STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

STATE OF MINNESOTA, by its Attorney General, Keith Ellison,

Plaintiff,

vs.

JUUL LABS, INC., a Delaware corporation f/k/a PAX LABS, INC. f/k/a PLOOM PRODUCTS, INC.; ALTRIA GROUP, INC. f/k/a PHILIP MORRIS COMPANIES, INC.; PHILIP MORRIS USA INC. f/k/a PHILIP MORRIS INC.; ALTRIA CLIENT SERVICES LLC; ALTRIA GROUP DISTRIBUTION COMPANY; ALTRIA ENTERPRISES LLC,

Defendants.

Case No. 27-CV-19-19888
The Honorable Laurie J. Miller

ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO EXCLUDE EXPERTS

The above-entitled matter came on for a hearing before the Honorable Laurie J. Miller, Judge of District Court, on December 16, 2022, on the motions for summary judgment and motions for exclusion of experts filed by the Plaintiff State of Minnesota ("the State"), Defendant Juul Labs, Inc. ("Juul"), and Defendants Altria Group, Inc., Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC (collectively "Altria" or "the Altria Defendants"). The motions were taken under advisement following the hearing.

Attorneys Adam Welle, Munir Meghjee, June Hoidal, Tara Sutton, Gary Wilson, Chuck Toomajian, Holly Dolejsi, and Kim McNulty appeared on behalf of the State of Minnesota.

Attorneys David Bernick and Jason Wilcox appeared on behalf of Defendant Juul Labs, Inc.

Attorneys George Soule, David Kouba, and Arthur Luk appeared on behalf of the Altria Defendants.

The Court has reviewed the memoranda of law, oral arguments, and all files, records, and proceedings herein. Being fully informed in the premises, the Court makes the following order:

ORDER

1. The State of Minnesota's motion for partial summary judgment on affirmative defenses is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to the following affirmative defenses: in pari delicto, accord and satisfaction, ratification, res judicata, collateral estoppel, laches, equitable estoppel, waiver, and unclean hands. It is DENIED with respect to the affirmative defenses of failure to mitigate damages and comparative fault.

2. Juul Labs, Inc.'s motion for partial summary judgment is DENIED.

3. The Altria Defendants' motion for summary judgment is DENIED.

4. The State of Minnesota's motion to exclude specified testimony by Drs. Laurence Steinberg and Ursula Winzer-Serhan is GRANTED as unopposed, based upon Juul Labs, Inc.'s withdrawal of the challenged opinions. The opinions withdrawn by Juul include Sections V, VII, and VII from Dr. Steinberg's report and Section III.E from Dr. Winzer-Serhan's report.

5. The State of Minnesota's motion to exclude or limit the testimony of Defendants' experts Dr. Kevin Keller, Dr. Jonah Berger, Dr. Dominique Hanssens, Dr.

Dennis Paustenbach, Dr. Darius Lakdawalla, Dr. M. Laurentius Marais, and Professor Kevin Murphy is DENIED.

6. Juul Labs, Inc.'s motion to exclude opinions of the State's experts Dr. Kurt Ribisl, Dr. Frank Chaloupka, Dr. Melissa Blythe Harrell, Dr. Richard Hurt, Eric Lindblom, Dr. Anne Griffiths, and Dr. Frances Leslie is DENIED.

7. The Altria Defendants' motion to exclude opinions of the State's experts Dr. Frank Chaloupka and Dr. Kurt Ribisl is DENIED.

8. The following Memorandum is incorporated as part of this Order.

BY THE COURT:

DATED: March 14, 2023

____
Laurie J. Miller
Judge of District Court

MEMORANDUM

I. Factual and Procedural Background

These facts are taken from the pleadings and written submissions on the parties' various motions. The facts are taken as true for the purposes of this order only and do not constitute findings of fact. On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party.

This case arises from the sale and marketing of electronic cigarette ("e-cigarette") products in Minnesota by Juul Labs, Inc. ("Juul"). Juul is an e-cigarette manufacturer incorporated in Delaware, with corporate headquarters in Washington D.C. The company entered the e-cigarette market in 2015.

Altria Group, Inc., a Virginia corporation with its principal place of business in Richmond, Virginia, produces and markets tobacco products, including combustible cigarettes. Philip Morris USA Inc., Altria Client Services LLC, Altria Group Distribution Company, and Altria Enterprises LLC are all wholly owned subsidiaries of Altria. Altria is the largest cigarette manufacturer in the United States. Altria Client Services provides Altria and its companies with services in areas including marketing, packaging design and innovation, product development, safety, health, and environmental affairs. Altria Group Distribution provides sales, distribution, and consumer engagement services to Altria's tobacco companies. Finally, Altria Enterprises provides service support to Altria and its subsidiaries. The Altria entities are collectively referred to as either "the Altria Defendants" or "Altria" in this order.

In the spring of 2017, Altria contacted Juul to discuss a possible partnership or acquisition. Altria had for years tried to develop its own e-cigarette products, but in 2017, it shifted its focus to joining forces with Juul. Altria researched and analyzed Juul's market share and growing popularity among youth. In April 2018, Altria presented a webinar entitled "What's The Hype? JUUL Electronic Cigarette's Popularity with Youth & Young Adults" to more than 100 Altria executives. In October 2018, after its e-cigarette subsidiary had lost $101 million in the first nine months of the year, Altria began pulling its own pod-based products from the market. As the Altria-Juul negotiations continued, Altria recognized that Juul was favored by youth e-cigarette users, and that a high percentage of youth users were succeeding in purchasing Juul products online. In September 2018, the FDA wrote to e-cigarette manufacturers, including Juul and Altria, asking for plans to address the widespread use of their products by minors. In October 2018, Altria responded

that it would discontinue its pod-based products and all flavors other than mint, menthol, and tobacco.

In December 2018, Altria purchased a 35% stake in Juul for $12.8 billion. This gave Juul access to Altria's shelf-space on the "power wall" behind the check-out counter in hundreds of Minnesota stores. It also provided Juul with access to Altria's tobacco smoker lists and services related to sales, distribution, marketing, promotion, lobbying, and regulation. Altria's assistance enabled Juul to improve the availability of its products at Minnesota retail outlets, and also increased the volume of Juul point-of-sale advertising in Minnesota. The advertisements featured slogans from Juul's "Make the Switch" program, which the FDA and public health groups have called false and misleading. Juul coupons were included in cigarette packages, including Marlboros, a favorite brand among underage smokers. Altria asserts that there is no evidence any of the Juul advertisements or coupons that it distributed reached any minors. Altria also provided Juul with regulatory services, to help it get Premarket Tobacco Product Applications ("PMTA") approval from the FDA for its products. Altria assisted Juul in efforts to shield Juul's mint flavor from being banned, even though Altria knew mint was a flavor preferred more by children than by adults. Altria notes that its provision of shelf space and logistical services to Juul ended in March 2020, and since then it has provided only regulatory affairs support to Juul.

Plaintiff State of Minnesota contends that Juul and Altria are the primary culprits behind a recent rise in tobacco and e-cigarette use by Minnesota minors, after many years of falling youth use of tobacco. The State characterizes youth vaping as an epidemic and a public health crisis. By 2014, after years of efforts aimed at reducing the underage use of tobacco, the percentage of high school students who had smoked at least one cigarette in the

past thirty days had dropped to 10.6%, down from 32.4% in 2000. In recent years, however, that downward trend has reversed, largely due to increasing use of e-cigarettes by minors. By 2020, 19.3% of Minnesota high school students reported having used an e-cigarette at least once in the last thirty days, and 35.4% reported having tried an e-cigarette at least once in their lives.

Juul and the Altria Defendants do not dispute that e-cigarette use among minors is a serious problem, but they strongly dispute the State's characterizations of their role in the problem. The State argues that Juul positioned its products to appeal to a young audience through use of social media and television advertising, as well as child-appealing flavors, and that Juul made it easy for minors to purchase its products because it sold many of them online using deficient age-verification methods. The State argues that Altria's marketing services perpetuated Juul's efforts to sell its products to youth.

Juul notes that the State was aware of the rise in youth vaping well before Juul came on the scene. The State first raised concerns with the FDA about a rise in youth vaping in 2013, and a report written by the Minnesota Department of Health noted a rapid rise in the use of e-cigarettes by youth in 2014, more than a year before Juul first launched its products. Furthermore, Juul notes that recent national surveys conducted by researchers have found that other e-cigarette brands are more popular than Juul with young users. One survey in 2022 found that Juul was not among the "usual brands" used by middle and high school students who used e-cigarettes.

Finally, Juul and the Altria Defendants accuse the State of having contributed to the problem of rising tobacco and e-cigarette use by minors by underfunding statewide tobacco control efforts and diverting money gained from tobacco settlements away from smoking

prevention and cessation efforts. The 1998 Tobacco Settlement Agreement, the result of a lawsuit filed by the State of Minnesota against cigarette companies in 1994, provided the State with over $6.1 billion in new revenues, paid gradually over time. The State collects additional tobacco-related revenue from taxes on tobacco products. Defendants contend that in 2018, the State received $166 million in tobacco settlement funds but did not spend any of those funds on tobacco prevention, control, or treatment. Other years show a similar disparity between tobacco-related funds received by the State and the amounts spent by the State on public health efforts regarding tobacco use. The 1998 Tobacco Settlement Agreement did not require those funds to be spent on tobacco-related measures, but directed them to the State's general fund, where they would be allocated through the State's regular budgeting process for all purposes.

On December 19, 2019, the State of Minnesota filed this action against Juul, alleging claims of consumer fraud, deceptive and unlawful trade practices, false advertising, public nuisance, negligence, and unjust enrichment. A year later, the State filed its First Amended Complaint, adding the Altria Defendants as parties and including an additional claim of civil conspiracy.

On February 1, 2021, JUUL filed its motion to dismiss, or in the alternative for judgment on the pleadings. On that same day, the Altria Defendants also moved to dismiss. The Court heard these defense motions on March 23, 2021 and took them under advisement at the close of the hearing. On June 21, 2021, the Court denied Defendants' motions to dismiss, except that the Court left open the Altria Defendants' argument regarding personal jurisdiction, pending jurisdictional discovery. The Altria Defendants chose not to follow up on that jurisdictional motion, however.

In the subsequent process of discovery on the merits, the State produced reports describing the remedy it plans to request in this action. The State seeks to hold Defendants liable for its claimed costs of abating the current public health crisis related to youth vaping, estimated by Plaintiff's experts to total at least $525.83 million. The State also seeks additional healthcare costs and reimbursement for the government's lost investments in tobacco control. Those costs, according to Plaintiff's experts, are estimated at an additional $333 million.

On December 16, 2022, all parties to this action filed motions seeking summary judgment as to some or all of the claims and affirmative defenses raised by their opponents. Additionally, all parties filed motions seeking to exclude opinions of their opponents' designated expert witnesses. This Order addresses all motions currently pending before the Court.

II. Summary Judgment Standard

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

Summary judgment is the proper remedy where the facts in a case are not in dispute and where the decision is made on questions of law only. *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 897 (Minn. 1965). Summary judgment is "intended to secure a just, speedy, and inexpensive disposition," but "it is not designed to afford a substitute for a trial where there are issues to be determined." *Id.* (citing *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955)). The party moving for summary judgment has the burden of showing the absence of any

genuine issue of material fact. "[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis in original) (citing *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002)). "A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented." *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633 (Minn. 1978) (citing *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 595 (Minn. 1957)).

On a motion for summary judgment, the trial court does not resolve disputed fact issues, but only determines whether a genuine issue of material fact exists. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997), reh'g denied (Minn. Aug. 5, 1997). In deciding a summary judgment motion, a court must "consider the evidence in the light most favorable to the nonmoving party." *Gradjelick*, 646 N.W.2d at 231 (citing *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001)). "[I]f any doubt exists as to the existence of a genuine issue as to a material fact, the doubt must be resolved in favor of finding that the fact issue exists." *Rathbun v. W. T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974).

A fact is deemed material for summary judgment purposes if its resolution will affect the outcome of the case. *O'Malley v. Ulland Brothers*, 549 N.W.2d 889, 892 (Minn. 1996). A genuine issue of material fact cannot be created by speculation. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). To defeat a motion for summary judgment, "the adverse party must present specific facts showing a genuine issue for trial unless, of course, the facts asserted by the moving party fail to adequately negate any issue of fact raised by the pleading." *Ahlm v. Rooney*, 143 N.W.2d 65, 68 (Minn. 1966). Evidence offered to defeat

summary judgment must be admissible at trial or indicate the existence of admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The admissible evidence must support a reasonable jury finding for the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Even if the record "leads one to suspect that it is unlikely [that a party] will prevail upon trial, that fact is not a sufficient basis for refusing [that party] his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." *Dempsey v. Jaroscak*, 188 N.W.2d 779, 783 (Minn. 1971) (quoting *Whisler v. Findeisen*, 160 N.W.2d 153, 155 (Minn. 1968)).

III. State of Minnesota's Motion For Partial Summary Judgment On Affirmative Defenses

In its Answer, filed August 5, 2021, Juul asserts several affirmative defenses: waiver, equitable estoppel, laches, ratification, unclean hands, in pari delicto, failure to mitigate damages and comparative negligence. In the Altria Defendants' August 4, 2021 Answer, they also assert several of the affirmative defenses set forth by Juul and a few additional ones: accord and satisfaction, res judicata, and collateral estoppel. The State seeks dismissal of all affirmative defenses raised in Defendants' answers. In response, Juul and the Altria Defendants have agreed to withdraw the affirmative defenses of waiver, equitable estoppel, laches, ratification, in pari delicto, accord and satisfaction, res judicata, and collateral estoppel. Therefore, the only remaining affirmative defenses in dispute are (a) failure to mitigate damages, (b) comparative negligence, and (c) unclean hands. The Court considers each one in turn.

A. Failure to Mitigate Damages

Generally, a plaintiff alleging a loss, whether because of a tort or a breach of contract, has a duty to mitigate damages. *See, e.g., Adee v. Evanson*, 281 N.W.2d 177, 180 (Minn. 1979) (a personal injury plaintiff has a duty to mitigate damages by acting reasonably in obtaining treatment); *Lesmeister v. Duffy*, 330 N.W.2d 95, 103 (Minn. 1983) (nonbreaching party has a duty to take reasonable steps to mitigate damages); *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. Ct. App. 1990) (an injured party must use "reasonable diligence and good efforts to minimize . . . losses"). The burden of proof lies with the defendant, who must show that damages could have been mitigated with reasonable diligence. *Lanesboro Produce & Hatchery Co. v. Forthun*, 16 N.W.2d 326, 328 (Minn. 1944). And a plaintiff's mitigation duty does not arise until "after a legal wrong has occurred, but while some damage may still be prevented." *Bemidji Sales Barn, Inc. v. Chatfield*, 250 N.W.2d 185, 189 (Minn. 1977). Defendants here seek an opportunity to prove that the State could have mitigated the damages it claims Defendants caused with respect to the underage use of e-cigarettes in Minnesota, but failed to do so.

The State makes three arguments for dismissal of the defense of failure to mitigate damages: (1) to protect the separation of powers, the Minnesota Tort Claims Act does not permit defendants to raise affirmative defenses requiring the factfinder to base liability on an assessment of discretionary governmental decision-making; (2) general separation of powers principles beyond those specified in the Minnesota Tort Claims Act do not permit the raising of such defenses; and (3) even if such defenses were permitted, the evidence here is not sufficient to create a triable issue of fact. The Court will address each argument in turn.

1. Minnesota Tort Claims Act

"Prior to 1976, the doctrine of sovereign immunity existed in Minnesota to prevent suit against the state without its consent." *Nusbaum v. Blue Earth Cnty*., 422 N.W.2d 713, 717 (Minn. 1988) (citing *Berman v. Minnesota State Agric. Soc'y*, 100 N.W. 732, 732 (Minn. 1904)). "In *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975), [the Minnesota Supreme Court] abolished the doctrine of sovereign immunity except as to 'the exercise of discretionary functions or legislative, judicial, quasi-legislative, and quasi-judicial functions.'" *Nusbaum*, 422 N.W.2d at 718.

Following *Nieting*, the Minnesota Legislature enacted the Minnesota Tort Claims Act ("MTCA"), codifying *Nieting* by generally permitting tort claims against the State, with some exceptions, including an exception for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736.

> The major underpinnings for the discretionary function exception to governmental tort liability rest in the notion that the judicial branch of government should not, through the medium of tort actions, second-guess certain policy-making activities that are legislative or executive in nature. "[J]udicial review of major executive policies for 'negligence' or 'wrongfulness' could 'disrupt the balanced separation of powers of the three branches of government."

Nusbaum, 422 N.W.2d at 718 (citation omitted). In determining the scope of statutory immunity, the Minnesota Supreme Court has "interpreted the discretionary function exception narrowly and [has] focused on its underlying purpose—to preserve the separation of powers by preventing courts from passing judgment 'on policy decisions entrusted to coordinate branches of government.'" *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996) (quoting *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn.1988)).

"This immunity from suit protects government entities and public officials from tort actions that would result in judicial second-guessing and after-the-fact review of legislative policy decisions or judicial review of discretionary decision making or policymaking, rather than merely ministerial duties." *Johnson v. State*, 553 N.W.2d 40, 43 (Minn. 1996). "In applying the discretionary function exception under . . . Minn. Stat. § 3.736, subd. 3(b) . . . this court has drawn a distinction between conduct at a planning level (protected) and conduct at an operational level (unprotected)." *Nusbaum*, 422 N.W.2d at 719.

If a decision "involves the type of political, social and economic considerations that lie at the center of discretionary action, including consideration of safety issues [and] financial burdens . . . it is not the role of the courts to second-guess such policy decisions." *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 412 (Minn. 1996).

While all parties agree that the MTCA protects the State from challenges to the performance of its discretionary functions in lawsuits brought by others, the State argues that this protection extends further, to protect the State against affirmative legal defenses premised on the same type of challenge in lawsuits brought *by the State*. The State notes that the MTCA is similar in language and structure to the Federal Tort Claims Act ("FTCA"), and the State cites several cases from around the country interpreting the FTCA to find that it applies not only to claims against the government but to affirmative defenses brought by defendants in suits filed by the government. *See, e.g., FDIC v. Carter*, 701 F. Supp. 730, 733 (C.D. Cal. 1987); *People ex rel. Grijalva v. Superior Ct.*, 159 Cal. App. 4th 1072, 72 Cal. Rptr. 3d 53 (2008); *Colorado Ins. Guar. Ass'n v. Sunstate Equip. Co., LLC*, 405 P.3d 320, 337–39 (Colo. Ct. App. 2016); *FDIC v. Ernst & Whinney*, No. 3-87-0364, 1992 WL 535605, at *2 (E.D. Tenn. May 19, 1992); *United States v. Sierra Pac. Indus.*, 879 F. Supp. 2d 1128, 1136–37

(E.D. Cal. 2012); *FDIC v. Mijalis*, 15 F.3d 1314, 1323–24 (5th Cir. 1994); *FDIC v. Oldenburg*, 38 F.3d 1119, 1121–22 (10th Cir. 1994); *FDIC v. Bierman*, 2 F.3d 1424, 1441 (7th Cir. 1993); *Resolution Trust Corp. v. Fleischer*, 835 F. Supp. 1318, 1321 n.5 (D. Kan. 1993).

In response, Defendants argue that the State has misconstrued the MTCA. Defendants contend that by its language, the MTCA pertains only to claims brought by a claimant seeking to hold the State liable for damages, and not to defenses raised when the State is seeking to hold someone else liable for damages. Defendants begin by citing the statutory text:

> Subdivision 1. General rule. The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment or a peace officer who is not acting on behalf of a private employer and who is acting in good faith under section 629.40, subdivision 4, under circumstances where the state, if a private person, *would be liable to the claimant*.
>
> . . .
>
> Subd. 3. Exclusions. Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are *not liable* for the following losses:
>
> . . .
>
> > (b) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused; . . .

Minn. Stat. § 3.736 (emphasis added). By this language, the MTCA specifies that it applies when the State would be liable to a claimant, not the other way around. The discretionary function exception declares that the State is "not liable for . . . a loss caused by the performance or failure to perform a discretionary duty." In the present matter, Juul and the Altria Defendants argue that the MTCA does not apply here, because they are not claimants—they have not asserted any claim or counterclaim against the State and do not seek to hold the State liable for anything.

The State responds by noting that the purpose of the discretionary function exception, as elucidated by the Minnesota Supreme Court, is to prevent the intrusion of courts into the affairs of the legislative and executive departments. In the State's view, permitting affirmative defenses based on a failure to mitigate theory will produce precisely the result that the exception was designed to prevent, equating to a form of liability within the ambit of the MTCA. Defendants, on the other hand, point to a series of federal cases interpreting the FTCA that reject this reasoning and decline to treat affirmative defenses the same as claims and counterclaims. *See, e.g., Frederick v. United States*, 386 F.2d 481, 487-88 (5th Cir. 1967); *United States v. Berry Engineering General Contractors, Inc.*, 2010 WL 11515470 (C.D. Cal. Jan. 20, 2010); *FDIC v. Stovall*, 2014 WL 8251465, at *2 (N.D. Ga. Oct. 2, 2014).

The federal cases interpreting the FTCA's waiver of sovereign immunity are not precedential or binding on this Court. Furthermore, the federal caselaw on this issue is not a model of clarity. Relevant federal cases interpreting the FTCA are in tension with one another. *Compare Frederick*, 386 F.2d at 487-88 (waiver of sovereign immunity does not waive immunity as to claims which do not meet the "same transaction or occurrence" test nor to claims of a different form or nature than that sought by it as plaintiff), *with Carter*, 701 F. Supp. at 733 (substantive portions of the FTCA relating to the determination of liability do apply both to affirmative suits brought against the government and to counterclaims and affirmative defenses in suits brought originally by the government); *see also United States v. Berry Engineering General Contractors, Inc.*, No. CV 09–1250 GAF, 2010 WL 11515470, at *3 (C.D. Cal. Jan. 20, 2010) (discussing the evolving caselaw on the question of the FTCA's application to affirmative defenses and counterclaims).

In the end, the Court must rely primarily on its interpretation of the text of the MTCA and the decisions of Minnesota appellate courts interpreting Minnesota law. As Defendants point out, the text of the MTCA repeatedly references circumstances in which the State would be liable to a claimant but makes no mention of defenses to claims brought by the State. While the Court understands the State's argument that permitting an affirmative defense of failure to mitigate will lead to the introduction of evidence comparable to the type of evidence that would be barred on a claim for liability under the MTCA, the statute itself does not contain language that would extend its terms to claims brought by the State, as opposed to claims against the State. The Court also recognizes that the discretionary function exception has traditionally been interpreted narrowly in Minnesota. *See Zank*, 552 N.W.2d at 721. The underlying purpose of the MTCA is to establish a framework for tort claims permitted to be brought against the State. It makes no attempt to define the scope of claims that may be brought by the State, or of permissible defenses to those claims. Accordingly, the Court will not expand the discretionary function exception in the MTCA beyond its scope as defined by the legislature.

2. General Separation of Powers Principles

The State next argues that basic regard for the separation of powers, even beyond what is set forth in the MTCA, should compel this Court to disallow any argument that the State failed to mitigate its damages. The money from the decades-old tobacco settlement which Defendants claim the State should have used to mitigate its claimed damages was paid into the State's general fund. The State contends that for the jury to evaluate how the State prioritized its allocation of general fund dollars would result in an improper judicial infringement on the executive and legislative roles. Defendants premise their failure to

mitigate defense on their view that Minnesota's legislature underfunded efforts to combat youth tobacco use, despite receiving a steady flow of funds from the tobacco lawsuits settled two decades ago. An evaluation of this affirmative defense would require the jury to second-guess funding decisions made by the legislature and tobacco control strategies pursued by the executive branch. The State contends such an inquiry falls well outside the scope of this litigation.

> They are asking this Court to decide complicated policy questions related to public health and safety, as well as fiscal realities and priorities: Could a different public health program have worked better to reduce youth vaping? Should appropriations have funded statewide initiatives or relied on local health officials? Do the State's tax revenues and balanced-budget requirements allow for additional levels of funding for public health and safety-related programs? Are such programs more important than funding schools, roads, local government operations, human services, and other basic sovereign responsibilities?

(State's Mem. in Supp. of Partial S.J., filed Nov. 1, 2022, at 24.)

In response, Defendants argue that depriving them of all affirmative defenses would infringe on the fundamental fairness of the trial. They cite several federal cases finding, in other contexts, that governments may not use sovereign immunity to disallow affirmative defenses or counterclaims when it is the state itself that has chosen to exercise the rights of a plaintiff. *See, e.g., Bull v. United States*, 295 U.S. 247, 262 (1935); *Texas v. Caremark, Inc.*, 584 F.3d 655, 659 (5th Cir. 2009); *Reata Const. Corp. v. Dallas*, 197 S.W.3d 371, 383 (Tex. 2006); *In re Lazar*, 237 F.3d 967, 978–79 (9th Cir. 2001); *State Off. of Child Support Enf't v. Mitchell*, 954 S.W.2d 907, 911 (Ark. 1997); *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994); *State ex rel. State Highway Comm'n of N.M. v. Town of Grants*, 364 P.2d 853, 855 (N.M. 1961); *State ex rel. Comm'rs of Land Off. v. Sparks*, 253 P.2d 1070, 1074–75 (Okla. 1953); *Berrey v. Asarco Inc.*, 439 F.3d 636, 644–45 (10th Cir. 2006); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d

550, 552–53 (8th Cir. 1989); *United States v. Kernen Constr.*, 349 F. Supp. 3d 988, 998 (E.D. Cal. 2018).

As with the issue of interpreting the MTCA's discretionary function exception, the Court must rule on this issue without the benefit of a binding ruling from the Minnesota appellate courts. The State's concerns regarding the factfinder's evaluation of decisions made by the governor and the legislature and the inherent separation of powers issues are valid concerns. However, the Court also must ensure basic fairness when a private defendant is brought into court by the government. The State is seeking to recover large sums of money from Defendants, based in part upon a negligence claim under Minnesota common law. The Court is unwilling to bar Defendants categorically from raising the defense of failure to mitigate damages. That is a standard defense available to negligence defendants under Minnesota tort law. Defendants seek through their defenses not to recover money from the State, but to reduce the amount of money the State may recover from them. The Court finds that the best way to achieve a proper balance is on an issue-by-issue basis as the trial proceeds, and the Court will endeavor to make these decisions with care and with the separation of powers in mind. As to the State's request to bar the mitigation defense completely, the State's motion for summary judgment is denied.

3. Sufficiency of the Evidence

The State argues that even if mitigation is a legally permissible defense, the defense should be dismissed on summary judgment for lack of supporting evidence sufficient to create a genuine issue of material fact. Specifically, the State contends that there is no evidence that negligent or reckless State action causally contributed to Minnesota's youth vaping epidemic. To do so, the State contends, Defendants must show negligent or reckless

action by the State that exceeded the fault of Defendants in causing the harm alleged in the complaint—specifically, surging youth vaping rates. *See Winge v. Minnesota Transfer Ry. Co.*, 201 N.W.2d 259, 263 (Minn. 1972) (affirming preverdict grant of a motion for directed verdict based on a determination that the fault of the plaintiff-driver exceeded that of the defendant-railroad). The State claims that it implemented timely and comprehensive strategies to address the youth vaping crisis in Minnesota, and that Defendants have no proof that the State's actions somehow fueled that crisis.

Defendants respond that they have evidence showing that the State recognized that vaping was becoming a problem among minors as early as 2014, but that from 2017 to 2020, the State failed to meet CDC guidelines and did not allocate sufficient operational funds for its underage vaping program. Defendants also point out that from 2015-2020, the State spent less than 3% of tobacco settlement and tax funds on anti-vaping prevention and cessation. They argue this evidence is sufficient for them to be allowed to argue that the State bears at least some of the fault, because it did not take reasonable steps to stem its losses from the alleged vaping epidemic.

The State replies that Defendants have no evidence to show that the State contributed to the rise in youth vaping, and they also have no evidence analyzing the impact of any monetary amount they claim the State should have spent to prevent the youth vaping crisis. Thus, the State argues, no facts exist to support shifting fault to the State.

The Court finds that summary judgment is not appropriate on the mitigation issue based upon alleged insufficiency of the evidence, given the parties' competing factual positions. On the present record, the Court cannot find, as a matter of law, that no genuine issue of material fact exists. In denying summary judgment, however, the Court is not ruling

that the issue necessarily will be submitted to the jury. Here, as in *Winge*, that decision should wait until the evidence is presented, giving the Court a complete factual record upon which to determine whether the mitigation defense may properly be submitted for the jury's determination.

B. Comparative Fault

As the State acknowledges in its Memorandum, "[t]he affirmative defenses of failure to mitigate and comparative fault are . . . interrelated, as evidenced by the inclusion of an unreasonable failure to mitigate damages in the Minnesota comparative fault statute's definition of 'fault.' *See* Minn. Stat. § 604.01, subd. 1a." (State's Mem. in Supp. of Partial S.J., filed on Nov. 1, 2022, at 19 n.49.) The referenced statute defines "fault" as:

> acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and *unreasonable failure to avoid an injury or to mitigate damages*.

Minn. Stat. § 604.01, subd. 1a (emphasis added). *See also McKay's Fam. Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. Ct. App. 1992).

The Court, having concluded that Defendants are not barred from raising an affirmative defense of failure to mitigate damages, and cognizant of the statutory definition of comparative fault, which includes an "unreasonable failure to . . . mitigate damages," finds that Defendants' affirmative defense of comparative fault is not subject to dismissal through summary judgment. As noted in *McKay's*, historically, Minnesota courts have applied comparative fault principles liberally, "even to situations in which other jurisdictions have refused such application." *McKay's*, 480 N.W.2d at 147 (quoting *Tomfohr v. Mayo Found.*, 450 N.W.2d 121, 123 (Minn. 1990)). Given the Court's denial of partial

summary judgment as to Defendants' mitigation affirmative defense, the State's motion for summary judgment dismissing Defendants' affirmative defense of comparative fault likewise is denied, at least to the extent the two defenses overlap. The Court notes that Defendants presented no theory other than mitigation to support their comparative fault defense.

C. Unclean Hands

The State argues that Defendants cannot assert the defense of unclean hands against the State, as the State's actions do not rise to the standard of illegality or unconscionability required by the doctrine. The equitable defense of "unclean hands" is premised on withholding judicial assistance from a party guilty of illegal or unconscionable conduct. *See Watson Co. v. United States Life Ins. Co.*, 258 N.W.2d 776, 778 (Minn. 1977). The defense derives from the equitable maxim that one "who comes into equity must come with clean hands." *See*, *e.g.*, *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). The doctrine may be invoked only against a party whose conduct has been "unconscionable by reason of a bad motive, or where the result induced by [its] conduct will be unconscionable." *Creative Commc'ns Consultants, Inc. v. Gaylord*, 403 N.W.2d 654, 658 (Minn. Ct. App. 1987) (quotation omitted). An example of qualifying unconscionable conduct includes diverting money intended for charity. *Abers v. Elliott*, No. A05-2439, 2006 WL 2053425, at *3 (Minn. Ct. App. July 25, 2006). Illegality, however, is not the standard. "The misconduct need not be of such a nature as to be actually fraudulent or constitute a basis for legal action." *Edin v. Josten's, Inc.*, 343 N.W.2d 691, 694 (Minn. Ct. App. 1984) (quoting *Earle R. Hanson & Assocs. v. Farmers Co-op. Creamery Co. of Clear Lake, Wis.*, 403 F.2d 65, 70 (8th Cir. 1968)).

The State argues that Defendants have not supplied even the bare minimum evidence required to create a triable issue of fact on whether the State acted unconscionably with respect to the teen vaping epidemic. Defendants respond that the State's use of tobacco settlement money for purposes other than fighting tobacco-related issues could be found by a jury to be unconscionable. The State responds that these tobacco settlement funds, by agreement, were paid into the State's general fund, with no requirement that they be spent for any particular purpose. The State argues that Defendants should not be permitted to argue that the legislature's appropriation decisions regarding allocation of the State's general fund dollars are illegal or unconscionable.

On a motion for summary judgment, all inferences are drawn in favor of the non-moving party. Nevertheless, on this question, the Court agrees with the State that the affirmative defense of unclean hands must be dismissed. Defendants' unclean hands defense rests entirely on their contention that the State improperly spent funds received from settlement of the tobacco litigation on things other than mitigation of harms from tobacco.

Defendants point to *Johnson v. Freberg*, 228 N.W. 159, 160 (Minn. 1929), as an example of a case that sustained an unclean hands defense despite no finding of illegality. But in *Johnson*, a party made significant misrepresentations to induce another party to enter a grossly one-sided land swap, then sought the court's assistance in enforcing the delivery of certain payments that were part of the deal. The Court found that the misrepresentations in service of such an unfair deal were unconscionable and that the plaintiff had unclean hands. In *Johnson*, the plaintiffs directly contributed to an unfair agreement that harmed defendants. They caused the harm.

Here, Defendants are not arguing that the State directly caused the rise in youth tobacco consumption. No one is accusing the State of encouraging e-cigarette use by anyone, particularly minors. Rather, Defendants' claim of unconscionability is premised on the same arguments and evidence cited in support of their failure to mitigate defense. Defendants may be correct that the State has failed to mitigate its damages, and they will be permitted to attempt to prove that at trial. However, a failure to properly fund tobacco mitigation efforts with funds directed to the State's general fund under a settlement agreement, where the agreement placed no restraints on the use of such funds, does not rise to the level of unconscionability required to maintain a defense of unclean hands. Accordingly, the Court grants the State's partial summary judgment motion with respect to the affirmative defense of unclean hands, and that affirmative defense is dismissed with prejudice.

IV. Juul's Motion for Partial Summary Judgment

A. Public Nuisance

Juul makes two arguments for dismissal of the State's public nuisance claim. First, it argues that a claim for public nuisance requires interference with a public or collective right, and the injuries claimed by the State do not meet this standard. Second, it argues that a public nuisance cause of action does not extend to product-liability based harms.

To support its narrow reading of the public nuisance cause of action, Juul cites several out-of-state cases on public nuisance law, based upon those states' limitation of public nuisance claims to claims alleging some form of communal injury or injury to public land or property. For example, in deciding that Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids, the Oklahoma Supreme Court stated: "a public right is a right to a public good, such as 'an indivisible resource shared by the

public at large, like air, water, or public rights-of-way.'" *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 726 (Okla. 2021). Similarly, in ruling that the public nuisance claim brought by the state against paint manufacturers whose lead paint products allegedly caused a statewide problem of lead poisoning, the Rhode Island Supreme Court stated, "[t]he sheer number of [alleged] violations does not transform [an alleged] harm from individual injury to communal injury." *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 448 (R.I. 2008) (citation omitted); s*ee also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114–16 (Ill. 2004) (rejecting availability of public nuisance claim to hold gun manufacturers liable for gun violence).

Juul also argues that permitting the public nuisance claim to proceed in this matter would erode the necessary distinction between products liability claims and nuisance claims. Juul notes that in *Hunter*, the Oklahoma Supreme Court dismissed an analogous public nuisance claim against opioid manufacturers, ruling that "[e]xtending public nuisance law to the manufacturing, marketing, and selling of products--in this case, opioids--would allow consumers to 'convert almost every products liability action into a [public] nuisance claim.'" 499 P.3d at 729–30 (citation omitted).

Juul cites several other out-of-state cases in which public nuisance claims related to the manufacture, sale, and marketing of dangerous products were dismissed based on rulings that such claims should be maintained as products liability claims. *See, e.g., Camden Cty. Bd. of Chosen Freeholders v. Beretta US.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001); *People v. Sturm, Ruger & Co., Inc.,* 309A.D.2d 91, 97 (NY. App. Div. 2003); *In re Firearm Cases*, 24 Cal.Rptr.3d 659, 682 (Cal. App.4th 2005); *City of Philadelphia v. Beretta US.A., Corp.,* 126 F. Supp. 2d 882, 909, 911 (E.D. Pa.2000), *aff'd,* 277 F.3d 415 (3d Cir. 2002); *Texas v. Am.*

Tobacco Co., 14 F. Supp. 2d 956, 972–73 (E.D. Tex. 1997). In *Alaska v. Juul Labs, Inc.*, No. 3AN-20-09477 CI., 2022 WL 2533303 (Alaska Super. Ct. Feb. 23, 2022), a trial court in Alaska dismissed a public nuisance claim similar to the one brought here, holding that the plaintiff State of Alaska had failed to identify a collective right of the public for which it sought redress, but instead identified potential individual injuries, which could be better addressed under the framework of a products liability claim. Courts ruling in this manner have expressed concern that public nuisance law lacks some of the safeguards of products liability law, such as a statute of limitations, and have worried that an expansion of public nuisance law would create enormous new avenues for liability.

The State responds by noting that its claim rests upon Minnesota law, not the law of other states. The State begins by citing Minnesota statutory authority for its public nuisance claim:

> Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:
> (1) maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or
> (2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public; or
> (3) is guilty of any other act or omission declared by law to be a public nuisance and for which no sentence is specifically provided.

Minn. Stat. § 609.74. The State argues that the Minnesota Legislature expanded upon the common law tort of nuisance by statute in enacting section 609.74. The State further claims that by disseminating advertisements appealing to youth and by selling e-cigarettes with inadequate age-verification methods, Juul has violated section 609.74 by "maintain[ing] a condition which unreasonably . . . injures or endangers the . . . health . . . of [a] considerable number of members of the public." *Id.* The State observes that further statutory authority for

its nuisance claim can be found in the False Statement in Advertising law, which provides that any violation is "a public nuisance and may be enjoined as such." Minn. Stat. § 325F.67.

As for Juul's reliance on non-Minnesota public nuisance cases, the State observes that out-of-state cases confining public nuisance claims to injuries to collective public rights or to public land or property are not binding on this Court and are not consistent with Minnesota nuisance law. Instead, multiple Minnesota appellate decisions have reached broader conclusions on the scope of nuisance claims that may be brought here. For instance, the Minnesota Supreme Court held that an injury to public land or property need not be proven to enjoin a tavern's illegal sale of alcohol as a public nuisance. *State v. Sportsmen's Country Club*, 7 N.W.2d 495, 496–97 (Minn. 1943) (state government could obtain an injunction to restrain a public nuisance, without showing any property right in itself).

Juul attempts to distinguish *Sportsmen's* by noting that there, the challenged nuisance was localized to a single property, which is consistent with Juul's theory that public nuisance is a property-based crime. But in another case, *Leppink v. Water Gremlin Co.*, 944 N.W.2d 493, 499 (Minn. Ct. App. 2020), the Minnesota Court of Appeals defined a public health nuisance as "any activity or failure to act that adversely affects the health of the community at large," and found the defendant's failure to prevent its employees from carrying lead off site constituted a public health nuisance by allowing lead to migrate from the defendant's plant into many other buildings and homes in the community. This adversely affected public health because lead exposure poses a serious risk to human health, particularly for young children. The *Leppink* decision rejected the defendant's argument that the migration of lead to private homes could not constitute a public nuisance. Instead, the court found that the statute allowing the State to seek a remedy for public health nuisances

"contains no limit on where the adverse health effects must occur." *Id.* at 501 (citing Minn. Stat. § 145.075).

Other Minnesota cases cited by the State likewise apply a broad definition to public nuisance claims. *See State v. Red Owl Stores, Inc.*, 92 N.W.2d 103, 113-14 (Minn. 1958) (state could bring public nuisance claim where defendant allegedly violated prohibition on sale of certain over-the-counter drugs without a license); *State ex rel. Goff v. O'Neil*, 286 N.W. 316, 319 (Minn. 1930) (affirming injunction against a loan business's charging exorbitant interest rates in violation of usury law, as a public nuisance); *Town of Linden v. Fischer*, 191 N.W. 901, 902 (Minn. 1923) (affirming injunction against public nuisance caused by public dance hall that repeatedly violated prohibition against unlicensed public dances); *State ex rel. Olson v. Guilford*, 219 N.W. 770, 771 (Minn. 1928) (affirming injunction against circulation of a "malicious, scandalous and defamatory newspaper" under public nuisance statute) (rev'd on other grounds in *Near v. Minnesota*, 283 U.S. 697 (1931)).

Juul provided no Minnesota authority that supports its narrow interpretation of the public nuisance cause of action. The Court also notes that the non-Minnesota cases Juul relies upon do not represent the full range of out-of-state authority on public nuisance claims. Other out-of-state cases have disagreed with the Oklahoma and Alaska approaches and have allowed a broader range of public nuisance claims to proceed. *See, e.g. City and County of San Francisco v. Purdue Pharma L.P.*, ---- F.Supp.3d ----, 2022 WL 3224463, at *58 (N.D. Cal. Aug. 10, 2022) (allowing opioid litigation to proceed, since unlike nuisance law in Oklahoma, California has never required that public nuisance claims be based upon some form of injury to land or property); *In re National Prescription Opiate Litigation*, 589 F.Supp.3d 790, 815 (N.D. Ohio 2022) (allowing opioid litigation to proceed, since Ohio's public nuisance case law is

broader than Oklahoma's, as shown by Ohio Supreme Court's allowance of claims that gun manufacturers created a public nuisance through facilitating the flow of firearms into the illegal secondary market) (citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136, 1143 (2002)).

This Court is bound to follow Minnesota statutes and precedents. The Minnesota legislature, through Minn. Stat. § 617.81, has authorized courts to grant an injunction to abate a nuisance based on a finding of nuisance under section 609.74. The State has sued Defendants under section 609.74. Although no Minnesota case is precisely on point, the Court finds that Minnesota precedent establishes a more expansive range for public nuisance claims than the narrow range defined in other states by the courts relied upon by Defendants, such as the decisions in Oklahoma and Alaska. The Court therefore finds that the State has set forth sufficient evidence to create a genuine issue of material fact to proceed on its claim that the alleged contributions of Juul and the Altria Defendants to the increase in youth vaping in Minnesota constitute a public nuisance.

Lastly, Juul argues that no evidence supports a finding of public nuisance in this case as the rate of e-cigarette smoking by minors is low and shrinking. The State disputes Juul's factual assertions, and states that its expert testimony will establish that Minnesota is experiencing a youth vaping epidemic. This is a quintessential fact question that cannot be resolved at the summary judgment stage. Accordingly, Juul's motion for partial summary judgment dismissing the State's public nuisance claim is denied.

B. Damages for Lost Investment in Tobacco Control and Unreimbursed Healthcare Costs

Juul next argues that it cannot be held liable for any lost investments in tobacco control because those funds were spent by state agencies, and the State has consistently

maintained throughout this litigation that Minnesota's state agencies are not parties to this litigation. Juul contends that the State cannot recover damages on behalf of third parties, and that it should be judicially estopped from now claiming to represent those agencies after having claimed for years that it does not. The State responds that it is not seeking to recover lost funds on behalf of the agencies but rather on behalf of the people of Minnesota. Further, the State points out that the Minnesota Supreme Court has not recognized the doctrine of judicial estoppel. *See State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005); *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999) (noting Minnesota has not expressly recognized the doctrine of judicial estoppel); *Ill. Farmers Ins. Co. v. Glass Serv. Co. Inc.*, 683 N.W.2d 792, 801 (Minn. 2004) (same). In *Pendleton*, the Court outlined the elements of judicial estoppel as applied elsewhere, but declined to adopt the doctrine, finding it inapplicable to the facts presented:

> First, the party presenting the allegedly inconsistent theories must have prevailed in its original position ("a litigant is not forever bound to a losing position"). . . Second, there must be a clear inconsistency between the original and subsequent position of the party. . . Finally, there must not be any distinct or different issues of fact in the proceedings.

706 N.W.2d at 507 (citing *Levinson v. United States*, 969 F.2d 260, 264-65 (7th Cir.1992)).

The Court is persuaded that the State has brought this case on behalf of the people of Minnesota. Any funds it collects will be on the people's behalf and not on behalf of any particular state agency. Therefore, the Court finds nothing inconsistent between the State's position in the discovery process, in which various state agencies were separately represented as non-parties, and the State's attempt to recover damages for lost tobacco control funds and healthcare costs that rightfully belong to the people of Minnesota. Accordingly, as in the cases cited above, the Court finds no need to address whether the doctrine of judicial estoppel may be adopted here, as the doctrine is inapplicable to the facts of this case.

V. The Altria Defendants' Motion for Summary Judgment

The Altria Defendants premise their summary judgment motion on two over-arching themes. They contend that: (1) the State spent only a tiny fraction of past tobacco settlement money on underage smoking and vaping, and therefore it should not be allowed to require Defendants to pay for an expensive abatement program, and (2) Altria is merely a minority, non-voting investor in Juul, and its services to Juul were limited to a time frame when underage vaping was no longer increasing dramatically. In other words, Altria argues that because underage vaping had already become a problem before it invested in Juul, it should not be held responsible. The first theme concerns the mitigation and comparative fault defenses, addressed above. Altria presents its second theme through a series of arguments, beginning with causation, and moving through damages and other legal theories. The Court addresses each one in turn.

A. Causation

1. Decline in underage vaping

According to the Altria Defendants, the State has failed to create a triable issue of fact as to causation, because underage vaping did not increase in a statistically significant way in Minnesota between 2017 and 2020, the years when the Altria Defendants allegedly were involved with Juul's marketing efforts. The Altria Defendants contend that this means the State cannot raise a genuine issue of material fact as to its claim that Altria increased underage vaping in Minnesota by investing in and providing services to Juul. Furthermore, even if underage vaping increased while the Altria Defendants were providing services to Juul, they argue that the State cannot link any alleged increase to them, because they did not design, manufacture, or sell Juul's products.

The State responds by citing Minn. Stat. § 8.31, subd. 3 for the proposition that causation is not required to establish liability in an enforcement action brought by the Attorney General. Furthermore, the State notes that even the remedies requiring proof of causation do not "require a strict showing of direct causation, as would be required at common law." *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 14 (Minn. 2001). Rather, "the causal nexus and its reliance component may be established by other direct or circumstantial evidence . . . " *Id.*; *see also State v. Minnesota Sch. of Bus., Inc.*, 935 N.W.2d 124, 135 (Minn. 2019) (Attorney General established a causal nexus between defendant schools' fraudulent statements and harm suffered by students, based in part upon materiality and pervasiveness of consumer fraud). The State points out that the Altria Defendants were aware that the majority of e-cigarette use had largely been driven by non-smokers, the majority being youth or young adults. The State further argues that while youth vaping had become problematic before Altria joined forces with Juul, youth vaping rates increased even further in 2019, during the Altria Defendants' services to Juul. The State also notes that Altria's similar causation argument was found unpersuasive in the multidistrict litigation ("MDL") involving claims against Juul pending in federal court. *See In re JUUL Labs, Inc. Marketing, Sales Practices and Products Liability Litigation*, No. 19-md-02913-WHO ("*Juul MDL Case"*), 2022 WL 1601418, at *15 (N.D. Cal. April 29, 2022) (denying Altria's summary judgment motion on causation under Tennessee law); *Id.,* 609 F.Supp.3d 942, 981 n.27 (N.D. Cal. June 28, 2022) (rejecting Altria's causation argument in connection with class certification motion).

The Court finds that the cited evidence is sufficient to establish the existence of a genuine issue of material fact as to causation with respect to the Altria Defendants. The

State's evidence that youth vaping increased during the time when the Altria Defendants were providing services to Juul in the Minnesota market, when taken in light of the cases establishing that the causal nexus required under Minnesota law in an enforcement action, is sufficient to create a fact issue. It will up to the jury to decide whether Altria is liable to some extent for the injury claimed by the State.

2. No proof of unlawfulness

The Altria Defendants next argue that the State has failed to connect them to any unlawful sales of Juul products in Minnesota. To establish causation, they say, the State needs to provide evidence that their violation of a legal duty caused the asserted harm, not simply that their lawful conduct purportedly had an undesirable consequence. *In re St. Jude Med., Inc.*, 522 F.3d 836, 839 (8th Cir. 2008). The Altria Defendants contend that the challenged advertisements they disseminated were emails and mailings to tobacco users labeled as adults in their database and inserts in cigarette packages limited by law to adult purchasers. Accordingly, they claim, the State cannot prove they assisted with marketing Juul's products to youth.

In response, the State relies on its tobacco science expert Dr. Kurt Ribisl, who stated in his report that the Altria Defendants' "assistance to JUUL was unreasonable and substantially contributed to JUUL sales, misconceptions, and youth use in Minnesota." (Ribisl Report at ¶ 18, 663.) Dr. Ribisl further opined that "Altria was very aware of JUUL's attraction to youth, yet committed its vast resources to expanding JUUL use in Minnesota. . . . Altria caused increased sales and awareness of JUUL products and played a major role in Minnesota's youth vaping epidemic." (Ribisl Report at ¶ 18, 661.)

The Court finds that the State's evidence is sufficient to create a material question of fact as to whether the Altria Defendants' actions unlawfully contributed to the harm claimed by the State. Accordingly, the Altria Defendants' motion for partial summary judgment on causation is denied.

B. Evidence of Damages

The Altria Defendants next argue that the damages requested by the State are unduly speculative, and that Minnesota law bars claims for speculative damages. The State responds that its economic expert, Dr. Frank Chaloupka, has presented detailed damages calculations on disgorgement, abatement, past tobacco control expenditures, health care costs, civil penalties, and costs attributable to Altria's provision of services to Juul. (Chaloupka Second Supplemental Report at Sections II-VIII). Furthermore, while Minnesota law does not allow speculative damages, neither does it require damages to be proven with exactitude. "Generally, damages need not be proved with absolute certainty nor with mathematical precision." *Bethesda Lutheran Church v. Twin City Const. Co.* 356 N.W.2d 344, 348 (Minn. Ct. App. 1984).

The Court finds that the State's evidence of its damages claim is sufficiently certain to withstand summary judgment.

C. Avoidable Consequences

The Altria Defendants seek to apply the doctrine of avoidable consequences to gain dismissal of the State's abatement claim, contending that the State acted irresponsibly in failing to mitigate tobacco-related harms, including by diverting funds gained from its settlement of prior tobacco litigation. This doctrine precludes recovery where a party "fail[s] to avoid injurious consequences" of alleged wrongdoing. *Bemidji Sales Barn, Inc. v. Chatfield*,

250 N.W.2d 185, 189 (Minn. 1977). The arguments for and against imposition of this doctrine mirror, in substantial part, the arguments presented for the affirmative defenses of failure to mitigate and comparative fault. In permitting the jury to hear those defenses, the Court rejected, in part, the State's argument regarding improper judicial intervention into legislative matters. Nevertheless, permitting the jury to consider these defenses is a far cry from resolving the factual disputes in Defendants' favor and simply stating that the defenses should be accepted. The Court finds no basis to do so here.

The Altria Defendants' motion for summary judgment dismissing the State's claims pursuant to the doctrine of avoidable consequences is denied.

D. Alleged Lack of Evidence of Essential Elements of Various Claims

1. Equitable Claims

The Altria Defendants quote the Court's ruling at the motion to dismiss stage, that equitable remedies are only permitted when there is no adequate remedy at law, and they ask the Court to dismiss the State's equitable claims, arguing that the State has adequate remedies at law. The State responds by citing *First Nat'l Bank of St. Paul v. Shallern Corp.*, 309 N.W.2d 316, 319–20 (Minn. 1981), for the proposition that Minnesota law permits a plaintiff to pursue alternative and inconsistent theories after the summary judgment stage. The State also argues that no alternative legal remedy exists as to its public nuisance claim.

The Court finds that the State accurately cites Minnesota law on this issue. The State is allowed to pursue alternative theories. Moreover, it is unclear at this stage whether the legal remedy sought by the State is adequate. The State, of course, will not be permitted to recover twice for the same damages, but the State is entitled to maintain its alternative

claims and may seek to show that the equitable abatement remedy it seeks is not obviated by the damages it seeks.

2. Misrepresentation Claims

The Altria Defendants argue that the State's claims against them under Minnesota's consumer protection laws fail, because the State cannot show the "Make the Switch" advertisements or Altria's October 25, 2018 letter to the FDA constituted unlawful misrepresentations. The State responds that Altria made affirmative misrepresentations in the advertisements it disseminated for Juul's "Make the Switch" campaign and in its October 25, 2018 letter to the FDA. Altria argues that discovery has proven that there were no such misrepresentations. Altria also argues that its letter to the FDA is protected under the *Noerr-Pennington* doctrine.

The State points to expert testimony from Dr. Ribisl that the Altria Defendants made unlawful misrepresentations when they disseminated JUUL products and advertisements that "communicat[e] [JUUL's] strength by weight," which "allows JUUL to represent that its products are 5% strength, instead of 5.9% strength by volume." (Ribisl Report at ¶¶ 319, 581.) The State's expert Dr. Hurt similarly opines that "JUUL's failure to incorporate industry practice measurement protocol (i.e., using mg/ml) is particularly problematic with younger users." (Hurt Report at 21.)

Minnesota's consumer protections laws are remedial in nature and are liberally construed in favor of coverage. *State v. Philip Morris Inc.*, 551 N.W.2d 490, 496 (Minn. 1996). This broad construction "reflect[s] a clear legislative policy encouraging aggressive prosecution of statutory violations." *Id*. The "overall tenor" of Minnesota's consumer

protection laws is "to maximize the tools available to stop the prohibited conduct." *Grp. Health Plan, Inc.*, 621 N.W.2d at 9.

Under Minnesota law, "one party to a transaction has no duty to disclose material facts to the other party." *Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014). "It is not enough" to introduce evidence "that the defendant omitted material information in a transaction." *Id.* at 696. "[A]n omission-based consumer fraud claim is actionable" only "when special circumstances exist that trigger a legal or equitable duty to disclose the omitted facts." *Id.* at 695. "Special circumstances" can arise when a party "has a confidential or fiduciary relationship with the other party," when failing to disclose additional material facts would make a party's earlier statement misleading, and when a party "has special knowledge of material facts to which the other party does not have access." *Id.*

The State argues Altria had a duty to disclose because it (1) made statements which, given additional material facts within its knowledge, were or became misleading; and (2) it had special knowledge of material facts. *Graphic Commc'ns Loc. 1BHealth & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014). Altria's dissemination of "Make the Switch" advertisements created a duty to disclose that JUUL's products were not safe alternatives to cigarettes or effective smoking cessation devices. Additionally, Plaintiff's evidence shows that during the relevant period, JUUL's advertisements and packaging omitted material facts regarding the cessation efficacy, addictive qualities, health risks and safety of JUUL products. (Ribisl Report at 300.)

Altria cites two federal cases for the proposition that the special knowledge theory does not apply to persons or entities not involved in the transaction. *In re TMJ Implants*

Prods. Liab. Litig., 880 F. Supp. 1311, 1318 (D. Minn. 1995); see also *Qwest Communications Co. v. Free Conferencing Corp.*, 990 F. Supp. 2d 953, 978-79 (D. Minn. 2014) (similar). Altria claims that there is no evidence it played a role in any transaction for Juul's products, but the State responds that Altria's advertisements on Juul's behalf could constitute involvement in transactions stemming from those advertisements. As for Altria's October 2018 letter to the FDA, the State argues that its expert Dr. Ribisl has opined that Altria's representation that mint was classified as a traditional tobacco flavor was deceptive and help stave off regulation for over a year. (Ribisl Report at ¶¶ 301-311.)

The Court finds that the State has created a genuine issue of material fact sufficient to withstand summary judgment on its claim of misrepresentation against the Altria Defendants. With respect to the *Noerr-Pennington* doctrine, the Court previously found that the doctrine "immunizes acts related to the constitutional right to petition the courts for grievance, unless the act is a mere sham." *Nielsen v. Bohnen*, 2013 WL 4504447, at *5 (Minn. Ct. App. Aug. 26, 2013). Given the State's expert evidence that Altria's letter to the FDA was deceptive, a fact issue exists whether the letter falls with the "mere sham" exception, and thus the *Noerr-Pennington* doctrine is not a proper basis to dismiss the State's claim on summary judgment.

3. The Public Nuisance Claim

The Altria Defendants claim that the State has no evidence to pursue a public nuisance claim against them, because the State has no evidence that they controlled Juul or the alleged nuisance Juul created. They further assert that the State has no evidence connecting them to any unlawful sales of Juul products to minors. They also join in Juul's motion for summary judgment on the public nuisance claim.

"Liability for damage caused by a nuisance turns on whether the defendant is *in control* of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance." *Tioga Pub. Sch. Dist. No. 15 of Williams Cnty. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993)). The Altria Defendants argue that they cannot be held liable for a public nuisance because they did not control Juul. The State responds that the instrumentalities responsible for the nuisance are not just those possessed by Juul. Inasmuch as the Altria Defendants used their own resources to create misleading advertisements which contributed to the problem of youth vaping, the State argues they can be held responsible for the resulting public nuisance.

The Court has already denied Juul's summary judgment motion on the public nuisance claim and incorporates that analysis here. To the extent that the Altria Defendants hold themselves outside of the conduct that may result in public nuisance liability for Juul, the Court finds that whether the Altria Defendants may be held responsible for the public nuisance claimed by the State raises a question of fact that cannot be resolved on summary judgment.

4. Negligence

At the motion to dismiss stage, this Court concluded that the State had sufficiently alleged a duty and breach with respect to the Altria Defendants—namely, that Altria "engag[ed] in a marketing campaign which was inherently appealing to youth." MTD Order at 13. The Altria Defendants now argue that discovery has proved otherwise. They assert that the Make a Switch advertisements were indisputably sent only to adult smokers. In response, the State relies on its experts' opinions that the Make a Switch advertisements were unreasonably dangerous in their construction and appeal toward youth.

The Court finds that the State's evidence is sufficient to create a triable issue of fact on the State's negligence claims against the Altria Defendants.

5. Unjust Enrichment

Unjust enrichment requires that "a benefit be conferred by the plaintiff on the defendant." *Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 247 (Minn. Ct. App. 2011). Where the defendant allegedly received a benefit from a third party, but not the plaintiff, the claim fails as a matter of law. *See Strategic Energy Concepts, LLC v. Otoka Energy, LLC*, 2019 WL 1409313, at *12 (D. Minn. Mar. 28, 2019). The Altria Defendants argue that the State has no evidence that the State conferred any benefit on them, or that any Juul product purchaser made a payment to the Altria Defendants. The State points out that Altria owns a substantial share of Juul and contends that this is sufficient to create a triable issue of fact as to this issue. The Court agrees and denies summary judgment on unjust enrichment.

6. Civil Conspiracy

Finally, the Altria Defendants seek dismissal of the State's claim that they conspired with Juul to disseminate misleading information about JUUL products. "A conspiracy is a combination of persons to accomplish an unlawful purpose or a lawful purpose by unlawful means." *Harding v. Ohio Cas. Ins. Co. of Hamilton*, 41 N.W.2d 818, 824 (Minn. 1950). The Altria Defendants argue that this claim must be dismissed because they did not begin communicating with Juul until 2017, well after Juul entered the marketplace. They also argue that the State has no evidence that the Defendants made an agreement to accomplish something unlawful.

The State responds that a party can be held liable for tortious acts by co-conspirators that took place prior to its entrance into the conspiracy. "A person who joins an existing

conspiracy before its consummation, with knowledge of its existence and purpose, becomes a party to the conspiracy the same as if he had originally conspired, and is liable as such." *Harding*, 41 N.W.2d at 823. The State argues that it has offered sufficient evidence to create a triable issue of fact that the Altria Defendants assisted Juul by creating misleading and harmful advertising and are therefore liable for all prior actions of the conspiracy into which they entered in 2017.

The Court finds that the State has done enough to create a genuine issue of material fact as to the existence of a civil conspiracy. The motion for summary judgment as to this claim therefore is denied.

VI. Legal Standard for Excluding Expert Witnesses

Having addressed the parties' summary judgment motions, the Court turns next to the parties' motions seeking to limit or exclude expert testimony. Under Minnesota's evidentiary rules, to be admissible, all testimony, including expert testimony, must be relevant and its probative value must not be substantially outweighed by the risk of unfair prejudice. *See Doe v. Archdiocese of St. Paul and Minneapolis*, 817 N.W.2d 150, 164 (Minn. 2012); Minn. R. Evid. 402, 403. A decision to exclude expert testimony lies within the sound discretion of the court. *Benson v. N. Gopher Enterprises, Inc.*, 455 N.W.2d 444, 445 (Minn. 1990).

Rule 702 of the Minnesota Rules of Evidence sets the parameters for expert opinions to be admissible, including that (1) the expert must have pertinent expertise, (2) the opinions must have foundational reliability, (3) the opinions must be helpful to the jury, and (4) for opinions involving a novel scientific theory, the underlying scientific evidence must be generally accepted in the relevant scientific community. *Doe*, 817 N.W.2d at 164; Minn. R.

Evid. 702. On the fourth Rule 702 factor, Minnesota follows the *Frye–Mack* standard to determine the admissibility of expert testimony based on novel scientific techniques and principles. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). Under the *Frye–Mack* standard, the proponent of a novel scientific theory must establish the proper foundation for admissibility by showing (1) that the scientific theory is generally accepted in the applicable medical or scientific community, *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and (2) that the principles and methodology used are reliable. *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980).

All parties' expert motions were presented as motions to exclude all or significant parts of the challenged experts' testimony. To the extent the Court denies the motions to exclude, no party will be precluded from making appropriate objections to expert testimony as it is given at trial.

VII. State's Motion to Exclude Expert Testimony

The State of Minnesota moves to exclude or limit the testimony of defendants' experts Kevin Keller, Jonah Berger, Dominique Hanssens, Dennis Paustenbach, M. Laurentius Marais, Darius Lakdawalla, Kevin Murphy, Laurence Steinberg, and Ursula Winzer-Serhan. In response, Juul has withdrawn the challenged opinions of Drs. Steinberg and Winzer-Serhan, and the State's motion to exclude those portions of the opinions is therefore granted as unopposed. The opinions withdrawn by Juul include Sections V, VII, and VII from Dr. Steinberg's report and Section III.E from Dr. Winzer-Serhan's report.

The Court's has reviewed each of the contested motions as to Defendants' expert witnesses and rules as follows.

A. Dr. Kevin Keller

Dr. Keller, the tenured E.B. Osborn Professor of Marketing at Dartmouth College, recently served as Senior Associate Dean of Marketing and Communications at the Tuck School of Business at Dartmouth College. Dr. Keller has an M.B.A. with a marketing emphasis from Carnegie Mellon University, and a Ph.D. in marketing from Duke University. Juul retained Dr. Keller to analyze its marketing content and techniques over time and to rebut testimony from the State's proffered marketing experts. Dr. Keller offers opinions that Juul's marketing campaigns and techniques were consistent with modern marketing techniques to target adult consumers and not to target youth.

The State first argues that Dr. Keller is not qualified to offer opinions on whether Juul's marketing strategy targeted minors. In his deposition, Dr. Keller admitted that he had not taken or taught any classes on responsible marketing of age-restricted products. He also testified that he has never published papers on the targeting of underage consumers or given advice on how to avoid targeting them. Juul responds that the State has created an overly narrow category of required experience, as it is not clear that a class on marketing strategies that target underage consumers of addictive products even exists. Juul maintains that Dr. Keller is well-qualified to offer marketing opinions, as he has published and taught extensively about marketing strategy, and he has served as a marketing manager for a variety of companies, ranging from Disney to American Express. Juul claims the established methods for studying marketing methodologies are transferable across a range of products in the general market, and there is no reason to believe that tobacco products are unique. Lastly, Juul notes that Dr. Keller has published studies on various aspects of market targeting, including targeting by age group.

The State next argues that Dr. Keller's opinions will not assist the jury and that they lack foundational reliability, as he did not examine whether Juul targeted underage consumers, but instead focused on whether Juul targeted Millennials (people aged 25-36). Because he acknowledged that he did not look at any age segments beyond Millennials, the State contends his opinions will be unhelpful to the jury. The State further argues that Dr. Keller's opinions are not foundationally reliable, because he admitted that the same tactics may appeal to younger consumers (Gen Z) as well as Millennials, but he did no research to determine the marketing implications of those tactics for Gen Z. Because Defendants could have targeted minors as well as older age groups, the State contends that Dr. Keller's opinions that Millennials were targeted is not relevant to the question of whether minors were targeted, and therefore would not assist the jury in resolving that central question. Finally, the State argues that Dr. Keller is unqualified to opine on youth tobacco prevention, but that he has offered such opinions in the guise of opining on pricing and product placement.

Juul rejects the State's characterization of Dr. Keller's opinions, arguing that he appropriately considered, as part of his analysis, Juul's marketing and sales practices specifically aimed at avoiding youth. Furthermore, Juul argues, Dr. Keller's comparison of Juul's marketing approaches and content over time to those employed by brands targeting adult consumers is relevant to the question of whether Juul targeted youth.

Upon review of Dr. Keller's qualifications and opinions, the Court concludes that the State's challenges to his testimony go more to weight than to admissibility and do not rise to the level that would justify precluding Dr. Keller from testifying at trial. The State is welcome to cross-examine Dr. Keller about any and all deficiencies they claim exist in his

report or his resume. These challenges may be relevant to the trier of fact in deciding credibility, but they do not render Dr. Keller's opinions inadmissible. The motion to exclude Dr. Keller from testifying as an expert witness is denied.

B. Dr. Jonah Berger

Dr. Berger is a tenured professor at The Wharton School of the University of Pennsylvania. He teaches a variety of marketing related courses, including marketing management, viral marketing, and information processing. Dr. Berger has a Ph.D. in Marketing from Stanford University and a B.A. in Human Judgment and Decision Making, also from Stanford University. He has published over fifty articles and three books, and he has been recognized by the American Marketing Association as one of the most productive researchers in marketing. Juul retained Dr. Berger to opine about its marketing and social media engagement, and to critique the State's experts' opinions.

The State contends Dr. Berger's opinions on Juul's social media posts lack foundational reliability, because he failed to consider Juul's deletion of youth-related posts in the past. The State cites evidence that Juul deleted certain of its own posts because of their appeal to youth, and that Dr. Berger admitted he knew nothing about that. Likewise, the State notes that Dr. Berger also was unaware that Juul had gotten thousands of "earned" social media posts deleted due to their youth-oriented nature. The State concludes that Dr. Berger's analysis of Juul's sanitized social media is unreliable. The State further argues that Dr. Berger has no expertise in public health, tobacco control, youth nicotine prevention, or required warnings on nicotine advertisements. Furthermore, during his deposition Dr. Berger was unable to answer questions regarding subjects that were touched on in his expert

report. In sum, the State contends Dr. Berger's opinions should be ruled inadmissible under Rules 702 and 403.

Juul accuses the State of again taking an overly narrow view of relevant expertise to frame its argument. Juul argues that Dr. Berger is an expert in the use of social media and contends that he is the only expert retained in this matter with training and experience in social media marketing. Juul believes this qualifies Dr. Berger to opine on the steps taken by Juul to minimize youth engagement with social media content about Juul. Juul argues that any alleged lack of expertise in public health or tobacco control is not relevant to his marketing analysis. Lastly, Juul notes that Dr. Berger's expert report was extensive, and an inability to recall certain details during a deposition does not indicate any lack of expertise.

Having reviewed the evidence regarding Dr. Berger's qualifications and opinions, the Court concludes that the State's challenges to those qualifications and opinions do not rise to the level that would justify precluding him from testifying at trial. The State is welcome to cross-examine Dr. Berger about his qualifications and his opinions. The gaps in his background, knowledge, and recollection of his report all may be weighed by the trier of fact in deciding credibility, but they do not render Dr. Berger's opinions inadmissible.

The Court's role in ruling on a motion to exclude an expert is not to decide whether a party has found the best possible expert. The Court is confined to determining whether the specific expert retained by a party has offered an admissible, even if imperfect, expert opinion. Dr. Berger's opinion is within the bounds of what an expert in his field of marketing may be permitted to offer. The Court finds that he is qualified to opine on Juul's social media marketing strategy, and that he has met the minimum standard of explaining

the foundation for his opinion on the reasonableness of Juul's marketing practices. The State's motion to exclude Dr. Berger from testifying as an expert witness is denied.

C. Dr. Dominique Hanssens

Dr. Hanssens is a Distinguished Research Professor of Marketing at UCLA, with over forty years of experience in the marketing field. He has published seven books and numerous articles, and he has graduate degrees in marketing and management. Juul retained Dr. Hanssens to rebut the opinions and analyses of the State's expert, Dr. Ribisl.

The State's motion targets Section V of Dr. Hanssens' report, which critiques Dr. Ribisl's opinions. The State argues that Dr. Hanssens' expertise does not match up with that of Dr. Ribisl, and that Section V of his report should be excluded for lack of foundational reliability.

Dr. Hanssens' expertise is in marketing, while Dr. Ribisl is a trained psychologist. Unlike Dr. Ribisl, Dr. Hanssens is not an expert in tobacco control policy, tobacco regulatory science, or tobacco youth prevention. The State argues that Dr. Hanssens' lack of expertise in Dr. Ribisl's field has resulted in a flawed critique. More specifically, the State contends that Dr. Hanssens failed to appreciate the methodology used by Dr. Ribisl, that Dr. Hanssens fundamentally misunderstood Dr. Ribisl's report, and that this renders Dr. Hanssens' opinions unhelpful and likely to confuse the jury.

Juul disagrees that Dr. Hanssens misunderstood Dr. Ribisl's report or methodology. Rather, in Section V of his report, Dr. Hanssens explains why he believes the methodology employed by Dr. Ribisl—an ad-by-ad, content analysis of Juul's advertising—does not support the marketing opinions Dr. Ribisl seeks to offer. Dr. Hanssens sets out an additional

marketing analysis that Dr. Hanssens believes must be done to reach an accurate result, from a marketing standpoint.

After reviewing the evidence regarding Dr. Hanssens' opinions, the Court finds that the State's challenges to those opinions do not rise to the level that would justify precluding him from testifying at trial. Perhaps the trier of fact will conclude that Dr. Hanssens' expertise and critique do not meet Dr. Ribisl's expertise and opinions head-on, but that does not mean Dr. Hanssens is unqualified to offer his opinions at trial. Inasmuch as the State's expert Dr. Ribisl, an accomplished psychologist, has opined on the misleading nature of Juul's marketing approach, Juul is entitled to offer a critique of that methodology using methodological principles devised to study marketing. It will be for the jury to decide what weight, if any, to give to Dr. Hanssens' critique of Dr. Ribisl.

D. Dr. Dennis Paustenbach

Dr. Paustenbach is a board-certified toxicologist and certified industrial hygienist, with nearly 35 years of experience in occupational health, risk assessment, toxicology, and environmental engineering. He has written over 300 peer-reviewed articles in these fields, and he has experience in assessing the health effects of exposure to carcinogenic and noncarcinogenic chemicals. Juul retained Dr. Paustenbach to opine on the proper methodology for conducting risk assessments and the results of his risk assessment for Juul's products. Juul plans to use Dr. Paustenbach to rebut the opinions of the State's experts Drs. Griffiths, Hurt, and Harrell.

The State argues that Dr. Paustenbach is not qualified to offer his public health opinions that the benefits of Juul's products as a smoking cessation tool outweigh their potential harm to youth, because he is neither a physician nor an expert in nicotine

addiction. In the State's view, Dr. Paustenbach is merely parroting Juul's talking points, and his opinions will not be helpful to the jury. As a toxicologist, he has no expertise in balancing the relative harm of an addictive substance to new users with the relative benefits of that substance in helping current smokers to quit. The State further suggests that Dr. Paustenbach's extensive track record as an expert witness in cases involving the health effects of chemicals, always on behalf of industry, reflects that he is biased in favor of corporate defendants. The State does not, however, cite authority for excluding an expert witness for alleged bias.

In response, Juul contests the State's characterization of Dr. Paustenbach's opinions. Juul argues that Dr. Paustenbach does not seek to balance the relative harms of addiction and smoking cessation. Rather, Juul represents that it plans to call Dr. Paustenbach solely to rebut the State's claims on the toxicology and health effects of Juul products, which falls well within Dr. Paustenbach's area of expertise.

The Court has reviewed the evidence regarding Dr. Paustenbach's opinions and concludes that the State's challenges to those opinions do not rise to the level that would justify precluding him from testifying at trial. The State's experts will opine on the damaging nature of Juul's products to human health. Dr. Paustenbach, as an expert in toxicology, is qualified to critique this testimony, and he should be given an opportunity to do so. Juul has disavowed any intent to ask him to balance the harms of addiction and smoking cessation. The State is welcome to cross-examine Dr. Paustenbach about his qualifications, and those challenges may be weighed by the trier of fact in deciding credibility. The motion to exclude Dr. Paustenbach from testifying as an expert witness is denied.

E. Dr. Darius Lakdawalla

Dr. Lakdawalla is a healthcare economist, the Quintiles Chair in Pharmaceutical Development and Regulatory Innovation at the University of Southern California, and the Director of Research at the Leonard D. Schaeffer Center for Health Policy and Economics. Dr. Lakdawalla holds a Ph.D. in Economics from the University of Chicago. His expertise centers on the intersection of epidemiology and economics. Juul retained Dr. Lakdawalla to opine on tobacco control expenditures and their effect on the economic issues raised in this case. He critiques the State's experts' analyses of the harms suffered by Minnesota as a result of Juul's actions, opining that the State's experts have overstated the extent of harm and the costs involved in abating those harms.

The State argues that Dr. Lakdawalla is unqualified to offer opinions on statewide tobacco control programs as these are not the subject of his research. Of his 100+ peer-reviewed articles, only two related broadly to tobacco control, and neither of those two focused on comprehensive statewide tobacco prevention and control efforts. While Dr. Lakdawalla claimed to have expertise in tobacco addiction, he identified only one article he co-authored on that subject, evaluating whether people who started cholesterol therapy were more likely to quit smoking. The State further argues that Dr. Lakdawalla's opinions on tobacco control expenditures will not be helpful to a jury because his testimony consists of basic factual observations about spending levels, observations that the jury can make on its own. The State also objects that Dr. Lakdawalla's opinion is nothing more than an inadmissible legal conclusion, to the extent he opines that Minnesota has spent far less than the CDC recommends on tobacco control programs and that its tobacco control spending is a reason for the vaping crisis. At the same time, however, Dr. Lakdawalla disclaimed that

he was providing any causation opinion about the association between state tobacco control spending and tobacco use.

Juul responds that Dr. Lakdawalla's expertise as a healthcare economist qualifies him to critique the work of the State's expert, Dr. Chaloupka, who is also an economist. Juul contends that Dr. Lakdawalla has expertise on the economic analysis of tobacco control programs, and that critiquing Dr. Chaloupka's work in demonstrating the cost of such programs for the State's proposed abatement remedy falls squarely within Dr. Lakdawalla's expertise. Juul also argues that the State has misstated the extent of Dr. Lakdawalla's analysis. In Juul's view, Dr. Lakdawalla's discussion of Minnesota's historical trends in spending on tobacco control provides the factual underpinning for his critique of Dr. Chaloupka's analysis. Juul contends that this testimony would be helpful to the trier of fact.

Having reviewed the evidence regarding Dr. Lakdawalla's opinions, the Court concludes that the State's challenges to those opinions do not rise to the level that would justify precluding him from testifying at trial. The State's expert, Dr. Chaloupka, will testify on the damaging nature of Juul's products to human health, particularly with respect to youth vaping, and the State's expert witnesses will present their opinions on an abatement program designed to mitigate those damaging effects. Dr. Lakdawalla, as a healthcare economist, is qualified to critique the testimony of Dr. Chaloupka, as to the public investments in tobacco control needed to abate the rise in tobacco use and vaping by minors. The extent of his past work in tobacco control is open to cross examination, but it does not provide a basis to disqualify him from testifying. As for the objection that Dr. Lakdawalla's opinions may cross the line into the impermissible realm of offering legal

opinions, the Court will sustain appropriate objections at trial, if that should happen. Juul reaffirms that Dr. Lakdawalla will not attempt to establish an affirmative causal relationship between Minnesota's tobacco control spending and rates of e-cigarette use, and the Court accepts Juul at its word. The motion to exclude Dr. Lakdawalla from testifying as an expert witness is denied.

F. Dr. M. Laurentius Marais

Juul retained Dr. Marais, a specialist in applied mathematical and statistical analysis, including the analysis of data in the fields of biostatistics and epidemiology, to serve as a rebuttal witness to the State's expert Dr. Chaloupka. Dr. Marais offers an evaluation of the reliability of Dr. Chaloupka's analysis of Juul's market share. The State does not object to Dr. Marais's qualifications but argues that his critique of Dr. Chaloupka is internally inconsistent and should be excluded as lacking foundational reliability. Dr. Marais opines that Dr. Chaloupka's market share estimates for Juul both underestimate and overstate Juul's market share, which the State points out is contradictory. The State also criticizes Dr. Marais's failure to explain why he says Dr. Chaloupka's market share is underestimated, because he provides no analysis of the underlying survey methodology, nor does he identify any flaws in that methodology. The State also criticizes the data upon which Dr. Marais relies as inappropriate. As for Dr. Marais's opinion that youth users frequently misidentify Juul products, the State notes that he relies on a single, non-peer-reviewed, Juul-funded survey as his support.

Juul responds that Dr. Marais has appropriately relied on market data in performing his analysis of Dr. Chaloupka's market share opinions. Juul contends that Dr. Marais has explained the data upon which he relies, and why he believes it is more appropriate than the

data upon which Dr. Chaloupka relies. Juul also argues that the State misunderstands Dr. Marais's misattribution opinion. Juul states that it contracted a study, following meetings with the FDA, that showed its subjects were unable to correctly identify Juul products based upon images, including those subjects who claimed to have used Juul products. While Juul contracted the study, no Juul staff were involved in conducting the study, and the FDA agreed the research was appropriate. Thus, Juul does not agree that Dr. Marais's reliance on the study provides grounds for a foundational reliability challenge.

Having reviewed the evidence regarding Dr. Marais's opinions, the Court concludes that the State's challenges to those opinions do not rise to the level that would justify precluding him from testifying at trial. The challenges go more to weight than admissibility. The State is welcome to bring out its challenges through cross-examination. It will be for the trier of fact to determine what weight to assign to these opinions, as well as the opinions that Dr. Marais seeks to rebut.

G. Professor Kevin M. Murphy

Professor Murphy is the George J. Stigler Professor of Economics in the Booth School of Business and the Department of Economics at the University of Chicago, where he has taught for almost 40 years. He teaches courses in microeconomics, price theory, empirical labor economics, and the economics of public policy issues. Over the course of his career, Professor Murphy has authored or co-authored more than 75 scholarly articles on various topics in economics, including tobacco and drug control issues. Professor Murphy has been recognized for his work in economics by the American Economic Association, which awarded him the John Bates Clark Medal, and the MacArthur Foundation, which awarded him a MacArthur Fellowship. In addition to his position at the University of

Chicago, Professor Murphy is a Faculty Research Associate at the National Bureau of Economic Research and Co-Director of the Health and Human Capital Program within the Health Economics Initiative at the Becker Friedman Institute. Professor Murphy has been qualified as an expert in numerous state and federal cases, including cases involving issues of public health. Altria seeks to use Professor Murphy to rebut the State's expert, Dr. Chaloupka.

The State argues that Professor Murphy's opinions should be excluded for a variety of reasons. The State claims that he is not qualified to opine on tobacco control programs or expenditures, and that the opinions he offers lack foundational reliability and merely speculate that an unidentified, more directly targeted method exists to calculate the expenditures necessary to reduce youth and young adult vaping. The States also claims his "but for" opinion that Juul would have obtained services elsewhere if Altria had not provided them is an unqualified legal opinion. The State identifies a number of contradictions between Professor Murphy's reported opinions and his deposition testimony and asks the Court to find that his testimony would not be helpful to the jury.

Altria responds that Professor Murphy, a renowned economics expert, is well-qualified to rebut Dr. Chaloupka, in that his economics expertise qualifies him to rebut Dr. Chaloupka's estimate of expenditure elasticity. Altria argues that Professor Murphy's critique of Dr. Chaloupka's abatement estimate is based on facts and basic economics, not speculation. They contend that his opinions are foundationally reliable and should not be excluded.

The Court concludes that the State's objection rests primarily on Professor Murphy's claimed lack of expertise in the specialized field of tobacco control, but that objection goes

more to weight than to admissibility. If Professor Murphy has given contradictory opinions, the State no doubt will make hay with them during cross-examination. But that does not provide grounds to exclude his testimony altogether. Accordingly, the Court denies the State's motion to exclude Professor Murphy's opinions.

VIII. Defendants' Motions to Exclude Expert Testimony

Both Juul and the Altria Defendants move to exclude the testimony of the State's experts Dr. Kurt Ribisl and Dr. Frank Chaloupka. Juul also moves to exclude the testimony of the State's experts Dr. Melissa Blythe Harrell, Dr. Richard Hurt, Eric Lindblom, Dr. Anne Griffiths, and Dr. Frances Leslie. The Court begins with the two experts objected to by both Juul and Altria, Drs. Ribisl and Chaloupka.

A. Dr. Kurt Ribisl

Dr. Ribisl, a behavioral psychologist by training, has authored over 190 peer-reviewed publications and has been issued several competitive grants relating to tobacco product marketing, warnings, and sales, including e-cigarette products. Dr. Ribisl was "a contributing author to three United States Surgeon's General reports on tobacco use." *Juul MDL Case*, 2022 WL 1814440, at *37-*38 (rejecting motions to exclude Dr. Ribisl). Dr. Ribisl has conducted dozens of studies examining the effect of tobacco marketing and labeling on tobacco use, including youth tobacco use. Dr. Ribisl regularly teaches and lectures on these and other public health issues.

The State has identified Dr. Ribisl as an expert to testify about the existence of a vaping epidemic among Minnesota youth, about Juul's efforts to make its products appealing to youth, about Juul's youth prevention programs and their flaws, about Altria's contribution to Juul sales, and about Defendants' contribution to Minnesota's youth vaping

epidemic. Defendants contend that Dr. Ribisl's marketing, causation, and abatement opinions are flawed and should be excluded. They argue he has no practical occupational experience in marketing. They argue he lacks empirical evidence to support his opinions about the appeal of Juul's marketing to youth. They argue his causation opinions lack foundational reliability. They criticize his estimation of the number of Juul's advertisements with false and misleading messages viewed in the State of Minnesota. They criticize his reliance on document coders to apply his rubric to the documents produced in discovery. They also challenge the foundational reliability of his abatement opinions.

The Court finds Dr. Ribisl to be qualified to testify as an expert in tobacco use, marketing, and control measures, given his wealth of experience in the field. As with the experts identified by Defendants to rebut his opinions, the various objections made to his opinions go more to their weight than to their admissibility. Accordingly, the Court denies Defendants' motions to exclude Dr. Ribisl's opinions.

B. Dr. Frank Chaloupka

Dr. Chaloupka is Distinguished Professor Emeritus in the Division of Health Policy and Analysis, School of Public Health, the University of Illinois at Chicago ("UIC"). He specializes in the field of health economics, with an emphasis on the role of policy and environmental influences on health behaviors. For twenty years, until his retirement in mid-2021, Dr. Chaloupka was also the Director of the UIC Health Policy Center. He is also the founder of the Tobacconomics research program—an international collaborative research program exploring issues related to the economics of tobacco and tobacco control. Dr. Chaloupka has authored over 500 publications, including articles, book chapters, and reports. His tobacco-focused research includes studying the effects of tobacco control

policies and programs on tobacco use. He has served as an expert witness on behalf of the U.S. government and state attorneys general in previous tobacco-related litigation. The State retained Dr. Chaloupka to serve as a damages expert in support of its claim for the loss of past state tobacco control expenditures. He also has offered opinions on the State's claims for disgorgement and abatement.

Defendants argue that Dr. Chaloupka's opinions are fatally flawed, because he cannot say how many Minnesota youth started vaping using Juul products, or how many switched to Juul. Without proof that Defendants caused Minnesota youth to vape, Defendants argue the State's expert opinions do not hold water and should be excluded. They also argue that Dr. Chaloupka's regression analysis actually proves that their advertisements were not a factor.

The State responds that Defendants have not challenged Dr. Chaloupka's methodology or foundational reliability for his opinions on Minnesota's tobacco control expenditures; instead, Defendants argue the State cannot recover this measure of damages. The State notes that is a legal issue, not an admissibility issue. Likewise, Defendants do not challenge Dr. Chaloupka's methodology in coming to his opinions on Juul's revenues and profits; instead, they assert that disgorgement is not proper. The State notes that legal argument was not raised by summary judgment motion. As for Dr. Chaloupka's opinions on abatement and Juul's ITP reset, the State argues his opinions are well-founded.

The Court finds that Dr. Chaloupka is qualified to give the damages opinions he has prepared, and that the various challenges to them made by Defendants go to their weight, not their admissibility. Accordingly, Defendants' motions to exclude Dr. Chaloupka's opinions are denied.

C. Dr. Melissa Blythe Harrell

Dr. Harrell is a Professor of Epidemiology at the University of Texas Health Science Center. She received her doctorate degree in epidemiology from the University of Minnesota in 2003. Dr. Harrell has researched the prevalence and causes of e-cigarette use amongst youth, including the impact of factors like flavors, product design, peer influence and advertising. Dr. Harrell has edited three U.S. Surgeon General's Reports on tobacco use, including as Senior Editor for the 2016 Report on E-Cigarette Use among Young People, for which she also authored the chapter on the epidemiology of e-cigarette use. She has authored over 150 peer-reviewed publications in leading scientific journals, more than 85% of which are focused on e-cigarette and other tobacco product use amongst youth and young adults. The State has retained her to offer opinions about Juul's role in causing an epidemic of e-cigarette use among youth and young adults in Minnesota and nationwide. She also opines that Juul's conduct has caused an increase in cigarette and marijuana use among young people. She concludes that vaping serves as a "gateway" to a potential lifetime of cigarette smoking.

Juul challenges Dr. Harrell's opinions as using descriptive epidemiology, but the State responds that her methodology is used by the Center for Disease Control and is well recognized in her field. Juul also challenges Dr. Harrell's qualifications and claims that her opinions lack foundational reliability, but as with the other experts discussed above, the Court finds the objections go to weight, not admissibility. Juul is welcome to cross-examine Dr. Harrell to expose the flaws Juul claims to have found in her analysis, but the Court does not find those flaws rise to the level that would make her opinions inadmissible. Juul's motion to exclude Dr. Harrell's opinions is denied.

D. Dr. Richard Hurt

Before retiring in 2014, Dr. Hurt was director of the Nicotine Dependence Center at the Mayo Clinic in Rochester, Minnesota. Under his oversight, the Center treated tens of thousands of smokers seeking to overcome their nicotine addiction. Dr. Hurt served as a Professor of Medicine at the Mayo Clinic College of Medicine from 1995 to July 2014, where he remains Emeritus Professor of Medicine. Dr. Hurt has authored over 200 scientific publications relating to tobacco and nicotine, including epidemiological and toxicology issues. His research projects have included randomized clinical trials of a wide range of pharmacologic treatments for nicotine dependance. Dr. Hurt has served as a consultant to the FDA's Drug Abuse Advisory Committee and testified before that Committee in 1991. The State retained Dr. Hurt to opine that Juul products can serve to initiate or sustain nicotine addiction in users, that Juul enhanced the nicotine delivery of its products to make the delivery of high levels of nicotine palatable, that Juul's vaping devices are not safe, and that they have not undergone proper trials to establish their safety and efficacy. Dr. Hurt also opines that treatment of nicotine addiction in adolescents is especially difficult, making it advisable to prevent their initiation of nicotine addiction.

Juul seeks to exclude Dr. Hurt's opinions on addiction and toxicity, arguing that he failed to conduct an "abuse liability assessment." The State responds that an expert does not have to engage in the analysis required by the FDA under a PMTA application for the expert's opinions to be admissible at a trial of negligence and public nuisance claims. A similar argument was rejected in the MDL. *See Juul MDL Case*, 2022 WL 1814440, at *7 (failure of an expert to engage in what Juul argues is the appropriate abuse liability standard does not mean that the expert's opinions are incorrect or excludable).

The Court finds that Dr. Hurt is qualified to opine on issues of nicotine addiction. The fact that he did not follow the precise analysis that Juul claims is proper does not make his analysis inadmissible. It may provide grounds for Juul to cross-examine, but it does not provide a basis for exclusion of his testimony. Juul's motion to exclude Dr. Hurt's opinions is denied.

E. Eric Lindblom

Mr. Lindblom is a Senior Scholar at Georgetown Law's O'Neill Institute for National & Global Health Law, where he previously served as the Director for Tobacco Control and Food & Drug Law. He was the Director of the Office of Policy at the FDA's Center for Tobacco Products, and he was General Counsel and Director for Policy Research at the Campaign for Tobacco-Free Kids, where he worked on tobacco control legal and policy issues since 1998. He has authored numerous studies relating to a broad range of tobacco control issues, including those pertaining to e-cigarettes. He has expertise in analyzing the regulatory and public health laws regarding tobacco products, including the overlapping elements that are protective of youth, adult consumers, and public health. The State retained him to offer opinions about the regulatory framework that existed when JUUL designed, developed, marketed, and sold its e-cigarettes, including tobacco control laws and regulations, common law standards for manufacturers, tobacco control court rulings and settlement agreements, and research-based tobacco control findings and expert recommendations.

Juul argues that Mr. Lindblom's opinions regarding e-cigarette industry standards are inadmissible because they lack foundation and are improper legal opinions. Juul contends that he "made up" what he claims to be the relevant standards. The State disagrees

and points out that his opinions were found admissible in the MDL. *See Juul MDL Case*, 2022 WL 1814440 at *30.

The Court finds that Mr. Lindblom is qualified to opine on issues of the regulatory framework for Juul's products. Juul's objections to his testimony do not render his opinions inadmissible, but may provide useful grounds for cross-examination. Juul's motion to exclude Mr. Lindblom's opinions is denied.

F. Dr. Anne Griffiths

Dr. Griffiths is a board-certified pediatric pulmonologist. After completing medical school at the University of Minnesota, she did her pediatric residency training at Northwestern University's Feinberg School of Medicine – Children's Memorial Hospital. She followed that with a Pediatric Pulmonary medicine fellowship at the Ann and Robert H. Lurie Children's Hospital of Chicago. Since completing her pediatric pulmonary fellowship, she has been working as a pediatric pulmonologist in Minnesota at Children's Respiratory & Critical Case Specialists, where she treats children with respiratory illnesses. She is the author of multiple published scientific articles on the history of e-cigarettes or vaping and the lung injuries it causes. As part of her clinical practice, Dr. Griffiths uses toxicology and epidemiology on a regular basis. The State has retained her to offer opinions on the health hazards of Juul's products. She opines that Juul's products cause injury to the lungs, impair and cause dysfunction in the immune system, increase the risk of infections, threaten control of asthma, cause and exacerbate COPD, and cause heart disease and risk of cancer.

Juul objects that Dr. Griffiths' opinions that e-cigarettes are harmful to users' health fall outside her expertise as a pulmonologist, and that they are not generally accepted. Juul

also objects that Dr. Griffiths is not qualified to offer opinions on marketing and product warnings. Juul criticizes Dr. Griffiths' reliance on her own clinical experience as well as her research in the medical literature. The State responds that Dr. Griffiths' opinions are well within her expertise, and that she is not an outlier in opining about the health risks of e-cigarettes, as many studies and medical organizations share the same view.

The Court concludes that Dr. Griffiths is qualified to testify about the health effects of e-cigarettes, and that her opinions are not subject to exclusion. Juul's objections to her testimony go toward weight, not admissibility. Juul's motion to exclude Dr. Griffiths' opinions is denied.

G. Dr. Frances Leslie

Dr. Frances Leslie is a neuropharmacologist with over forty years of research experience concerning addictive substances, particularly nicotine and tobacco. Dr. Leslie obtained a B.Sc. in pharmacology and a PhD in neuropharmacology. She joined the University of California, Irvine in 1981 and retired as a Full Professor in 2019. She is currently a Professor Emerita in the Department of Pharmaceutical Sciences at UC Irvine. Dr. Leslie has published over 150 peer-reviewed articles and was identified as one of the top 2% of scientists in her discipline in 2020. While most of Dr. Leslie's research focuses on animals, she has published some interdisciplinary papers including human subjects. She is currently part of a team investigating the impacts of the constituents of electronic cigarettes on brain activation. Dr. Leslie co-authored the 2016 U.S. Surgeon General's report on E-Cigarette Use Among Youth and Young Adults. Dr. Leslie has served on numerous National Institutes of Health ("NIH") study sections throughout her career. The State retained Dr. Leslie to opine on the impact of nicotine on the adolescent brain, including

mental health issues. Among other things, she is of the opinion that adolescents are more sensitive than adults to the rewarding effects of nicotine, that clinical studies have shown a strong association between e-cigarette and alcohol use in adolescents, and that adolescent nicotine use effects changes in brain structure that persist into adulthood. To reach her opinions, she conducted a full review of the published medical literature and applied her special learning and expertise to the issue.

Juul challenges Dr. Leslie's opinions on the grounds that she failed to conduct her own empirical studies or meta-analyses of the literature. Juul claims her opinions are foundationally unreliable because she primarily relies on animal studies, and she does not set forth a basis to translate the results in rodent studies to human adolescents. The State counters that Dr. Leslie's report contains an entire section captioned "Why Animal Data is Relevant to Human Experience." (Leslie Rep. at § III.) She has extrapolated from animal studies for her entire career, and her approach is not a novel scientific methodology. The State notes that this same argument was rejected in the MDL. *See Juul MDL Case*, 2022 WL 1814440, at *11 (challenged experts relied on more than the few studies Juul attacked in its motion to exclude, and the studies identified "provide grounds for cross-examination, not exclusion").

The Court concludes that Dr. Leslie is qualified to testify, and that her opinions are not subject to exclusion before trial. As the MDL Court concluded, Juul's challenges to her opinions "provide grounds for cross-examination, not exclusion." *Id.* In other words, the issues raised by Juul go toward weight, not admissibility. The motion to exclude Dr. Leslie's opinions is denied.

L.J.M.