UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

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

PROPOSED INTERVENOR THEODORE H. FRANK'S MOTION TO RECONSIDER FINAL APPROVAL ORDER AND TO ALTER OR AMEND FINAL JUDGEMENT

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 3

I. The Underlying Complaint 3

II. Terms of the Settlement 4

III. "Notice" of Settlement 7

IV. Objection on Putative Behalf of Shareholders 8

V. Fairness Hearing and Unnoticed Amendment to Settlement 10

ARGUMENT 12

I. The Settlement approval and accompanying fee orders should be vacated under Rule 60(b). 12

A. Frank meets the threshold requirements for Rule 60(b). 12

B. The final approval order should be vacated under Rule 60(b)(4) as void due to the lack of notice. 19

C. In the alternative, the judgment is void under Rule 60(b)(1) because it is supported by this Court's mistake of law as to adequate notice and Frank's excusable neglect in timely objecting to the Settlement. 21

D. Alternatively, relief maybe be ordered under Rule 60(b)(6). 24

II. The error is not harmless because final approval should be denied on the merits. 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASELAW

Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.,
843 F.2d 808 (4th Cir. 1988). 17

Blaney v. West,
209 F.3d 1027 (7th Cir. 2000) 19

Cavalieri v. Virginia,
2022 WL 1153247 (4th Cir. 2022) 23

Central Operating Co. v. Util. Workers of Am.,
491 F.2d 245 (4th Cir. 1974) 14

Davis v. Lott,
2019 WL 718600 (D.S.C. 2019)....................13

Foster v. Arletty 3 S.A.R.L.,
278 F.3d 409 (4th Cir. 2002) 15-16

G.C. & K.B. Invs., Inc. v. Wilson,
326 F.3d 1096 (9th Cir. 2003) 15

Hill v. McDermott, Inc.,
827 F.2d 1040 (4th Cir. 1987) 21-22

Holland v. Virginia Lee Co.,
188 F.R.D. 241 (W.D. Va 1999)....................13

In re Davita Healthcare Partners, Inc. Derivative Litig., No. 12-cv-2074-WJM-CBS,
2014 WL 13024782 (D. Colo. Dec. 3, 2014)....................20

In re Literary Works in Elec. Databases Copyright Litig.,
654 F.3d 242 (2d Cir. 2011)....................20

In re UnitedHealth Grp. S'holder Derivative Litig.,
631 F.3d 913 (8th Cir. 2011) 8

Jackson v. FIE Corp.,
302 F.3d 515 (5th Cir. 2002) 16

Jackson v. United States,
245 F. App'x 258 (4th Cir. 2007) 13-14, 16

JTH Tax, Inc. v. Stocker,
2011 WL 2119409 (E.D.Va. 2011)...24

Jones v. City of Richmond,
106 F.R.D. 485 (E.D. Va. 1985) 13

Jones v. Flowers,
547 U.S. 220 (2006)...18

Kemp v. United States,
142 S. Ct. 1856 (2022)... 15, 20-22

Klapprott v. United States,
355 U.S. 601, 615 (1949)...21

Knight v. Trimble,
2013 WL 6140743 (N.D. Cal. 2013) 15

Mullane v. C. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950).. 18-20

Nat'l Credit Union Admin. Bd. v. Gray,
1 F.3d 262 (4th Cir. 1993) 17-18

Park Corp. v. Lexington Ins. Co.,
812 F.2d 894 (4th Cir. 1987) 13

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985)..19

Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship,
507 U.S. 380 (1993).. 22-24

Randall v. Merrill Lynch,
820 F.2d 1317 (D.C. Cir. 1987).. 17-18

Reid v. Angelone,
369 F.3d 363 (4th Cir. 2004) 24

Robert F. Booth Trust v. Crowley,
687 F.3d 314 (7th Cir. 2012) 23

Sloss Indus. Corp. v. Eurisol,,
488 F.3d 922 (11th Cir. 2007) 22

Staren v. American Nat'l Bank & Trust Co. of Chicago,
529 F.2d 1257 (7th Cir. 1976) 21

United Student Aid Funds, Inc. v. Espinosa,
559 U.S. 260 (2010)..19

Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC,
859 F.3d 295 (4th Cir. 2017) 13

Wendt v. Leonard,
431 F.3d 410 (4th Cir. 2005) 19, 21

Werner v. Carbo,
731 F.2d 204 (4th Cir. 1984) 15, 17-18, 22-23

Zerkle v. Cleveland-Cliffs Iron Co.,
52 F.R.D. 151 (S.D.N.Y. 1971) 25

Zimmerman v. Bell,
800 F.2d 386 (4th Cir. 1986) 16, 24

STATUTES AND FEDERAL RULES

Fed. R. Civ. P. 11 14

Fed. R. Civ. P. 23.1 ....8, 19-20

Fed. R. Civ. P. 60 ....*passim*

INTRODUCTION

Just over five months ago, this Court granted final approval to the parties' proposed settlement, granted class counsel's fee motion in part for $15 million, and entered final judgment. *See* ECF No. 178 ("Final Approval Minute Order"); ECF No. 179 ("Fee Order"); ECF No. 180 ("Final Judgment"). Shareholder-Intervenor Theodore H. Frank moves to vacate these orders.

The parties' Settlement—approved without direct notice to shareholders—harms the victims of defendant's alleged mismanagement by requiring shareholders to pay $100 million of corporate funds to third parties, some of whom may undermine Altria's most profitable 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), an independent monitor (contracted to receive up to $10 million dollars to administer the deal), and the named plaintiffs (who each received $15,000). Accordingly, it was approved without true opposition—the only objectors in fact wish to inflict *more* harm to the corporation, a fact they do not disguise. The Settlement beneficiaries obliged them, to the detriment of shareholders.

Plaintiffs presented the underlying lawsuit as a tool to rectify mismanagement by Altria and Juul's boards, whose alleged breaches of fiduciary duties cost Altria shareholders billions. 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* harm to shareholders by forcing them to fund a massive, nine-figure corporate donation with the hope some very expensive publicity removes the sting from the Juul acquisition. While also paying $15 million to plaintiffs' attorneys' which the Court correctly observed had not been "doing their job" by initially proposing an effectively illusory settlement. ECF No. 171 at 18.

But why would the board agree to this? Aren't they charged to act as fiduciaries to Altria? Simply put, agents—like Altria's directors—often have different incentives than their principal.

Agents can be threatened or induced to act against the true interests of those they serve, and plaintiffs' counsel are familiar with such problems—a hypothetical breach of the boards' duties underly this lawsuit! The named defendants each had conflicted interests in this case because they were each sued in their individual capacity. In settling, the defendant effectively chose to spend other people's money—Altria shareholder money—at least in part to avoid their own potential liability. The Juul defendants do not even have a nominal duty to Altria, so unsurprisingly they agreed that Altria could pay for release of the claims against them. While the suit itself was harmful to the company by distracting management, the board's refusal to provide adequate notice to shareholders should be interpreted as a full-flavor smoking gun that the board knew many shareholders would find the suit improvidently settled at the expense of shareholders.

Final judgment should be vacated, and the parties returned to their previous positions. If plaintiffs can prove defendants breached their duties as they pleaded, perhaps they will be held liable to the victims of this breach—the shareholders. Frank finds it plausible that Juul was beset by an unforeseeable storm of activist and regulatory rancor to hound legal and safe products from the market, which cratered Altria's investment. Whether or not the named plaintiffs were right, Altria is not best served by the board giving away corporate money from shareholders to unharmed third parties. Altria's shareholders do not benefit by paying $100 million plus additional costs to groups that, at best, have missions that are inconsistent with Altria's existence. The Court reached a different conclusion (ECF No. 180 at ¶ 4), but due to the lack of notice, no party argued against this supposition.

Frank now moves the Court to vacate its initial Final Approval Order, Fee Order and Final Judgment under Fed. R. Civ. P. 60(b)(4), (b)(1) and (b)(6).

BACKGROUND

The Settlement releases shareholder claims against Altria board members, Juul Labs, Inc. ("Juul"), and Juul's directors, all of which were alleged to have 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 the Settlement. All costs, expenses, plaintiffs' attorneys' fees, service awards, and the funding commitment for $100 million in programing are paid by Altria. No other party "shall have any responsibility" for covering any costs. *Id.* at ¶¶ 1.2, 2.2, 4.3.

Altria's board was alleged to have breached its fiduciary duty to the corporation in connection with Altria's $12.8 billion investment in Juul. *See* ECF No. 110 at 111. The Juul defendants allegedly abetted the board's misconduct. *Id*. at 112. Alleged misconduct by Juul and Altria's directors cost Altria billions of dollars, so the plaintiffs sued them on behalf of the corporation. Altria's board supposedly unjustly enriched themselves at corporate expense. *Id*. But the Settlement provides no disgorgement from the alleged wrongdoers. The directors let themselves off the hook by draining *another* $125+ million from the corporation. This money will be sent to uninjured third parties.

I. The Underlying Complaint

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. The Complaint asserts that Altria Defendants "were fully aware that JUUL had built its success on marketing to and addicting underage consumers using methods that mirrored and updated the strategies perfected and exploited by Altria and other Big Tobacco companies before a wave of public and private litigation culminated in the 1998 Tobacco Master Settlement

Agreement[,]" *id.*, but that despite knowledge of "the obvious legal, regulatory, financial, and reputational risks to Altria," the Altria Defendants decided to make the investment. *Id.*

The Complaint further asserts that "Altria's Board of Directors [] and senior officers failed to disclose these known risks to Altria stockholders." *Id.* at ¶ 18. The Complaint concludes that there is strong evidence that the Altria Defendants colluded with the JUUL Defendants to assist in financing illegal marketing of JUUL products to youth. *Id.*

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.

II. Terms of the Settlement

The settling parties originally proposed a settlement that purported to disburse $117 million "to fund Altria's programs to prevent underage use of tobacco" and various "governance reforms." ECF No. 125 at 2. The Court rejected this settlement, finding it to be a "façade" without objective "measurables" or oversight for either the purported reforms or the spending. ECF No. 131 at 4. The Court observed "I see nothing in this deal at all about the wrongdoers. Some of these people are still working there." *Id*. at 5. The Court later remarked that this first-proposed settlement recalled the concern "that there's collusion between counsel for both sides, and that the plaintiffs' counsel is more worried about their fee than delivering for their clients." ECF No. 171 at 7. Though the Court did not suggest that collusion had occurred, the initial settlement "reeked" of it. *Id*.

The Court stated that it would set a trial to commence in September 2023 unless its parameters for settlement were met. ECF No. 131 at 7-8. The Court's parameters were:

1. The "same amount of money: Over five years… $100 million for these anti-smoking programs." *Id.* at 8-9.

2. "[T]he programs must be truly independent of Altria … the senior vice president of corporate citizenship can select the outside programs subject to the approval of what -- I'm going to require a compliance monitor here." *Id.* at 9.

3. Elaborating on independence, the Court remarked: "your senior vice president of corporate citizenship [is] on the board of UVA. Money can't go to UVA." *Id.*

4. "$10 million for compliance monitoring over five years." *Id.* at 10.[1]

5. "[T]he remaining $7 million… is going to be set aside, if necessary, and only if necessary, for corrective measures, if dictated by the compliance monitor." *Id.*

6. The parties must work together "to come up with programs with measurables, not hollow aspirations." *Id.*

7. "[B]ecause I'm not happy with the way this is going, I'm picking the monitor. … It will be a former federal prosecutor that does this kind of work." *Id.*

8. "I want to know if there's disciplinary action that's been going on, or some kind of training for them not to do this nonsense again. … But there has to be some kind of corporate training, some corporate discipline. Are they coughing up money? Are they surrendering shares? I mean, if they're sufficiently big shots in Altria such that they can have decision-making -- every one of these guys get shares as part of their package, their financial package. Maybe they ought to be surrendering some shares here." *Id.* at 11.

9. "I want to know who they are too. Who's still working there that is alleged to have engaged in the conduct that's identified in the complaint?" *Id.*

Following denial of the motion, the parties attended several settlement conferences before Magistrate Judge Colombell. The parties apparently substantially resolved their differences and were advised of and agreed to the Court's selection of Independent Monitor, Michael J. Dry.[2] The

[1] The Court later explained this amount: "I have no idea how much this is going to cost so I just figured I would go higher than lower." ECF No. 171 at 15.

[2] The record does not indicate how the selection of Mr. Dry was conveyed to the parties; his name first appears in the record with the revised settlement agreement. ECF No. 140.

Court later explained that it found it necessary to select the Monitor because plaintiffs' counsel had substantially not done their job.[3]

The parties filed an amended Settlement on October 18, 2022, which mostly adopted the Court's parameters. ECF No. 140-1. That said, the amended Settlement does not indicate whether any disciplinary action had or would occur, nor did it specifically identify which directors allegedly participated in the misconduct. Seven of Altria's twelve current directors are "Altria Defendants" named in plaintiffs' complaints. 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. Of this $10 million will be used to "reasonably compensate" the Independent Monitor, and $7 million is held in in reserve, which the Independent Monitor ***may*** spend to help Altria meet its policy and governance commitments, described below. ECF No. 144 at 16. 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 No. 140-1, Ex. A at ¶ 4.

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

[3] "The other thing I did -- you know, look, by doing that, I'm also open to attack here. I don't want people thinking wrongly that the only reason I picked him is because he's my buddy. Because he is my buddy. I supervised him. I have high regard. That wasn't it. And I didn't like doing that. Because, normally, in these kind of cases, if the plaintiffs' counsel were doing their job, they would have written this up in the first place and they would have recommended a monitor." ECF No. 171 at 18.

training; (4) reporting of teen smoking survey data to the FDA; and (5) distribution of *WeCard* signage. *Id.* 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).

The Settlement lastly purports to impose governance reforms. It requires Altria to maintain a pre-existing management-level Disclosure Committee (*id.* at ¶ 26),[4] and amend the Finance Committee's Charter to have the authority to review strategy regarding mergers. *Id*. at ¶ 27. To be clear, the Finance Committee (currently 7 members including 4 Altria Defendants) is a subset of the 12-member board. 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 committee and the board. *Id*. at 5-6. All of these purported governance reforms existed in the parties' originally-proposed settlement verbatim. ECF No. 125-1 at ¶¶ 3-23.

III. "Notice" of Settlement

Although the Settlement commits over $130 million of corporate funds to purposes that are at best inconsistent and at worst antagonistic to Altria's interests, the parties stipulated that no

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[4] 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.

direct notice would be provided. ECF No. 140-1 at 22. The motion for preliminary approval asserted without citation that "courts generally deem published notice sufficient because derivative settlements do not extinguish claims held by individual shareholders." ECF No. 140 at 28. It cited *In re UnitedHealth Grp. S'holder Derivative Litig.*, for the proposition that Rule 23.1(c) stands "[i]n contrast to the more extensive requirements governing notice in certified class actions." 631 F.3d 913, 917 (8th Cir. 2011). But in *UnitedHealth Grp.*, notice was "sent out to all shareholders." *Id*.

The parties only provided bareboned publication notice, namely:

1. a notice letter printed in extremely small type on page B5 of the November 14, 2022 *Wall Street Journal*. ECF No. 166-1 at 3.
2. a copy of the Settlement Agreement itself and stipulated notice filed with the SEC via Form 8-K. ECF No. 166 at 1-2.
3. a copy of the same notice posted at https://www.altria.com/shareholdersettlement, which is no longer active. *Id.* at 2.

No direct notice was provided to shareholders. When the Settlement was amended in February 2023 to make the terms arguably even less favorable to Altria shareholders, no supplemental notice was provided—not even publication notice.

IV. Objection on Putative Behalf of Shareholders

The proposed Settlement received a single objection by activists who "hold and promote antismoking views and therefore lack a strong interest in Altria's financial success." ECF No. 170 at 2. For example, the individual objectors collectively own fourteen shares (about $625 worth) of Altria stock. These objectors own shares for the avowed purpose of advocating against Altria, shareholders be damned. ECF No. 164 at 4-6. One objector states "[w]e think it's time to bring charges against tobacco companies and their executives for murder." *Id*. at 4.

The objection argued that the proposed Settlement did "not offer an adequate remedy for the Altria Defendants' egregious actions and would only serve to compound Altria's error," and that "the Proposed Settlement fails to recoup anything from the individuals responsible for the Company's harm: the individual Defendants." ECF No. 152 at 2, 3. "Plaintiffs have failed to recover from the Altria Defendants for the harm inflicted upon the corporation as a result of this disastrous investment decision. Indeed, the Proposed Settlement does not recoup any losses from the Altria Defendants." *Id*. at 11. The objectors also observed that the "Proposed Settlement is not designed to prevent recurrence of Altria's misguided business decisions." *Id.* at 12.

These objectors did not dispute the premise that monetary grants to youth anti-smoking charities would constitute a corporate benefit, but instead objected to the manner of selecting recipients. First, they argued that an ineffective "tobacco-sponsored youth prevention programs puts Altria and its shareholders at further risk of harm. … the funding of these programs could put Altria at the crosshairs of another wave of intense litigation regarding its misguided business practices targeting the youth." *Id.* at 16. Second, they argued that the Independent Monitor should not give deference to Altria's funding proposals. *Id.* at 20. Third, they complained the Settlement does not require the Altria Defendants—the actual wrongdoers—to compensate the company or shareholders. *Id.* at 22.

The Court ordered the parties to meet and confer with the objectors and brief any opposition in advance of the fairness hearing. *See* ECF No. 158. The named plaintiffs and defendants each filed oppositions to the objection, which observed that the objectors in fact wish to inflict harm on the corporation. ECF No. 164 at 4-6; ECF No. 165 at 12-14.

In reply, the objectors countered that they "have the experience and expertise directly relevant to the Proposed Settlement's stated goal: ensuring the prevention of youth smoking." ECF

No. 167 at 1-2. As for the contention that the objectors were not working in Altria's best interest, the objectors argued that "[i]nstead of recouping any money for the harm Altria caused the Company and its Shareholders … the Parties agreed that the funding component in the Proposed Settlement would be solely used on youth prevention and cessation, and that this was in the Company's best interests." *Id.* at 4. The objectors suggested the entire grant should be given to the Truth Initiative, an organization dedicated to making "tobacco … a thing of the past." *Id.* at 12; *Our Mission*, The Truth Initiative (accessed July 24, 2023) https://tinyurl.com/yz5r349d.

V. Fairness Hearing and Unnoticed Amendment to Settlement

At the fairness hearing on January 20, 2023, the Court discussed the Objection with counsel. In terms of evaluating specific charities, the Court remarked "that's what Mr. Dry is going to do.… I'm not retaining experts, and, frankly, I've had too great of a role here trying to work this through. That should have been the plaintiffs' counsel's responsibility here." ECF No. 171 at 13. The Court articulated how the Independent Monitor should evaluate contributions based on whether they (1) aim to prevent youth smoking, (2) are independent, and (3) spend new money. *Id.* at 14. The objectors agreed this went "a long way" toward resolving their first identified flaw, which the Court found resolved that objection. *Id.* at 15. The Court ordered a revised settlement agreement incorporating this understanding of how "deference" should work. ECF No. 170 at 4.

As for the third "flaw" that none of the directors would pay for their alleged breaches, the Court explained its view that this was less important. The Court observed that the Monitor would ensure "100 percent training" and that holding back a $7 million reserve would provide an incentive for compliance. ECF No. 171 at 15-16. "[A]gain, I've put all my eggs in the Mike Dry's basket. It is because I have so much confidence in him." *Id.* at 16-17. Objectors' counsel responded that they didn't care as much about making the directors pay as ensuring the money was spent on effective programs against youth smoking. *Id.* at 17.

The Court sustained the second of the three "flaws" identified by the objectors, counting $20 million spent on "legacy" programs. The Court suggested spending the first $20 million on the Truth Initiative, which the defendants rejected because the Truth Initiative has attacked and litigated against the company. *Id*. at 20. "The purpose of the funding component of this settlement is to enhance the company, to strengthen its image with its stakeholders, with employees, regulators, shareholders, communities." *Id*. The Altria defendants offered to provide "new" $20 million funding to existing programs, but the Court answered "I am not moving on this." *Id*. at 23. When the Altria defendants said it was a material term of the Settlement, the Court replied "Well, that's fine. I'll just reject it and we'll go to trial. Frankly, I'm tired of this." *Id*. The Court explained that it should not count as part of the Settlement money that was "recently" donated by Altria. *Id*. at 25. The Court said it would define "legacy program" as one "that has received any funding from Altria within the last three years." *Id*. at 29. Defendants' counsel did not have authority to modify the Settlement on the spot, so the Court ordered the parties to reach a supplemental agreement, if possible, with input from the objectors and Monitor. The Court's written order found the Settlement would not be adequate if Altria could backfill 20% of the committed funds from legacy programs. ECF No. 170 at 3.

A supplemental agreement was reached which followed the Court's suggestion of discounting programs funded since January 20, 2020. ECF No. 173-2 at 2. The 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. Final approval was granted to the Re-Amended Settlement on February 17, 2023, four days after the amendment was filed. ECF No. 180 (entered February 20).

In defending their fee request, plaintiffs' counsel credited the Court for pressuring the defendants. "[W]hen a court tells the parties that something needs to be done, that introduces a completely new dynamic. That's the reality. We don't have that ability to bring that kind of pressure. I wish we did, but we don't. That's how it happened here." ECF No. 181 at 13. The Court observed that plaintiffs' leverage should be the risk of trial, and reiterated that the originally-proposed settlement was "illusory." *Id*. at 17. The Court found that one factor in support of the fee request is that money "comes from the corporation itself. So … it's not like every dollar I give to you detracts from a plaintiff who was injured, right?" *Id*. at 20. Although the Court found that plaintiff's counsel had struck a "façade" settlement requiring significant judicial intervention to approve, and that counsel benefit from earlier securities and government litigation, the Court awarded $15 million of the $17.5 million attorneys' fee request. *See* ECF No. 179. The Court noted the fee request and the underlying lodestar hours were unopposed and unchallenged. *Id*. at 11, 14.

ARGUMENT

I. The Settlement approval and accompanying fee orders should be vacated under Rule 60(b).

Fed. R. Civ. P. 60(b) permits the Court, on motion, to vacate any earlier judgment because, *inter alia*, the initial "judgment is void," for "excusable neglect" or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(4), (b)(1), and (b)(6). Frank meets these requirements, and his motion also satisfies the threshold requirements necessary for relief under any 60(b) motion.

A. Frank meets the threshold requirements for Rule 60(b).

"In order to obtain relief from a judgment under Rule 60(b), a moving party must show that his motion is timely, that he has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside." *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir. 1987). Frank meets all of these showings. His motion is filed

within months of the final approval order and premised upon a meritorious objection to the underlying Settlement that makes Altria shareholders worse off. The parties are not prejudiced by vacatur because the only "penalties"—delay and legal costs—are not prejudice under Fourth Circuit law, and any prejudice is the fault of the parties' improper notice, anyway.

1. Frank's Rule 60(b) motion is timely.

Rule 60(b) challenges—regardless of the subcategory they're brought under—must be filed within a "reasonable time." *Jackson v. United States*, 245 F. App'x 258, 260 (4th Cir. 2007). For Rule 60(b) motions brought under Rule 60(b)(1-3), the movant must also satisfy an additional hurdle of entering the motion no more than one year after final judgment. Fed. R. Civ. P. 60(c). Frank raises this Motion over five months after final judgment was entered on February 17, 2023, so he easily meets this additional one year cap. Final Approval, ECF No. 180 at 16. Accordingly, to satisfy timeliness for his Rule 60(b) challenges, Frank need only show that the five months it took to raise this challenge was "reasonable"—a burden he meets. *Jackson*, 245 F. App'x at 260.

Reasonableness is judged by looking to "the delay . . . from the time the party is deemed to have notice of the grounds for its Rule 60(b) motion." *See Holland v. Virginia Lee Co.*, 188 F.R.D. 241, 248 (W.D. Va 1999) (citing *Jones v. City of Richmond*, 106 F.R.D. 485, 489 (E.D. Va. 1985)). It is a highly fact-dependent inquiry, "based on the circumstances" of each individual case. *Davis v. Lott*, 2019 WL 718600, at *1-2 (D.S.C.) (citing *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 300 (4th Cir. 2017)). There is no hard time limit as to when a Rule 60(b) motion becomes unreasonably tardy, and "a void judgment does not acquire validity merely by the passage of time." *Jackson*, 245 Fed. Appx. at 260.

Frank's Rule 60(b) motion is timely because—unlike the defendants in *Central Operating Co. v. Util. Workers of Am.*—he can provide a "satisfactory explanation" for his delay to submit

it. 491 F.2d 245, 253 (4th Cir. 1974). When Frank learned of the final judgment on February 25, 2023, he had three substantial legal issues to address rather than the one if he received adequate notice: In addition to challenging the validity of the Settlement—Frank also now had to (a) research and argue the Settlement should be vacated under relevant Rule 60(b) caselaw and (b) ensure the Rule 60(b) motion does not expose himself or this firm to Rule 11 concerns regarding the finality of court holdings. *See* Fed. R. Civ. P. 11.

Additionally, Frank needed to ascertain the extent of party prejudice—namely, whether significant shareholder money had already been sent to third-party recipients. Thus, on June 26, counsel for Frank inquired "as to whether Altria—as of June 22, 2023—has started to fulfill its spending promises under the Funding Commitment, or whether it elects to commence next calendar year." Declaration of John Andren ("Andren Decl.," attached), Ex. A. Under the Settlement, Altria had the option to count from the current calendar year (2023), or to commence January 1, 2024. ECF No. 140-1, Ex. A at ¶ 7. Counsel for Altria defendants did not respond until July 10, and on that date they advised "Altria expects to provide information responsive to your request through a source of information generally available to all shareholders." Andren Decl. Ex. B. Frank did not learn the answer to his question until August 1, which Altria filed a Form 10-Q with the SEC, which stated that Altria "expect[s] to begin funding [$100 million over a five-year period] in 2024." Andren Decl. ¶ 5 & Ex. C. This inquiry was necessary to ascertain that Frank's objection would not cause substantial prejudice to third-party organizations. Declaration of Theodore H. Frank ("Frank Decl.," attached) at ¶ 18.

Further, to bring his Rule 60(b) motion, Frank had to review—for the first time—this case's substantial electronic record and engage in significant legal research to present thorough and thoughtful arguments to this Court as to why the judgment should be reopened. Because Frank

never got adequate notice of the Settlement, he came in essentially *blind* to the case. Frank Decl. ¶ 7. And movants generally have time to "investigate[] potential grounds for a Rule 60(b) motion" before submitting it. *See Knight v. Trimble*, 2013 WL 6140743, at *10 (N.D. Cal. 2013). This investigatory time encompasses not only researching legal claims to vacate the judgment, but also ensuring the arguments raised before this Court are valid, honest, and do not waste judicial resources. *See G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003).

Separately, Frank's motion—entered at about twenty-four weeks from judgment—is in the same ballpark as the eleven-week delay in filing for Rule 60(b) relief the Fourth Circuit held as "clearly" reasonable in *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984). In that case, the movant was already a party familiar with the record and did not have to research any new law—he was simply correcting a known and "obvious" mistake of law the court made in rendering judgment. *Id.* at 206; *Kemp v. United States*, 142 S. Ct. 1856, 1863-4 (2022) (noting mistakes of law under Rule 60(b)(1) do not have to be obvious). If eleven weeks was "clearly" reasonable to correct a relatively straightforward legal error in *Werner*, then "clearly" the time Frank took to review the record for the first time, ensure minimal prejudice, develop legal arguments, and challenge the judgment.

Finally—in the context of Rule 60(b)(4), the Fourth Circuit has interpreted the "reasonable" time constraint invoked by Rule 60(b) to "be little, if any, time limit." *Foster v. Arletty 3 S.A.R.L.*, 278 F.3d 409, 414 (4th Cir. 2002). "Motions attacking a judgment as void under Rule 60(b)(4) have no time limit." *Jackson v. United States*, 245 F. App'x at 260 (*citing Jackson v. FIE Corp.*, 302 F.3d 515, 523-24 (5th Cir. 2002)). In any event, Frank certainly brings his motion within a "reasonable time." *Id.* (rejecting that argument that an alleged "four-month delay" precludes relief under Rule 60(b)).

Therefore, Frank's Rule 60(b) motion is timely.

2. Frank's objection is meritorious.

The Settlement suffers fatal flaws that prevent—and should have prevented—final approval. As explained in Frank's contemporaneously-filed objection (and below in Section II), the underlying Settlement harms the interests of shareholders. The purported wrongdoers pay nothing in the Settlement. The alleged victims—Altria shareholders—have to foot the bill for to fund third parties (plaintiffs' counsel, the Independent Monitor, and indeterminate funding beneficiaries) who are either indifferent to or openly hostile to the interests of shareholders.

To be clear, the Court appropriately denied the originally-proposed settlement because it appeared to be a largely-illusory vehicle in order for settling counsel to obtain attorneys' fees, which raised the possibility of "collusion" as the Court observed. ECF No. 171 at 7. But in forcing the parties to reach non-illusory terms, the Settlement fails to "fairly and adequately serve the interests of the corporation on whose behalf it was brought." *Zimmerman v. Bell*, 800 F.2d 386, 391 (4th Cir. 1986) (cleaned up). The Settlement should be rejected for the simple reason that it fails to benefit shareholders and instead diverts corporate money to third parties against shareholder interests while letting the directors off for $0—with "training" requirements in the case of the Altria director-defendants and requiring no injunctive relief whatsoever from the Juul defendants.

3. The parties are not meaningfully prejudiced.

Amongst all the prongs a movant must satisfy to earn relief via Rule 60(b), "[t]he prejudice factor is of lesser importance." *Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 265 (4th Cir. 1993). A party which contests a Rule 60(b) motion is not prejudiced when the alleged harm from granting it does not exceed "that suffered by any party which loses a quick victory." *Augusta*

Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir. 1988). Further, that party does not get to claim prejudice from reopening the case when the relevant harm "is [] of its own making." *Gray*, 1 F.3d at 265. This case exemplifies both principles: Because any harm from voiding the judgment is akin to that "suffered by any party who loses a quick victory" and the parties are at fault for Frank's delay in objecting to the Settlement, there is no prejudice preventing this Court from granting Frank's Rule 60(b) motion. *Augusta Fiberglass*, 843 F.2d at 812; *Gray*, 1 F.3d at 265.

First, any harm to the parties from reopening the Settlement is typical to what any party to litigation assumes and therefore is not prejudice for the purposes of Rule 60(b). *See Augusta Fiberglass*, 843 F.2d at 812; *Randall v. Merrill Lynch*, 820 F.2d 1317, 1321 (D.C. Cir. 1987). "The protraction of proceedings, the time and expense" of more litigation, and "loss of leverage in settlement discussions" are all "practical considerations" for the parties but not within the scope of "prejudice contemplated by the" Rule. *Werner*, 731 F.2d at 207. Delay and "[a]dditional legal costs . . . are the inevitable result whenever a judgment is vacated." *Id.*; *Randall*, 820 F.2d at 1321. And the harm from reversal is not prejudice either. *See Augusta Fiberglass*, 843 F.2d at 812. For this reason, the settling parties suffer no prejudice: they return to their prior positions with the full gamut of claims and defenses. Plaintiffs, in particular, retain their strongest leverage: trial on the merits. *See* ECF No. 181 at 17. Frank's objection puts the parties in the same position as if the Settlement hearing were today, rather than in January 2023. This ensures the only price the parties pay for his Rule 60 motion are delay and "additional legal costs"—so there is no prejudice from granting the motion. *Werner*, 731 F.2d at 207; *Randall*, 820 F.2d at 1321.

Separately, when the harm from reopening judgment "is [] of [the parties'] own making," they have no claim to prejudice. *Gray*, 1 F.3d at 265. Frank's 60(b) motion comes now—rather

than during the objection window—because the parties willingly embraced an approach to notice that was lawfully and practically inadequate. *See supra* I.B; Frank Decl. ¶ 7. Notice should be direct when practical, and the ease and cheapness of modern e-mail and mail makes this methodology presumptive. *See Mullane v. C. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315, 317-19 (1950). At the very least, the notice approach the parties did take—comprising a singular ad in the *Wall Street Journal*, filing an 8-K, and posting on the investor relations page of Altria's website—does not indicate an "actual[] desire[] to inform" nonparty shareholders like Frank of the Settlement. *Jones v. Flowers*, 547 U.S. 220, 229 (2006). Especially when weighed against the considerable relief—coming straight from Altria's corporate treasury—at stake in the Settlement. Thus, there is separately no prejudice to the parties from granting Frank's 60(b) motion because they are at fault for his seeking post-judgment relief.

The strongest claim of prejudice does not belong to the parties, but to potential third party beneficiaries under the settlement. However, Altria has not and does not expect to disburse any of its $100 million funding commitment until 2024. Andren Decl. ¶ 5 & Ex. C. This leaves only the Independent Monitor. The Court can ameliorate any harm to the Monitor by awarding him fees for effort performed to date based on the equitable principle of *quantum meruit*. Alternatively, fees may be shifted as a sanction against the parties responsible for the deficient notice that necessitated vacatur. In the event the parties do not reach a new settlement to benefit shareholders, the Court should shift costs from the settling parties to cover the Monitor's invoice for the services he has provided to date. This expense—at most $2 million—is much less harmful to the corporation than the Settlement itself.

Accordingly, granting Frank's Rule 60(b) motion does not prejudice the parties because it only causes further litigation delay and associated costs, and because the parties' own inadequate approach to notice forced the timing of Frank's motion.

B. The final approval order should be vacated under Rule 60(b)(4) as void due to the lack of notice.

Rule 60(b)(4) allows a court to relieve a party from a final judgment, order or proceeding when "the judgment is void." "An order is 'void' for purposes of Rule 60(b)(4) only if the court rendering the decision lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law." *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 273 (2010) ("jurisdictional and notice failings…define void judgments that qualify for relief under Rule 60(b)(4)"). "[F]or a Rule 60(b)(4) motion, district courts have little leeway. Once a district court decides the underlying judgment is void, the trial judge has no discretion and must grant the appropriate 60(b) relief." *Blaney v. West*, 209 F.3d 1027, 1031 (7th Cir. 2000).

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 a permissible court order as to proper notice 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).

Here, 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 inadequate, and therefore deprived this Court of jurisdiction to approve the settlement. *Kemp*, 142 S. Ct. at 1864. Settlement notice must be direct whenever practical. *See Mullane*, 339 U.S. 306 at 315, 317-

19. As Frank points out, Altria has used services to deliver efficient and direct notice for other class action settlements. Frank Decl. ¶¶ 10-11. The company declined such services, and "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). And because parties like Frank could not scrutinize the Settlement because they did not know about it, this "contravention of due process stripped this Court of its authority to … intelligently to approve the settlement." *In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242, 265 (2d Cir. 2011) (Straub J., concurring and dissenting in part) (internal quotation omitted). 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—especially in view of the size of a $132+ million settlement. Publication alone is not a "reliable means of acquainting interested parties of the fact that their rights are before the court." *Mullane*, 339 U.S. 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*, 547 U.S. at 229; Frank Decl. ¶ 12.

Finally, Rule 60(b)(4) has sometimes been narrowly construed because it's thought to circumvent the appeal process, but that concern does not apply here. The Fourth Circuit cautioned against granting Rule 60(b)(4) relief for parties that "use Rule 60(b)(4) to circumvent an appeal process they elected not to follow." *Wendt*, 431 F.3d at 412. But Frank is not a party, and thus he did not elect not to appeal. In fact, he cannot appeal at all because he is not a party until his motion to intervene is granted.

C. In the alternative, the judgment stands voidable under Rule 60(b)(1) because it is supported by this Court's mistake of law as to adequate notice and Frank's excusable neglect in timely objecting to the Settlement.

"It is well settled that the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with technical procedural problems." *Staren v. American Nat'l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). And Rule 60(b), within the greater Federal Rules, exists to "vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States,* 355 U.S. 601, 615 (1949). Assuming Frank wins his intervention motion, he joins this litigation as a party and Rule 60(b)(1) gives the Court grounds to then invalidate the Settlement "for … mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1); ECF No. 180. Frank's objection to the Settlement and this Motion implicate both mistake and excusable neglect.

The Court made a mistake of law when it sanctioned the parties' insufficient notice to Altria shareholders regarding the Settlement. In turn, Frank had excusable neglect in failing to timely object since he did not receive notice of the Settlement hearing. Frank Decl. ¶ 7. Because Frank did not object before the hearing, this Court issued final judgment which now precludes Frank's timely objection to the Settlement. ECF No. 180. That judgment is the direct result of both "mistake" and "excusable neglect," and *either* prong gives this Court good cause to grant Frank's Rule 60(b)(1) motion.

As a threshold matter, "mistake[s]" under Rule 60(b)(1) encompass mistakes of law that are not "obvious." *Compare Kemp*, 142 S. Ct. at 1864 *and Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (4th Cir. 1987). Fourth Circuit caselaw traditionally issued 60(b)(1) motions only when "the judgment obviously conflicts with a clear statutory mandate or when the judicial error involves a fundamental misconception of the law," *Hill*, at 1043, but the Supreme Court invalidated this narrow interpretation in *Kemp v. United States*, 142 S. Ct. at 1862-63 (rejecting an interpretation

of 60(b)(1) that was limited to "obvious" legal errors). Today, Rule 60(b)(1) can be used to make "broad" challenges to any "judicial error[] of law." *Id.* at 1865.

Importantly, the *Kemp* Court also dismissed concerns over "litigation gamesmanship and strategic delay" associated with using Rule 60(b)(1) motions as a backdoor appeal to eschew Rule 59's thirty-day time limit. *Id.* at 1864. The Court noted Rule 60 protects finality by limiting the categories of legal challenges and that Rule 60(b)(1) has its own time limits, specifically that the pertinent motion be brought "within a reasonable time" and within one year of the judgment's entry. *Id.*; Fed. R. Civ. P. 60(c). Frank fulfills these two temporal requirements, as about twenty weeks have elapsed since this Court's final judgment on the Settlement—analogous to what the Fourth Circuit typically holds to be a "clearly" reasonable time. *See Werner*, 731 F.2d at 207 (finding eleven weeks to be "clearly" reasonable for a plaintiff already involved in the litigation and who had no substantial legal research to complete before raising the motion).

Thus, the Settlement should be invalidated under Rule 60(b)(1) first because this Court erred as a matter of law concerning the parties' proposed notice. *See infra* I.B.

The Settlement should also be invalidated under Rule 60(b)(1) because it is the product of excusable neglect. What "constitutes excusable neglect is generally an equitable" decision, "taking into account the totality of the circumstances surrounding the party's omission." *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 934 (11th Cir. 2007); *see also Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 389, 395 (1993). The Supreme Court laid out four factors to balance in adjudicating excusable neglect, specifically (1) prejudice, (2) the length of delay in challenging a judgment, (3) the "reason for delay, including whether it was within the reasonable control of the movant," and (4) whether the movant acted in "good faith." *Pioneer*, at 395.

Under the *Pioneer* standard, the Settlement must be set aside because Frank's inability to object during the Court-sanctioned window constitutes excusable neglect. For one, the parties are not prejudiced because Frank's objection, to his knowledge, does not address money already spent as part of the Settlement, so granting the 60(b)(1) motion and allowing Frank to object now would be functionally the same as if Frank had notice and timely objected. *See Cavalieri v. Virginia*, 2022 WL 1153247, at *2 (4th Cir. 2022). And prejudice does not include "normal inconveniences parties suffer when any judgment is vacated." *Werner*, 731 F.2d at 207. As already noted, the length of delay here is reasonable, too. *Id.*

Most importantly, however, are the last two *Pioneer* factors: Frank's reason for challenging the Settlement now—post-judgment—is just, not "within [his] reasonable control," and brought in good faith. 507 U.S. at 395. Frank did not receive adequate notice of the Settlement from the parties to challenge it before judgment and, because he was not a party, could not appeal it within the thirty-day window when he learned of it from his colleague on February 25, 2023. Frank Decl. ¶ 7. Even if Frank could have intervened "freely" to appeal under the Seventh Circuit's reasoning in *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318-19 (7th Cir. 2012)—which this Circuit has not yet adopted—asking him to do so within thirty days of learning of the Settlement and judgment for the first time would have been unequitable. When he finally did learn about the Settlement, Frank and his counsel diligently researched the issues related to this case and filed this Rule 60(b) motion in accordance with thorough and timely legal research. Frank Decl. ¶¶ 13-18. In other words, he acted in good faith.

And critically, "[a] party cannot be held accountable for an action when they have never received notice of [relevant] proceedings." *JTH Tax, Inc. v. Stocker*, 2011 WL 2119409, at *12 (E.D.Va. 2011). Penalizing Frank for his timeliness in objecting by upholding this Settlement

would betray this fundamental due process-derived principle. Accordingly, the *Pioneer* factors weigh heavily toward finding the Settlement being approved only because of Frank's excusable neglect.

Because this Court's mistake of law as to adequate notice and Frank's excusable neglect sustained the Settlement, this Court should vacate it under rule 60(b)(1).

D. Alternatively, relief maybe be ordered under Rule 60(b)(6).

If the Court disagrees that the above issues render the Settlement voidable for purposes of Rule 60(b)(1) or (b)(4), Frank moves to set aside the judgment under Rule 60(b)(6)'s catch-all provision. "Rule 60(b)(6) provides the court with a grand reservoir of equitable power to do justice in a particular case." *Reid v. Angelone*, 369 F.3d 363, 374 (4th Cir. 2004) (cleaned up), *abrogated in part* by *United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). Although 60(b)(6) only applies to extraordinary circumstances, this is one such instance.

II. The error is not harmless because final approval should be denied on the merits.

The settling parties may argue that Frank's Rule 60(b) motion ought to be denied because any error is harmless. They may argue the Court can simply reaffirm the underlying Settlement, eliminating any prejudice to Frank. However, as explained in Frank's proposed objection, filed with this motion, the Settlement ought to be rejected.

A derivative settlement should only be approved "'if it fairly and adequately serves the interests of the corporation' on whose behalf it was brought." *Zimmerman*, 800 F.2d at 391 (quoting *Republic National Life Insurance Co. v. Beasley*, 73 F.R.D. 658, 667 (S.D.N.Y. 1977)). The proponents of a proposed settlement bear the burden of establishing that their proposal is fair. *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971).

The underlying Settlement does not serve corporate interests, but instead gives away over $100 million from the treasury to release claims against Altria's directors and, notably, Juul

directors, who pay nothing. If the commitment really benefitted Altria, a faithful board would have engaged in it on its own, and certainly would have done so instead of agreeing to an illusory commitment that the Court was concerned signaled "collusion" between the settling parties.

Nor does the Settlement prevent reoccurrence of the claimed harm. The training commitments, which were part of the settlement initially rejected by the court, provide no concrete benefits. Neither shareholders nor the world "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. The directors—including Juul's directors—remain free to harm Altria shareholders in the future. Indeed Juul—presumably with the assent of its board, who settled their underlying claims for $0 and no injunction—recently petitioned the International Trade Commission to block importation of FDA-authorized vaping devices marketed by NJOY, which Altria recently acquired for $2.75 billion.[5] The corporation doesn't benefit from this Settlement. To the extent it was victimized by its board, the settlement instead compounds the injury.

CONCLUSION

As Frank's objection demonstrates, this Settlement is littered with flaws and causes further harm to Altria shareholders. Had the parties utilized constitutionally sufficient notice in proposing it, shareholders like Frank would have raised these concerns earlier. Alas, they took shortcuts and—as a result—Altria is worse off, and the Settlement is legally unsound. Accordingly, vacatur is not only appropriate, but demanded by law.

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[5] Jim McDonald, VAPING360, *Pod Wars! Juul Sues NJOY for Patent Infringement*, at https://vaping360.com/vape-news/125006/pod-wars-juul-sues-njoy-for-patent-infringement/.

DATED this 4th day of August, 2023.

Respectfully submitted,

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