

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, May 13, 2022

Order extending the time to rule on Complaint Counsel’s motion to take official notice of a decision by the Food and Drug Administration.

ORDER EXTENDING TIME FOR RULING ON MOTION FOR OFFICIAL NOTICE OF FDA DECISION

On March 31, 2022, Complaint Counsel moved for the Commission to take official notice of a March 24, 2022 decision by the Food and Drug Administration (FDA) to grant marketing authorization to certain e-cigarette devices (“FDA Decision”). Complaint Counsel’s Motion Requesting Official Notice of FDA Decision (“Motion”). On April 7, 2022, Respondents opposed the Motion (“Opposition”). Commission Rule 3.22(a) provides that the Commission shall rule on a motion within 45 days of the last-filed answer or reply to the motion, if any, unless there is good cause to extend the deadline. As explained herein, we find that there is good cause to extend the time for ruling on the Motion until issuance of a final opinion and order in this matter.

Commission Rule 3.43(f) authorizes the Commission to take “official notice” of any material fact that is not subject to reasonable dispute in that it is either generally known within the Commission’s expertise, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A material fact is one “that might affect the outcome of the suit under the governing law[.]” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Complaint Counsel explain that the FDA Decision granted marketing authorization to Logic Technology Development LLC (“Logic”) for certain e-cigarettes and associated e-liquids under the Logic Pro and Logic Power brands. Motion at 3 and Ex. A pp. 1, 5. Complaint Counsel argue that the FDA Decision is material to this proceeding because, “[m]uch like Altria’s discontinued MarkTen cigalike product, the newly approved Logic products do not contain nicotine salts nor are they pod-based products.” Motion at 5. Thus, according to

Complaint Counsel, the FDA’s approval of the Logic products tends to refute the ALJ’s conclusions that Altria’s products, several of which lacked nicotine salts and were not pod-based, lacked conversion potential¹ and therefore would have been unlikely to receive FDA marketing authority (known as “PMTA approval”). *Id.* According to Complaint Counsel, the ALJ credited testimony that the cigalike format of Altria’s MarkTen products would not appeal to a sufficient pool of smokers to generate sufficient conversion potential, that the lack of nicotine salts was a problem for conversion, and that these issues raised serious concerns for receiving FDA approval. Motion at 5-6. Complaint Counsel assert that the FDA’s decision to authorize two Logic products

¹ In this context, “conversion potential” refers to the ability of a product to convert adult smokers away from combustible cigarettes.

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that lacked nicotine salts, one of which is a cigalike, “severely undercuts” Respondents’ claims that Altria’s existing products would have been unable to obtain PMTA approval. *Id.* at 6.

Respondents do not contest the accuracy of Complaint Counsel’s proffered records insofar as they evidence the FDA Decision. Rather, Respondents argue that Complaint Counsel unfairly denied them the opportunity to develop context around the Logic products by failing to make available for deposition an executive of the parent company that owns Logic. Opposition at 1. Respondents state that this failure deprived them of the opportunity to develop evidence of the performance, consumer appeal, and PMTA process for the Logic products. *Id.* at 1-2.

Further, Respondents question Complaint Counsel’s contention that the FDA Decision is material to this proceeding. *Id.* at 2. Specifically, say Respondents, absent discovery and context, the authorization of the Logic products has no bearing on whether entirely different products would have obtained authorization, and in any event no bearing on the ALJ’s determination that there was a consensus within Altria at the time of the investment at issue that its on-market products would not have obtained PMTA approval. *Id.*

We find the FDA Decision to be not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned, as required by Rule 3.43(f). Under our precedent, official notice may be taken of references “generally accepted as reliable.” *In re Basic Research, LLC*, 2006 WL 271518, at *1 (F.T.C. Jan. 23, 2006) (citing *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984)). “Matters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and ‘records and reports of administrative bodies.’” *In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004) (citing *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003)). The fact of the FDA Decision, as reported in FDA documents, is not subject to reasonable dispute, and Respondents do not attempt to dispute it.

A fact must also be material for us to take official notice of it. Rule 3.43. Whether the FDA Decision is material depends in part on what that decision implies about PMTA approval prospects for Altria’s former cigalike products and its former products lacking nicotine salts. These issues, and this assessment, will benefit from the full briefing and oral argument that will accompany Complaint Counsel’s appeal. The Commission will weigh Respondents’ concerns about the scope of discovery taken of Logic when considering whether to grant the Motion and what inferences, if any, to draw from the FDA Decision.

Accordingly,

IT IS HEREBY ORDERED THAT the deadline for ruling on Complaint Counsel’s Motion for Official Notice of FDA Decision is **EXTENDED** until the issuance of the Commission’s final opinion and order in this matter.

By the Commission.

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IN THE MATTER OF

**HACKENSACK MERIDIAN HEALTH, INC.,
AND
ENGLEWOOD HEALTHCARE FOUNDATION***Docket No. 9399. Order, May 24, 2022*

Order granting Complaint Counsel's motion to withdraw the matter from adjudication to allow the Commission to determine whether further relief is warranted.

ORDER WITHDRAWING PROCEEDING FROM ADJUDICATION

On August 4, 2021, the United States District Court for the District of New Jersey granted the Federal Trade Commission's motion for a preliminary injunction against the proposed merger between Respondents Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation until completion of this administrative proceeding. *FTC v. Hackensack Meridian Health, Inc.*, No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021). The Third Circuit Court of Appeals affirmed the district court's injunction on March 22, 2022. *FTC v. Hackensack Meridian Health, Inc.*, No. 21-2603, 2022 WL 840463 (3d Cir. Mar. 22, 2022). On March 31, 2022, Respondents notified Complaint Counsel that they were abandoning their transaction. Respondents mutually terminated their merger agreement and withdrew their Hart-Scott-Rodino Notification and Report Forms on April 5, 2022.

Complaint Counsel have moved the Commission to withdraw the matter from adjudication to allow the Commission to determine whether further relief is warranted. Respondents, on the other hand, seek dismissal of the Complaint on the bases that the administrative action is now moot, that further proceedings would be unnecessary and wasteful, and that there is no need for any additional relief. Because Respondents support immediate dismissal, they oppose withdrawing the case from adjudication. The question of whether further relief may be warranted, however, may bear on the issues presented. Therefore, we find that it is in the public interest to withdraw the matter from adjudication and stay all proceedings in this matter for 60 days while the Commission considers the potential need for additional relief.

Accordingly,

IT IS HEREBY ORDERED that this matter is withdrawn from adjudication until July 15, 2022, and that during the period the matter is withdrawn from adjudication all proceedings in this matter before the Chief Administrative Law Judge are stayed and all pending deadlines in this matter are tolled.

By the Commission.