

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Rebecca Kelly Slaughter, Acting Chairwoman**
 Joseph J. Simons
 Noah Joshua Phillips
 Rohit Chopra
 Christine S. Wilson

In the Matter of

Altria Group, Inc.
a corporation;

and

JUUL Labs, Inc.
a corporation.

DOCKET NO. 9393

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION TO
RESCHEDULE THE EVIDENTIARY HEARING**

Complaint Counsel respectfully asks the Commission to deny Respondents’ Altria, Inc. and Juul Labs, Inc.’s (“JLI”) motion to postpone the evidentiary hearing currently scheduled for April 13, 2021 an additional 90 days due to the ongoing COVID-19 pandemic. Respondents unrealistically speculate that a three-month delay will allow the Chief Administrative Law Judge to conduct an in-person evidentiary hearing and incorrectly argue that the FTC Act does not allow for evidentiary hearings to be conducted via videoconference. The public interest weighs heavily in favor of ensuring that Commission litigation proceed efficiently and without delay, and Respondents have failed to show good cause to postpone the evidentiary hearing.

FACTUAL BACKGROUND

On December 20, 2018, Altria acquired a 35% non-voting interest in JLI. On March 8, 2019, Altria filed an HSR application to convert that interest to voting securities and to appoint

three members of JLI's Board. The Commission filed an administrative complaint on April 1, 2020, and an evidentiary hearing was scheduled for January 5, 2021. Due to "the declared public health emergency associated with the outbreak of the coronavirus disease 2019 ("COVID-19"), the Commission entered a series of orders staying the administrative proceedings. Order Regarding Scheduling in Light of Public Health Emergency (April 3, 2020); Second Order Regarding Scheduling in Light of Public Health Emergency (April 13, 2020); Third Order Regarding Scheduling in Light of Public Health Emergency (June 3, 2020). The evidentiary hearing was rescheduled to begin on April 13, 2021. Scheduling Order (Aug. 4, 2020). On November 23, 2020, the parties submitted a joint stipulation concerning remote depositions protocols under which the parties agreed that "[i]t is presumed that all depositions in this case shall be Remote Depositions." Stip. and Order Concerning Remote Deposition Practices and Protocols (Nov. 23, 2020). The Chief Administrative Law Judge entered the stipulation on November 24, 2020. Order Entering Stipulation (Nov. 24, 2020). On January 12, 2021, Complaint Counsel and Respondents filed a joint motion to extend certain deadlines in the scheduling order to accommodate an additional week of fact discovery *without* changing the date of the April 13, 2021 evidentiary hearing. Joint Mot. For First Revised Scheduling Order (Jan. 12, 2021). The Chief Administrative Law Judge granted that motion and entered a revised scheduling order maintaining the April 13, 2021 hearing date. Order Granting Joint Motion to Revise Scheduling Order and First Revised Scheduling Order (Jan. 13, 2021).

Complaint Counsel have worked diligently to prepare for the possibility of conducting an evidentiary hearing via videoconference, especially in view of the email all counsel received from the Office of Administrative Law Judges noting the "likely event that the evidentiary hearing in this matter will be conducted by video conference." *See* Email from Dana L. Gross to

Counsel (Jan. 11, 2021) (submitted as Respondents' Exhibit A). Respondents now seek a further three-month delay to these proceedings.

ARGUMENT

Pursuant to Rule 3.41(b), "the hearing will take place on the date specified" by the Commission. 16 C.F.R. § 3.41(b). However, the Commission may order a later date for the commencement of the hearing "upon a showing of good cause." *Id.*; 16 C.F.R § 3.21(c)(1) (similar). Respondents argue that two sets of changed circumstances justify delaying the hearing: the FDA's approval of two highly effective vaccines and the increased severity of the pandemic. These facts do not justify a further delay. While the vaccine news is promising, the timetable for the Chief Administrative Law Judge and his staff, witnesses, and counsel to receive vaccinations is highly uncertain at this time. And, while Complaint Counsel shares Respondents' concerns regarding the severity of the pandemic, these concerns can be remedied by proceeding with a virtual hearing. Given the Complaint's substantial allegations of ongoing harm, public interest considerations counsel against any further delays.

A. There is Substantial Uncertainty Surrounding the Feasibility of Conducting an In-Person Trial in July 2021

Respondents argue for a postponement of trial until July 2021 because "the anticipated duration of pandemic is no longer indefinite." Resps.' Mot. at 5. Quoting Dr. Anthony Fauci, Respondents insist that the country will achieve herd immunity in late June or early July, and suggest that the parties could then proceed with an in person trial, apparently as if the pandemic had never occurred. At best, Respondents' argument is so speculative that, if the Commission grants Respondents' motion now, it is likely that Respondents would file an identical motion asking the Commission for another three-month delay before the rescheduled hearing starts. At

worst, Respondents' motion reflects a deliberate misunderstanding of the concept of herd immunity, the vaccine, and COVID-19 itself.

First, "herd immunity" is not the elimination of a virus. Instead, it is the level of immunity that must exist within a population so that the spread of the virus begins to decline.¹ Thus, even if, as Respondents speculate, the country reaches herd immunity this summer, COVID-19 will still threaten the population because the risk of contagion, albeit lower, will still exist.

Second, the timeline for vaccine distribution remains highly uncertain as ongoing vaccination efforts face substantial logistical hurdles and delays.² Additionally, participants in this evidentiary hearing – many of whom are young, healthy, and able to work from home – may be among the last to receive the vaccine.³ Third, while the vaccines will reduce the risk of COVID-19 for those who are vaccinated, they will still be able to carry and to transmit the virus to unvaccinated individuals. Or, as explained in another context:

[S]omeone who has been vaccinated still has a reasonably high likelihood of picking up the disease at a party and giving it to their immunocompromised friend later in the week. That means the vaccinated probably shouldn't go to parties where there are unvaccinated people while the pandemic rages.⁴

¹ WebMD, *What is Herd Immunity?*, available at <https://www.webmd.com/lung/what-is-herd-immunity#1>.

² See Rebecca Robbins et al., *Here's Why Distribution of the Vaccine Is Taking Longer Than Expected*, The New York Times (December 31, 2020), available at <https://www.nytimes.com/2020/12/31/health/vaccine-distribution-delays.html>; Costas Paris, *Supply-Chain Obstacles Led to Last Month's Cut to Pfizer's Covid-19 Vaccine-Rollout Target*, The Wall Street Journal, (Dec. 3, 2020), available at <https://www.wsj.com/articles/pfizer-slashed-its-covid-19-vaccine-rollout-target-after-facing-supply-chain-obstacles-11607027787>.

³ See Christina Maxouris, *'Healthy, young' Americans will likely get Covid-19 vaccine in mid- to late summer, experts say*, CNN (Jan. 25, 2021); available at <https://www.cnn.com/2021/01/25/health/us-coronavirus-monday/index.html>.

⁴ Rick Egan, *Can vaccinated people still spread Covid-19? Here's what we know*, The Salt Lake Tribune (January 14, 2021), available at <https://www.sltrib.com/news/2021/01/14/can-vaccinated-people/>.

Thus, even if everyone attending the hearing is vaccinated, an in-person trial would be irresponsible: individuals could transmit the virus among themselves and one or more of them could then contribute to the spreading of the virus to unvaccinated individuals not involved in the trial. Additionally, an in-person trial would require several third-party witnesses to travel to Washington, DC and stay in local hotels. Quite reasonably, these witnesses may fear the risks associated with participating in an in-person trial, and Complaint Counsel has no reason to believe a three-month delay would assuage these fears.

Based on this evidence, it is highly speculative that the parties will be able to proceed with an in person trial in July. Instead, the burdens of an April trial or a July trial will be the same: as Dr. Fauci has suggested, public health precautions such as social distancing and wearing facemasks could continue through the end of 2021 and into 2022, even after a vaccine is widely distributed.⁵

B. Respondents' Objections to a Virtual Evidentiary Hearing Are Baseless

Next, Respondents argue that the FTC Act requires the Chief Administrative Law Judge to conduct an in-person evidentiary hearing. Resps.' Mot at 7. Complaint Counsel disagrees. As a preliminary matter, Respondents' contention that the FTC Act contemplates in-person trials is misleading at best. The FTC Act was passed in 1914, well before many households had telephone lines, let alone the internet connections and video conferencing software we enjoy today. Given these advances in technology and the unprecedented nature of the current global pandemic, courts have frequently ordered that trials proceed remotely via videoconference even over the objection of one or both parties. *See Gould Electronics Inc. v. Livingston Cty. Rd.*

⁵ Carolyn Crist, *WebMD Poll: Vaccine, Experts Will Mark the Panedmic's End*, WebMD Health News (Nov. 9, 2020), available at <https://www.webmd.com/lung/news/20201109/webmd-poll-vaccines-experts-will-mark-pandemics-end#:~:text=Anthony%20Fauci%2C%20MD%2C,2021%20and%20into%202022.>

Comm'n, 470 F. Supp. 3d 735, 737-38 (E.D. Mich. 2020); *Liu v. State Farm Mut. Auto Ins. Co.*, No. 2:18-1862-BJR, 2020 U.S. Dist. LEXIS 237718 at *2 (W.D. Wa. Dec. 17, 2020); *Argonaut Ins. Co. v. Manetta Enters., Inc.*, No. 19- cv-0482 (PKC), 2020 U.S. Dist. LEXIS 103625 *5-6 (E.D.N.Y., June 11, 2020).

In particular, Respondents argue that an in-person evidentiary hearing is necessary in order for the Chief Administrative Law Judge to make credibility determinations. Courts have consistently rejected similar arguments in other bench trials. *Flores v. Town of Islip*, 2020 U.S. Dist. LEXIS 159252 *5 (E.D.N.Y., Sept. 1, 2020) (“[T]he issues of prejudice that could arise in the jury context are simply absent [in a bench trial.]”); *Raffel Sys. v. Man Wah Holdings*, 2020 U.S. Dist. LEXIS 212350 at *8 (E.D. Wisc., Nov. 13, 2020) (“[T]his is a bench trial where there is a single fact-finder as opposed to a jury trial with multiple fact-finders needing to hear and view the testimony.”). Indeed, courts have found that trial by videoconference “permits the Court and counsel to view a witness live ‘along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration.’” *Gould*, 470 F. Supp. 3d at 743 (quoting *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 970 (D. Minn. Mar. 13, 2020)); *see also Xcoal Energy Res. v. Bluestone Energy Sales Corp.*, No. 18-819-LPS, 2020 U.S. Dist. LEXIS 149779 at *9 (D. Del. Aug. 18, 2020) (“The Court believes (and is every day observing) that able counsel can effectively examine witnesses without being in the same room, providing the Court the evidence it needs to make necessary factual findings, including credibility determinations.”); *Ranson v. Herrera*, 1:11-cv-01709-LJO-EPG (PC), 2018 U.S. Dist. LEXIS 1326, at *3 (E.D. Ca. Jan. 28, 2018) (“However, because a witness testifying by video is observed directly with little, if any, delay in transmission, video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings.”). In fact, some courts have concluded that remote bench trials may even

carry some benefits, including one court finding that it “will be able to get an even closer look at . . . witnesses’ faces via videoconference than [it] could during an in-person hearing.” *Raffel*, 2020 U.S. Dist. LEXIS 212350 at *8.

Respondents further argue that “even if the hearing could be conducted remotely, the reality is that the trial team’s *preparations* before and during the hearing could not be.” Resps.’ Mot. at 7. Yet Respondents fail to articulate any reason why trial preparation tasks such as witness and exhibit preparation require in-person interaction. As Respondents acknowledge, Complaint Counsel has been engaged in full-time telework since March 2020, and in this time, has adjusted and prepared for the “new normal” that is conducting our work, including hearings and trials, remotely.⁶ It defies reason for Respondents to argue that although the entire legal profession has adapted to remote proceedings and preparations for proceedings, the five law firms representing Altria and JLI are unable to do so.⁷

While Complaint Counsel acknowledges that conducting a remote evidentiary hearing presents a unique set of challenges, these challenges are far from insurmountable. The FTC staff has already conducted a partially remote trial in *Federal Trade Commission v. Peabody Energy Corporation*, 2020 U.S. Dist. LEXIS 184154 (E.D. Mo., Sept. 29, 2020). As the *Peabody* court stated,

. . . the parties worked furiously to exchange written discovery, take dozens of depositions, and prepare hundreds of pages of briefing and thousands of exhibits—all within the extraordinary constraints imposed by a global pandemic.

⁶ See Ian Conner, *2020: Remote work with real results*, Fed. Trade Comm’n (Jan. 5, 2021 at 9:42 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/01/2020-remote-work-real-results>.

⁷ Complaint Counsel observes that Respondents’ Counsel has participated in depositions from the same location as the witness on several occasions, suggesting that Respondents have found a feasible solution to conduct in-person preparation.

In considering the Motion, the Court has been the beneficiary of those herculean efforts, as both sides ably distilled their complex arguments into coherent, comprehensible presentations over the course of a nine-day evidentiary hearing, followed by proposed findings of fact and conclusions of law and closing arguments.

Id. at *5. In sum, Respondents' personal preference for an in-person hearing is insufficient to demonstrate good cause for a further delay of at least three-months.

C. The Public Interest Supports Proceeding with the Evidentiary Hearing as Scheduled

Finally, Respondents argue that a delay will neither prejudice Complaint Counsel nor harm the public interest. They suggest that it is reasonable to infer that the Commission's decision not to file for an injunction in federal court indicates that "there is no particular urgency associated with the issues here." Resps.' Mot. at 8. These arguments are unavailing.

At the outset, we note that Respondents' argument is directly contrary to the Commission's rulemaking and policy statements of the past dozen years. In 2009, the Commission adopted Rule 3.11, which established the Commission's firm commitment to speedy hearings. This rulemaking was necessitated by "the long-standing concerns of the courts and the bar that the Commission's Part 3 adjudicatory process has been too protracted." 74 Fed. Reg. 1804 (Jan. 13, 2009). *See also* 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules) ("... the Commission's Part 3 adjudicatory process has long been criticized as being too protracted.").

Since 2009, the Commission has religiously adhered to this commitment, even during the pandemic. As the Commission has explained, "[t]he public has an interest in ensuring that Commission litigation proceeds efficiently and without delay. This interest is substantial." *In re Axon Enterprise, Inc.*, No. 9389, 2020 WL 1041712, at *4 (F.T.C. Feb. 27, 2020).

Moreover, as the Complaint in this matter alleges, Respondents' conduct results in ongoing harm to consumers through the elimination of current and future price, innovation, and shelf-space

competition. Compl. ¶¶ 62-69. This harm to consumers continues, and Respondents continue to reap economic benefits, *each day* that this anticompetitive transaction remains in place.

Contrary to Respondents' assertion, the Commission's decision to file this action before the Administrative Law Judge has no bearing on the severity of issues alleged nor the presence of ongoing consumer harm. *See e.g., Axon*, 2020 WL 1041712 at *4 (denying motion for delay of evidentiary hearing in action alleging anticompetitive consummated acquisition). In light of the serious allegations of ongoing harm in the Complaint, the public interest supports proceeding with the evidentiary hearing on April 13, 2021 as scheduled. Accordingly, Respondents' motion fails to show good cause for a three-month delay.

CONCLUSION

For the foregoing reasons, Respondents' motion should be denied.

Dated: January 28, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2021, I served the foregoing document via email to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

January 28, 2021

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