

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PERRIGO COMPANY ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 1:17-CV-737

HON. ROBERT J. JONKER

ORDER CANCELLING BENCH TRIAL

This matter is scheduled for bench trial beginning Tuesday, May 26, 2020. Under the terms of the Final Pretrial Order, the trial will likely last about two weeks. As the Court informed the parties at the Final Pretrial Conference in February, the Court was fortunate to find a two-week block for a civil trial.

The scheduling all happened before the Covid-19 pandemic. The parties are now concerned that the trial cannot proceed safely on the current schedule, and they have outlined their respective positions in a Joint Motion for a status conference. ECF No. 312. Both sides agree that the trial should not proceed in-person as scheduled. Both sides also want a successor trial date as soon as practicable. The government is willing to consider trial by video, or scheduling of trial in shorter segments, if those things will facilitate trial yet this calendar year. Perrigo opposes a video trial.

The Court does not necessarily share the pessimism of the parties regarding the ability to conduct a bench trial safely in late May and early June. The Eastern District of Kentucky just completed an 8-week jury trial that began in late February and ran uninterrupted to

completion. <https://www.courier-journal.com/story/news/crime/2020/04/26/federal-jury-sits-through-8-week-trial-amid-coronavirus-pandemic/3028236001/> However, the Court acknowledges that having counsel travel from two hard hit metropolitan areas, and the need to work with witnesses coming from multiple out-of-town locations creates unique challenges. And since counsel on both sides agree that an in-person bench trial should not begin on May 26, the Court will not second guess the parties. It will simply accede to the request and will cancel the in-person trial.

The Court has considered the possibility of a video trial, as the government proposes. The Court has certainly gotten considerable practice with video hearing technology over the past six weeks or so. Based on that experience, the Court is satisfied that many hearings have been able to proceed without compromising the fairness and effectiveness of the process, and without infringing on the constitutional or statutory rights of the parties or the public. But based on its experience, the Court is convinced a bench trial like this one cannot effectively proceed by video. The Court has seen effective direct and cross examination of witnesses by video in some limited situations. But the Court cannot imagine a trial where all witnesses were examined by remote video, particularly with the mass of exhibits in play here and the technical complexity of some of the issues. Credibility judgments are also easier to make in most cases with in-person testimony. An in-person trial will be essential, in the Court's view, to assure fairness, effectiveness and efficiency for the parties, the Court and the public.

As for rescheduling, the Court will need to address this with the parties as its own post-Covid calendar begins to take shape. Criminal jury trials always have priority because of constitutional and statutory speedy trial rights. Because no criminal jury trials have been proceeding over the past 6 weeks in this District, the Court expects a spike of demand to follow reconstitution of the jury trial

process. Unfortunately, all civil cases will have to wait for that anticipated backlog to clear. And a civil case requiring two weeks to try may be particularly hard to schedule before the end of the year, though the Court will certainly endeavor to do so, using all available resources, which may even include a new District Judge if the President's current nominee wins Senate confirmation.

The Court has also considered the government's proposal for a segmented trial if the calendar permits shorter windows of time than the full two weeks on consecutive days. On the one hand, it may be that certain witness groups or issues could be bundled and presented in multiple segments. But waiting a little longer for a consecutive day schedule will provide a significantly better process than trial in segments. Many of the issues overlap. And the Court's understanding of the case is certainly better if it can focus without interruption for the time necessary to complete trial, rather than engage the material in multiple rounds.

The Court sees nothing to be gained by a telephone status conference at this time. As the post-Covid calendar begins taking shape, the Court will convene a status conference to discuss logistics and timing.

Accordingly, the Court **GRANTS** the parties' Joint Motion to the extent of **CANCELLING** the bench trial set to begin May 26, 2020, and **DENIES** it in all other respects. The Court will convene a status conference when it is in a position to provide the parties with meaningful guidance on a rescheduled trial date.

IT IS SO ORDERED.

Dated: April 28, 2020

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE