

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

LOUISIANA REAL ESTATE APPRAISERS BOARD

Docket No. 9374. Order, February 12, 2021

Order granting Complaint Counsel's motion to lift the stay imposed on this proceeding and order that the evidentiary hearing commence ten weeks after issuance of the order lifting the stay.

ORDER LIFTING STAY AND RESUMING ADMINISTRATIVE PROCEEDINGS

Complaint Counsel have moved that the Commission lift a stay that it has imposed on this proceeding and order that the evidentiary hearing commence ten weeks after issuance of the order lifting the stay. Complaint Counsel's Motion to Lift the Stay and Set Hearing Date (Dec. 18, 2020), *supplemented by* Supplement to Complaint Counsel's Motion to Lift the Stay and Set Hearing Date (Jan. 19, 2021). Respondent Louisiana Real Estate Appraisers Board ("Respondent" or "the Board") does not oppose the lifting of the stay, but argues that in light of concerns raised by the COVID-19 pandemic, the evidentiary hearing should commence no sooner than August 16, 2021. Respondent Louisiana Real Estate Appraisers Board's Opposition in Part to Complaint Counsel's Motion to Lift the Stay and Set Hearing Date (Dec. 28, 2020) ("Response").¹ As explained below, we have determined to grant Complaint Counsel's motion.

Background

On April 11, 2019, the Board filed a complaint with the United States District Court for the Middle District of Louisiana, seeking, *inter alia*, a declaration that the Commission had violated the Administrative Procedure Act in issuing an Opinion and Order² denying Respondent's motion to dismiss the complaint in this proceeding and dismissing Respondent's third and ninth affirmative defenses. The Board asked the court to hold unlawful and set aside the Commission's April 10, 2018 Order and to order the Commission to dismiss its administrative complaint. On July 29, 2019, the District Court issued an order staying all pending activity in this administrative proceeding.³ In recognition of the District Court's action,

¹ Respondent, however, repeatedly suggests that a later trial date may ultimately prove necessary. Response at 3 n.3, 10. According to Respondent, "no in-person administrative proceeding should take place until all participants, including the Administrative Law Judge, witnesses, counsel, and staff, are vaccinated against COVID-19." *Id.* at 10.

² *La. Real Estate Appraisers Bd.*, Docket No. 9374, Opinion and Order of the Commission (Apr. 10, 2018), https://www.ftc.gov/system/files/documents/cases/d09374_opinion_and_order_of_the_commission_04102018_redacted_public_version.pdf.

³ *La. Real Estate Appraisers Bd. v. United States FTC*, 2019 WL 3412162 (M.D. La. July 29, 2019).

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the Commission subsequently issued its own order staying the proceeding pending further judicial action and a further order from the Commission.⁴

The Commission appealed the action of the District Court. On October 2, 2020, the United States Court of Appeals for the Fifth Circuit vacated the District Court's stay order and remanded to the District Court with instructions to dismiss the Board's lawsuit for lack of jurisdiction.⁵ The appellate court subsequently rejected the Board's petitions for panel rehearing and for rehearing *en banc*, as well as the Board's motion to stay issuance of the appellate court's mandate. A request for the Supreme Court to stay the Commission's proceeding pending Supreme Court review also has been denied. The Fifth Circuit's mandate has issued. Consequently, only the Commission's own August 5, 2019 stay currently bars resumption of this administrative proceeding. Complaint Counsel's Motion asks us to lift that stay.

Analysis

Respondent does not oppose lifting the stay. Response at 1. Although Respondent has now petitioned the Supreme Court to review the Fifth Circuit's order lifting the judicial stay, Petition for a Writ of Certiorari, *La. Real Estate Appraisers Bd. v. United States FTC*, No. 20-1018 (Jan. 22, 2021), 2021 WL 307477, Commission rules provide that the "pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding: (i) [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs" Commission Rule of Practice 3.41(f)(1), 16 C.F.R. § 3.41(f)(1). Under the circumstances presented, continuing a stay of this proceeding would conflict with the public interest in expeditiously resolving the Commission's complaints, see 16 C.F.R. § 3.1, and promptly providing guidance to Respondent and to third parties in similar circumstances. And if the allegations in the Complaint are established, a continued stay could undermine the public interest in maintaining competition.⁶ For these reasons, the Commission does not find good cause to continue to stay this proceeding.

Respondent argues that beginning the evidentiary hearing in a time frame consistent with Complaint Counsel's request would be "unsafe for all participants and prejudicial to [Respondent's] ability to effectively prepare and present its case." Response at 1. We share Respondent's concern for the health of participants and support staff involved with our adjudicative proceedings. Indeed, our initial response to the COVID-19 pandemic was to issue a series of short stays of ongoing adjudicative proceedings.⁷ As circumstances that called for these

4 *La. Real Estate Appraisers Bd.*, Docket No. 9374, Order Staying Administrative Proceeding, (Aug. 5, 2019), https://www.ftc.gov/system/files/documents/cases/d9374_lreab_commission_order-august_5-2019.pdf.

5 *La. Real Estate Appraisers Bd. v. United States FTC*, 976 F.3d 597 (2020).

6 Respondent's assurance that it will not enforce the rule that is the source of dispute until this proceeding is resolved, Response at 3, 9, does not preclude the possibility of competitive harm from the ongoing effects of Respondent's known regulatory policies.

7 See, e.g., *Altria Group, Inc.*, Docket No. 9393, Order Regarding Scheduling in Light of Public Health Emergency (Apr. 3, 2020), <https://www.ftc.gov/system/files/documents/cases/d09393orderstayinghearing.pdf>; *Altria Group, Inc.*, Docket No. 9393, Second Order Regarding Scheduling in Light of Public Health Emergency (Apr. 13, 2020),

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stays continued, we realized we must move forward with the business of the agency. We allowed our last health-related stays to lapse after July 6, 2020. In consultation with the Office of the Secretary and the Chief Administrative Law Judge, we have been thinking carefully about how to conduct evidentiary hearings via video conferencing. And we now find ourselves positioned to move forward with virtual trials in a way that is in the interest of the health and safety of the litigants and consistent with due process.

Respondent has suggested no reason why safety concerns would arise if the hearing were conducted by video conferencing and trial preparations were accomplished via video and/or telephone. Rather, Respondent has questioned the effectiveness and fairness of such mechanisms. Respondent has asserted that unless it can prepare its witnesses “in person” it will be unable to “fairly and fully present witness testimony,” *id.* at 2; *see also id.* at 5, but it has not demonstrated that witness preparation could not be accomplished by telephone and/or video mechanisms. Indeed, such means are not unknown even in non-pandemic times when a witness faces travel difficulties or schedule conflicts. Respondent’s counsel have also suggested that consultation with their client “in real time” might be necessary for effective cross-examination, *id.* at 2, 5, but they have not shown why this could not be accomplished electronically, with flexible trial administration. Respondent’s additional basis for requiring an in-person trial – that this proceeding is likely to involve some questions of fact, resulting in need to assess witness credibility, *id.* at 3-4 – does not distinguish this proceeding from other cases in which courts have found that they could adequately assess witness credibility, discussed below, or from trial practice in general.⁸

Respondent cites three instances where individual courts have delayed trials because of health concerns, *id.* at 7, but numerous courts have been conducting virtual trials during the pandemic,⁹ and administrative agencies have similarly had experience with utilizing video conferencing for their hearings.¹⁰ In particular, courts and agencies have found that current

https://www.ftc.gov/system/files/documents/cases/d09393_commission_order_ext_staypublic_0.pdf; *Altria Group, Inc.*, Docket No. 9393, Third Order Regarding Scheduling in Light of Public Health Emergency (June 3, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_commission_third_order_regarding_scheduling_in_light_of_public_health_emergency.pdf. As noted above, this proceeding had already been stayed for other reasons.

⁸ Matters that do not involve disputed issues of material fact may be resolved by summary judgment or summary decision, without need for a trial. Fed. R. Civ. P. 56; 16 C.F.R. § 3.24.

⁹ *See, e.g., Liu v. State Farm Mut. Auto Ins. Co.*, No. 2:18-1862-BJR, 2020 U.S. Dist. LEXIS 237718 at *2, 9 (W.D. Wa. Dec. 17, 2020) (ordering that multi-day jury trial take place via video conference due to COVID-19); *Flores v. Town of Islip*, No. 2:18cv3549, 2020 WL 5211052 (E.D.N.Y. Sept. 1, 2020) (ordering multi-day bench trial of Voting Rights Act case via video conference); *Vitamins Online, Inc. v. HeartWise, Inc.*, No. 2:13-cv-00982-DAK, 2020 WL 3452872 (D. Utah Jun. 24, 2020) (ordering bench trial of Lanham Act case via video conference; trial took fifteen days); *Financial Guaranty Ins. Co. v. Putnam Advisory Co.*, No. 12-cv-7372 (LJL), 2020 WL 3428136 (S.D.N.Y. Jun. 23, 2020) (with parties’ consent, court found that COVID-19 constituted compelling circumstances for trial via video conference; trial took twelve days); *Centripetal Networks, Inc. v. Cisco Systems, Inc.*, No. 2:18cv94, 2020 WL 3411385 (E.D. Va. Apr. 23, 2020) (ordering that bench trial take place via video conference in a complex patent case; trial took 22 days).

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video conference technology, properly used, can meet the requirements of fairness and due process for a trial or hearing. For example:

- The district court in *Liu v. State Farm* found good cause to conduct a jury trial via simultaneous video transmission due to COVID-19. 2020 U.S. Dist. LEXIS 237718 at 5-7. Simultaneous video transmission would meet the requirement of Federal Rule of Civil Procedure 43(a) that the trial be conducted in “open court” because “near instantaneous transmission of testimony with no discernable difference between it and ‘live’ testimony [would] allow[] a juror to judge credibility unimpeded.” See also *Warner v. Cate*, No. 1:12-cv-1146-LJO-MJS, 2015 U.S. Dist. LEXIS 102043 (E.D. Ca. Aug. 4, 2015) at *3 (“Because a witness testifying by video is observed directly with little, if any, delay in transmission, ... courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings.”)
- The district court in *Gould Elecs. v. Livingston Cty. Rd. Comm’n*, 470 F.Supp.3d 735, 741 (E.D. Mich. 2020), observed that during the current pandemic “videoconference technology has been implemented successfully to conduct bench trials in cases involving varying degrees of complexity.” Finding that it was not currently safe to conduct a trial in a courtroom, and that it was unclear when it would become so, the court ordered a video conference trial, specifically rejecting one party’s claim that such a trial would violate due process. *Id.* at 742. Simultaneous video transmission would allow 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.” *Id.* at 743, quoting *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020).
- In *MPLX Ozark Pipe Line LLC*, 171 FERC ¶ 63018, 2020 WL 2119359 (May 4, 2020), FERC’s Chief Administrative Law Judge ordered a virtual hearing. The ALJ observed that judges had successfully conducted various types of conferences and oral arguments via video conference, including one with over a hundred participants, and that any unique concerns regarding preparation of particular witnesses for the hearing could be raised before the ALJ. 171 FERC at ¶ 66141. See also *William Beaumont Hosp. & Mich. Nurses Ass’n*, 370 NLRB No. 9, 2020 WL 4754961 (Aug. 13, 2020) (respondent failed to show that a hearing held by video conference would deny it due process).

10 See Admin. Conf. of the U.S., *Best Practices for Using Video Teleconferencing for Hearings* (Dec. 5, 2014), <https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings>; Admin. Conf. of the U.S., *Agency Use of Video Hearings: Best Practices and Possibilities For Expansion* (Jun. 17, 2011), <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>.

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Reviewing these precedents, we conclude that the Administrative Law Judge can conduct an adjudication via video conferencing consistent with due process and fundamental fairness. Given the challenges of the COVID-19 pandemic, including its continued spread and the uncertain duration of its status as a public health crisis, we have determined that the Commission should utilize the available technology in preference to subjecting this case to further delay. Consequently, inclusion in this Order of provisions specifying that the trial be conducted via video conferencing appropriately addresses Respondent's objections to the hearing date and enables the Commission to move forward with the business of the agency.

Accordingly,

IT IS HEREBY ORDERED that

- (1) Complaint Counsel's Motion to Lift the Stay and Set Hearing Date is **GRANTED**;
- (2) the stay of this proceeding imposed by the Commission's order of August 5, 2019, is lifted;
- (3) the evidentiary hearing in this proceeding before the Chief Administrative Law Judge of the Federal Trade Commission is rescheduled to commence on April 20, 2021, at 10:00 a.m.;
- (4) the Chief Administrative Law Judge shall establish a revised prehearing schedule that will permit the evidentiary hearing to commence on the date set by the Commission;
- (5) the evidentiary hearing in this proceeding will take place virtually via live web streaming; and
- (6) public access to the evidentiary hearing in this proceeding, to the extent permitted by any *in camera* orders, shall be allowed only via telephone or live web streaming, in either instance, only for monitoring purposes.

By the Commission.

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IN THE MATTER OF

PEPSICO, INC.

Docket No. C-4301. Order, February 18, 2021

Letter Order approving respondent's motion to extend the term of the Monitor's agreement for an additional two years.

LETTER APPROVING THE THIRD AMENDMENT TO THE MONITOR'S AGREEMENT

Megan H. Hurley, Esq.
Senior Vice President and General Counsel
PepsiCo Beverages North America

Eric A. Croson
Ann Arbor, Michigan 48108

Re: *In the Matter of PepsiCo, Inc.*, Docket No. C-4301

Dear Ms. Hurley and Mr. Croson:

This letter serves to approve the Third Amendment to the Monitor's agreement submitted to the Commission on January 14, 2021. The Amendment extends the term of the Monitor's agreement for an additional two years.

By direction of the Commission.