

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Altria Group, Inc.  
a corporation,**

**and**

**JUUL Labs, Inc.  
a corporation**

**Docket No. 9393**

**RESPONDENTS' MOTION TO ENFORCE THE DISCOVERY CUTOFF AND  
EXCLUDE THE DECLARATION OF {CONFIDENTIAL}**

Pursuant to Rule 3.22 of the Commission Rules of Practice, 16 C.F.R. § 3.22,

Respondents respectfully move the Court for an order (1) enforcing the February 8, 2021

deadline for the close of fact discovery with respect to the proposed deposition of {CONFIDENTIAL}

; and (2) excluding {CONFIDENTIAL}

declaration from the record of this case pursuant to Additional Provision 9 of the August 4, 2020 Scheduling Order.

As set forth in the attached memorandum, despite diligent efforts, Respondents have not been given the opportunity to depose {CONFIDENTIAL}. Complaint Counsel has offered no assurance that ongoing efforts to arrange for {CONFIDENTIAL} deposition will be successful, and they are unable to provide any timeframe for a possible deposition other than that they hope to be able to schedule it before the evidentiary hearing begins.

A proposed order is attached.

Dated: February 22, 2021

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**Docket No. 9393**

**PROPOSED ORDER**

Upon Respondents' Motion to Enforce the Discovery Cutoff and Exclude the Declaration of {CONFIDENTIAL}, and having considered the papers in support and in opposition thereto, it is hereby

ORDERED, that due to the passing of the February 8, 2021 deadline for the completion of fact discovery in this matter, the deposition of {CONFIDENTIAL}

shall not be scheduled, and it is further

ORDERED that the declaration of {CONFIDENTIAL} obtained by Complaint Counsel is inadmissible and may not be used in this matter pursuant to Additional Provision 9 of the August 4, 2020 Scheduling Order.

Date: \_\_\_\_\_

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

**UNITED STATES OF AMERICA  
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**In the Matter of**

**Altria Group, Inc.  
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a corporation**

**Docket No. 9393**

**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO ENFORCE  
THE DISCOVERY CUTOFF AND EXCLUDE THE DECLARATION OF  
{CONFIDENTIAL}**

**INTRODUCTION**

Pursuant to Additional Provision 9 of the August 4, 2020 Scheduling Order, “no declaration shall be admitted unless a fair opportunity was available to depose the declarant.” Complaint Counsel has informed Respondents that they intend to introduce into evidence a declaration made by {CONFIDENTIAL}

Despite diligent efforts, however, Respondents were not given the opportunity to depose {CONFIDENTIAL} before the February 8 fact discovery cut-off in this case. This is because he resides in Switzerland and Swiss law prevents him from sitting for a remote deposition there.

Complaint Counsel has informed Respondents that they still intend to introduce {CONFIDENTIAL} declaration and that they are making efforts to arrange for his deposition. Exs. E and G. Doing so will involve motions practice before this Court, before the Commission, and before a federal judge, followed by a request for assistance to Swiss authorities and a possible decision by Swiss authorities allowing the deposition to go

forward in some manner.

Complaint Counsel has offered no assurance this effort will be successful, and they are unable to provide any timeframe for a possible deposition other than that they hope to be able to schedule it before the evidentiary hearing begins. At the same time, Complaint Counsel has refused to acknowledge that Respondents will be prejudiced by the taking of {CONFIDENTIAL} deposition significantly out of time.

Respondents respectfully ask the Court to enforce the discovery cut-off and exclude {CONFIDENTIAL} declaration from the case. An important purpose of discovery cut-offs is to allow the parties to prepare for trial with a known fact record. *Bradley v. Denver Health & Hosp. Auth.*, No. 08-cv-02587-PAB-KMT, 2010 U.S. Dist. LEXIS 85870, at \*25 (D. Colo. March 22, 2010) (“purpose of a discovery cutoff is to structure the litigation to alleviate a burden of continually producing evidence and to assure adequate time to prepare for trial.”); *see also Chrysler Int’l Corp. v. Chemaly*, 280 F.3d 1358, 1362 (11th Cir. 2002) (affirming grant of protective order blocking use of deposition testimony taken after discovery deadline).

## ARGUMENT

Complaint Counsel produced a copy of {CONFIDENTIAL} declaration during discovery in this case. That declaration makes various statements about {CONFIDENTIAL} business and speculates about, among other things, what happened to Respondent JLI’s business after Altria made a unilateral decision to discontinue certain products. It is essential that Respondents have an opportunity to depose {CONFIDENTIAL} to test the basis for these assertions. Without such an opportunity, Respondents will be denied a fair hearing if his declaration is admitted into the record. *See Soto v. Castlerock Farming & Transp., Inc.*, No. 1:09-cv-00701-AWI-JLT, 2013 U.S. Dist. LEXIS 179899, at \*43 (E.D.

Cal. December 23, 2013) (striking declaration because defendant “would be unduly prejudiced if Plaintiff was permitted to fail to produce deponents for a full and meaningful deposition but still be permitted to rely upon untested declarations”).

Respondents and {CONFIDENTIAL} counsel began discussing deposition scheduling on December 21, 2020. Ex. A. In early January, {CONFIDENTIAL} counsel agreed to a January 28, 2021 deposition date. Ex. A. In cooperation with {CONFIDENTIAL} counsel, a subpoena ad testificandum was served on January 13, 2021. Exs. A and B. On January 25, 2021, just three days before the deposition, {CONFIDENTIAL} counsel informed Respondents that {CONFIDENTIAL}, who was in the United States when he signed his declaration, had relocated to Switzerland and that he would not participate in a remote deposition due to restrictions under Swiss law. Ex. D. {CONFIDENTIAL} counsel also informed us that {CONFIDENTIAL} would not be able to travel to a country where he could lawfully participate in a remote deposition because of travel restrictions related to COVID-19. Ex. D.

As a result, Respondents were unable to depose {CONFIDENTIAL} as scheduled on January 28. Respondents’ counsel have remained in touch with {CONFIDENTIAL} counsel to see if his situation has changed, but counsel has provided no indication that {CONFIDENTIAL}

would be able to travel and has provided no new date for the deposition. Ex. F. The fact discovery cut-off in this case was on February 8.

On January 26, one day after learning {CONFIDENTIAL} would be unavailable for his scheduled deposition, Respondents wrote to Complaint Counsel requesting that, if Complaint Counsel intended to rely on {CONFIDENTIAL} declaration, they secure {CONFIDENTIAL} availability for a deposition before the close of fact discovery. Ex. C.

Respondents also requested that Complaint Counsel agree not to introduce {CONFIDENTIAL}

{CONFIDENTIAL} declaration if he could not be deposed prior to the close of fact discovery, consistent with the requirements of the Scheduling Order. Exs. C and E. Complaint Counsel did neither of these things. Exs. E and G.

Complaint Counsel and Respondents' counsel met and conferred regarding this issue on February 10 and 16. Ex. H. Respondents' counsel expressed our willingness to take {CONFIDENTIAL} deposition slightly out of time if it could be arranged, as we have agreed to do with two other third parties.<sup>1</sup> During the parties' discussion on February 16, Respondents' counsel suggested February 26 as the cut-off for this deposition, the last business day of the month and nearly three weeks after the discovery cut-off in the Scheduling Order. Ex. G.

This would allow Respondents to take the deposition and consider the testimony obtained in that deposition before proceeding to the pre-hearing steps that Respondents must take in March. These include deposing Complaint Counsel's expert, who cites {CONFIDENTIAL} declaration in his report, which Respondents hope to do in early March; serving exhibit and witness lists on March 11; serving Respondents' expert report on March 15; and filing motions *in limine*, if any, by March 25. It would be prejudicial to Respondents to have to take these steps not knowing if they will even have a chance to depose a fact witness Complaint Counsel intends to rely on.

Complaint Counsel has refused to agree to any date as a cut-off for {CONFIDENTIAL} deposition. Instead, they seek an indefinite amount of time to try to arrange the deposition, including up to the beginning of the evidentiary hearing. Ex. G. Complaint Counsel apparently have a process in mind that involves an application to this Court and

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<sup>1</sup> The last of the fact witness depositions was scheduled to be taken on the day of this filing, February 22. That witness is located in Texas, however, and has been affected by the recent winter weather and power outages in that state. Therefore, we agreed to postpone this deposition until March 10. This was an exceptional and unforeseen event due to an act of nature.

then the Commission, then an application to a federal district court, then an official request to authorities in Switzerland that might be granted, which would then allow some form of remote deposition to be taken. To Respondents' knowledge, Complaint Counsel has not started this process even though they have been aware of this issue since at least January 25. Nor have they provided us any timeline for how long it will take or even any indication of whether it is likely to succeed.

When it served their purposes, Complaint Counsel opposed any postponement of the evidentiary hearing or any further extension of the discovery schedule. Now, however, they want to be the sole beneficiary of an extension for a witness whose declaration they wish to use.

Respondents have no disagreement that Swiss law requires special permission for an individual located in its jurisdiction to sit for a voluntary deposition. According to a U.S. State Department website:

Taking voluntary depositions in Switzerland is subject to prior authorization by the Federal Department of Justice and Police. Foreign requests must be addressed to the central authority of the canton where the evidence is to be taken or where the person to be deposed is located. To speed up the process, Swiss authorities recommend that you send a copy to the Federal Office of Justice, International Private Law Unit, 3003 Bern, Switzerland. The Swiss penal code provides that attorneys attempting to take a deposition or serve process in Switzerland outside of these authorized methods are subject to arrest on criminal charges.

Judicial Assistance Country Information, Switzerland, United States Dep't of State, available at <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Switzerland.html> (last accessed February 18, 2021). Nor do we doubt that this is a time-consuming and unpredictable process. Respondents' counsel also appreciate that the pandemic has complicated {CONFIDENTIAL} availability, which is why they were willing to accommodate Complaint Counsel and take {CONFIDENTIAL} deposition somewhat out of time.



However, Respondents' right of defense should not be compromised because Complaint Counsel wishes to introduce a declaration from a witness Respondents have had no fair opportunity to depose. The Scheduling Order is clear: where a declarant is not made fairly available for deposition, the declaration is inadmissible and may not be used. This is Complaint Counsel's witness, and it was their responsibility to make him available for deposition in a timely manner. Having waited until well after the close of fact discovery to even begin the elaborate process of obtaining the proper legal authorizations, Complaint Counsel should not be allowed to use a declaration simply because they say they might be able to schedule some form of deposition before trial.

#### RELIEF REQUESTED

For the foregoing reasons, Respondents respectfully request that the Court enforce the deadline for the close of fact discovery with respect to {CONFIDENTIAL} deposition and exclude his declaration from the record of this case.

Dated: February 22, 2021

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**Docket No. 9393**

**RESPONDENTS' MEET AND CONFER STATEMENT**

Pursuant to the August 4, 2020 Scheduling Order, Respondents submit this statement in support of their Motion to Enforce the Discovery Cutoff and Exclude the Declaration of {CONFIDENTIAL}. In a good faith effort to resolve by agreement the issues raised by the Motion, Respondents conferred with Complaint Counsel on February 10 and February 16, 2021. Complaint Counsel opposes the Motion. Because the parties were unable to reach an agreement, Respondents respectfully submit this motion to enforce the discovery cutoff and exclude the Declaration of {CONFIDENTIAL}.

Dated: February 22, 2021

Respectfully submitted,

s/ David I. Gelfand

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**Docket No. 9393**

**DECLARATION OF DAVID I. GELFAND IN SUPPORT OF MOTION TO ENFORCE THE DISCOVERY CUTOFF AND EXCLUDE THE DECLARATION OF <sup>(CONFIDENTIAL)</sup>**

I, David I. Gelfand, declare as follows:

1. I am a partner at the law firm of Cleary Gottlieb Steen & Hamilton LLP, counsel to Respondent Juul Labs, Inc. ("JLI"). I am one of the counsel of record for JLI in the above-captioned matter.
2. I respectfully submit this declaration to provide certain documents that are referred to in JLI's Motion to Enforce the Discovery Cutoff and Exclude the Declaration of <sup>(CONFIDENTIAL)</sup>
3. Submitted herewith are true and correct copies of the following:

Exhibit	Description
A	January 13, 2021 email from Linden Bernhardt, JLI counsel
B	January 13, 2021 subpoena ad testificandum
C	January 26, 2021 letter from David I. Gelfand, JLI counsel, to Complaint Counsel

Exhibit	Description
D	January 28, 2021 email from Linden Bernhardt
E	January 29, 2021 email from David I. Gelfand
F	February 8, 2021 email from David Kully, {CONFIDENTIAL} counsel
G	February 8, 2021 email from Michael Lovinger, Complaint Counsel
H	February 12, 2021 email from David I. Gelfand

\* \* \*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: February 22, 2021

/s/ David I. Gelfand

David I. Gelfand

# EXHIBIT A

# FILED IN CAMERA



# EXHIBIT B

# FILED IN CAMERA

# EXHIBIT C

# FILED IN CAMERA

# EXHIBIT D

# FILED IN CAMERA

# EXHIBIT E

# FILED IN CAMERA



# EXHIBIT F

# FILED IN CAMERA

# EXHIBIT G

# FILED IN CAMERA

# EXHIBIT H

# FILED IN CAMERA

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on February 22, 2021, I caused a true and correct copy of the foregoing Respondents' Motion to Enforce the Discovery Cutoff and Exclude a Declaration to be served via e-mail upon the following:

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