensure the reasonability of fee awards by scrutinizing material issues and claims in fee requests, *see In re High Sulfur Content*, 517 F.3d 220, 227 (5th Cir. 2008) —and duplicity of effort is one of these considerations. Courts should "exclude" bills for labor "not reasonably expended" where cases are "overstaffed" and hours are "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). But the Court failed to address at all the concern that splitting work across capable and costly law firms might be a disservice to the class.

The Court arguably failed to appreciate its fiduciary duty regarding the fee award. It remarked to plaintiffs' counsel "one factor that weighs, I think, in your favor, is that the fee award does not come from your clients. It doesn't come from the plaintiffs. It comes from the corporation itself. … [I]t's not like every dollar I give to you detracts from a plaintiff who was injured, right?" ECF No. 181 at 20. In fact, money taken from the corporation *does* detract from injured shareholders, and the fee analysis should take this into account.

CONCLUSION

Objector Frank respectfully asks that the Court deny final approval to the Settlement because it does not benefit shareholders.

DATED this 4th day of August, 2023.

Respectfully submitted,

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