

Interlocutory Orders, Etc.

IN THE MATTER OF

**ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.***Docket No. 9393. Order, February 22, 2021*

Order denying respondent's motion for a further, 90-day continuance, citing continuing health concerns engendered by the pandemic.

ORDER GRANTING CONTINUANCE

This proceeding involves the Commission's challenge to a series of agreements, along with the resulting partial purchase transaction, between Altria Group, Inc. ("Altria") and Juul Labs, Inc. ("JLI"), collectively "Respondents." Through those agreements and the transaction, Altria allegedly ceased to compete in the United States market for closed-system electronic cigarettes in return for a substantial ownership interest in JLI. Following a series of continuances ordered by the Commission in recognition of the dangers posed by the COVID-19 pandemic, the evidentiary hearing in this proceeding is scheduled to begin on April 13, 2021.¹

Respondents have now moved for a further, 90-day continuance, citing continuing health concerns engendered by the pandemic. Motion to Reschedule the Evidentiary Hearing Due to the Ongoing Pandemic (Jan. 15, 2021) ("Respondents' Motion" or "Respondents' Motion to Reschedule the Evidentiary Hearing"). Complaint Counsel oppose Respondents' Motion.

The FTC's Rules of Practice authorize the Commission to order a later hearing date in an adjudicative proceeding "upon a showing of good cause." 16 C.F.R. § 3.41(b); *see also* 16 C.F.R. § 3.21(c)(1). As discussed below, we conclude that the evidentiary hearing in this proceeding may be safely and fairly conducted electronically, without posing health risks or prejudicing any party. However, due to conflicts posed to the current hearing schedule by the timing of another evidentiary hearing, scheduled to commence on April 20, 2021, we have determined that there is good cause to defer commencement of the evidentiary hearing in this proceeding until June 2, 2021.

Respondents argue that retaining the April 13 date and holding an in-person hearing "would create a non-trivial risk of COVID-19 infection for the Chief ALJ, the witnesses, Complaint Counsel, Respondents' counsel, and their support teams—many of whom are unlikely to be vaccinated by April." Respondents' Motion at 2. 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 this and other

¹ *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 ("Third Stay Order").

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pending adjudicative proceedings.² As circumstances that called for these 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.

Respondents have 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. Instead, Respondents have questioned the effectiveness and fairness of such mechanisms. Thus, Respondents have asserted that “a virtual hearing is no substitute for an in-person trial,” and “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.” *Id.* at 7. Although Respondents have identified a number of trial, trial-supportive, and pretrial activities that they would prefer to conduct in person, *id.* at 2, 4, 6-8, Respondents have not demonstrated that virtual alternatives would not suffice. Indeed, numerous courts and agencies have been turning to virtual trials as the best mechanism for dealing with the pandemic.³ Respondents stress that credibility determinations may play an important role in the evidentiary hearing, *id.* at 2, 7-8, but they have not shown that credibility cannot be adequately assessed through video conferencing. A number of courts have found that video conference technology, properly used, can meet the requirements of fairness and due process. 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 WL 8465987. 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

2 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), https://www.ftc.gov/system/files/documents/cases/d09393_commission_order_ext_staypublic_0.pdf; *Altria Group, Inc.*, Docket No. 9393, Third Stay Order.

3 See, e.g., *Liu v. State Farm Mut. Auto Ins. Co.*, No. 2:18-1862-BJR, 2020 WL 8465987 (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). 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, observing 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).

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instantaneous transmission of testimony with no discernable difference between it and ‘live’ testimony [would] allow[] a juror to judge credibility unimpeded.” *Id.* at *2.

- 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 *Warner v. Cate*, No. 1:12-cv-1146-LJO-MJS, WL 4645019 (E.D. Ca. Aug. 4, 2015) at *3, the court explained that “[b]ecause 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.”⁴

Finally, Respondents argue that delaying the evidentiary hearing by 90 days would not harm the public interest. Respondents’ Motion at 8. The Commission’s scheduling determinations reflect its commitment to conduct its adjudications expeditiously, to the extent practicable and consistent with the requirements of law. See 16 C.F.R. § 3.1. Prompt resolution of adjudicative proceedings speeds resolution of the particular disputes at issue and provides timely guidance to others facing similar issues. And if the allegations in the Complaint are established, an unwarranted delay of the hearing could undermine the public interest in maintaining competition. Respondents argue that any benefit from the Complaint’s proposed remedy would take years to materialize. Respondents’ Motion at 8-9. That, of course, is no basis for adding an unnecessary increment to the time before competitive benefits result.

We conclude that the Chief Administrative Law Judge can conduct an adjudication via video conferencing consistent with due process and fundamental fairness and that the pandemic-related arguments advanced in Respondents’ Motion do not constitute good cause for further

⁴ Respondents also suggest—without actually asserting—that the FTC Act prohibits virtual trials. Respondents’ Motion at 7 (“The FTC Act contemplates in-person trials.”). Respondents point to Section 5(b) of that statute, 15 U.S.C. § 45(b) (as well as identical language in Section 11(b) of the Clayton Act, 16 U.S.C. § 21(b)), which provides for issuance of a Commission complaint “containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint” and gives the respondent “the right to appear at the place and time so fixed.” Obviously, the chosen language does not—and in 1914 could not—advert to video conferencing, but the statute is satisfied by determinations fixing a hearing to be conducted virtually and providing for Respondents to appear electronically.

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delay. 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 unnecessary delay. Consequently, inclusion in this Order of provisions specifying that the trial be conducted via video conferencing appropriately addresses Respondents' objections to the hearing date and enables the Commission to move forward with the business of the agency.

Nonetheless, a more modest continuance than requested by Respondents has become necessary. The federal courts have recently lifted a long-running stay in another FTC adjudicative proceeding, and the evidentiary hearing in that matter has been scheduled to commence on April 20, 2021.⁵ To avoid conflict between the two hearings, we have determined to defer commencement of the evidentiary hearing in this proceeding until June 2, 2021. This should allow both evidentiary hearings to proceed without overlapping.

Accordingly,

IT IS HEREBY ORDERED that

- (1) Respondents' Motion to Reschedule the Evidentiary Hearing is **GRANTED IN PART**;
- (2) the evidentiary hearing in this proceeding before the Chief Administrative Law Judge of the Federal Trade Commission is rescheduled to commence on June 2, 2021, at 10:00 a.m.;
- (3) 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;
- (4) the evidentiary hearing in this proceeding will take place virtually via live web streaming; and
- (5) 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.

⁵ *La. Real Estate Appraisers Bd.*, Docket No. 9374, Order Lifting Stay and Resuming Administrative Proceedings (Feb. 12, 2021).

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IN THE MATTER OF

TRAFFIC JAM EVENTS, LLC,

AND

DAVID J. JEANSONNE II

Docket No. 9395. Order, March 1, 2021

Order extending the withdrawal of this matter from adjudication for the purpose of considering a Consent Proposal.

ORDER EXTENDING WITHDRAWAL OF MATTER FROM ADJUDICATION UNTIL APRIL 5, 2021

On December 28, 2020, the Commission issued an Order withdrawing this matter from adjudication for the purpose of considering a Consent Proposal. Pursuant to that Order, this matter is scheduled to revert to Part 3 adjudicative status on Monday, March 1, 2021. To facilitate further consideration of the Consent Proposal, the Commission has decided to extend the withdrawal of this matter from adjudication.

Accordingly,

IT IS ORDERED THAT, pursuant to 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b)(2015), this matter will remain withdrawn from adjudication through April 2, 2021, after which it will return to adjudicative status.

By the Commission.