

**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 *IN LIMINE* TO EXCLUDE A DECLARATION AND A
WITNESS**

Pursuant to Rules 3.22 and 3.43 of the Commission Rules of Practice, 16 C.F.R. §§ 3.22 and 3.43, Respondents respectfully move the Court for an order excluding the declaration of a witness that Respondents have had no opportunity to depose from the record of this case pursuant to Additional Provision 9 of the August 4, 2020 Scheduling Order and excluding testimony from the declarant.

Dated: April 20, 2021

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In the Matter of

**Altria Group, Inc.
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Docket No. 9393

[PROPOSED] ORDER

Upon consideration of Respondents' Motion *in Limine* to Exclude a Declaration and a Witness, it is hereby

ORDERED, that Respondents' motion is granted and the declaration of a witness that Respondents have had no opportunity to depose is inadmissible and may not be used in this matter pursuant to Additional Provision 9 of the August 4, 2020 Scheduling Order, and it is further

ORDERED, that Complaint Counsel may not offer testimony into evidence from the declarant.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

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

In the Matter of

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

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**JUUL Labs, Inc.
a corporation**

Docket No. 9393

**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO
EXCLUDE A DECLARATION AND A WITNESS**

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 included on their final exhibit list the declaration of a witness that Respondents have had no opportunity to depose (the “Declaration”) and who was the subject of Respondents’ prior Motion to Enforce the Discovery Cutoff and Exclude a Declaration, filed on February 22, 2021. Because this individual’s employer has apparently asked that his role as a declarant be kept confidential, we refer to him as “Declarant” in this motion. Consistent with the terms of the Scheduling Order, the Declaration should not be admitted. Furthermore, because Respondents have had no opportunity to depose the Declarant, Complaint Counsel should not be permitted to introduce testimony from the Declarant at the evidentiary hearing.

BACKGROUND

As the Court will recall from our prior motion papers, Respondents and counsel for the Declarant had agreed to a January 28, 2021 deposition. *See* Ex. A, Respondents’ Mot. to

Enforce the Discovery Cutoff and Exclude a Declaration (“Mot.”) at 2. Three days before the scheduled deposition, counsel for the Declarant informed Respondents and Complaint Counsel that the Declarant was located in Switzerland and could not participate in a remote deposition there due to restrictions under Swiss law. *Id.* As a result, Respondents were unable to depose the Declarant as scheduled on January 28 and have not been able to depose him in the months since. However, Complaint Counsel have indicated to Respondents that they still intend to rely on the Declaration. *See* Mot. at 3-4. Fact discovery in this matter closed on February 8.

On February 22, Respondents filed a motion to enforce the February 8 close of fact discovery and exclude the Declaration. During discussions with Complaint Counsel regarding anticipated revisions to the Scheduling Order and in the spirit of compromise, Respondents had offered to extend the February 8 deadline for taking the Declarant’s deposition to late March provided that the Declaration would not be introduced if the deposition could not be taken by that time. *See* Ex. B, Respondents’ Supplemental Mem. at 1-2. Complaint Counsel declined, apparently hoping to keep this issue open-ended for as long as possible. *See id.* at 2. Respondents filed a supplemental memorandum on March 3, respectfully suggesting that the Court require Complaint Counsel to arrange for the Declarant’s deposition by March 26 in light of the Second Revised Scheduling Order filed with the Court on March 1.

Complaint Counsel filed their opposition to Respondents’ motion on March 5 and indicated that they were working on “two options” to provide for the deposition of the Declarant. *See* Ex. C, Complaint Counsel’s Opposition (“Opp.”) at 4. The first option was for the Declarant to travel to another country to sit for a deposition. As for the second option, Complaint Counsel said that they were “concurrently working to seek prior approval from

Swiss authorities to take a voluntary deposition” of the Declarant in Switzerland. *Id.* at 4-5. Complaint Counsel had similarly told Respondents during a meet-and-confer in mid-February that they were working on a process to seek approval to conduct a remote deposition in Switzerland. *See* Mot. at 1-2.

On March 16, Complaint Counsel contacted Respondents and asked if Respondents would consent to relief Complaint Counsel intended to seek by motion to this Court, consisting of a recommendation to the Commission that the Commission authorize a federal court action to request that Swiss authorities authorize the deposition of the Declarant. *See* Ex. D, Declaration of David I. Gelfand. Respondents promptly informed Complaint Counsel that they would take no position on Complaint Counsel’s proposed motion. *Id.* To Respondents’ knowledge, Complaint Counsel never filed such a motion with the Court.

In its order dated March 16, the Court found that Respondents had made reasonable efforts to take the Declarant’s deposition before the discovery cutoff but denied Respondents’ motion as premature. The Court held that while the deadline for concluding depositions of fact witnesses had passed, under Rule 3.21(c)(2), Complaint Counsel could choose to file a motion seeking an extension of the deadline “upon a showing of good cause.” Ex. E, Order Denying Without Prejudice Respondents’ Mot. to Enforce Discovery Cutoff and Exclude Declaration (“Order”) at 2. The Court also relied on the fact that it was “not apparent that the Declaration is going to be offered as an exhibit,” noting that Respondents “retain the right to object to the admissibility of the Declaration should it appear on Complaint Counsel’s final exhibit list, including by motion *in limine*.” *Id.*

On April 12, 2021, Complaint Counsel submitted their final exhibit list to both Respondents and to the Court. Complaint Counsel included the Declaration on this exhibit list as PX8007. Complaint Counsel also included the Declarant on their final witness list

dated March 1, 2021, indicating that he would “testify about matters raised or discussed in his declaration,” among other topics.

Respondents respectfully file this motion *in limine* as suggested by the Court in its prior order.

ARGUMENT

It is now April 20, only six weeks from the beginning of the evidentiary hearing and more than two months after the close of fact discovery in this case. While Complaint Counsel stated in their March 5 opposition that they were “working with [the Declarant’s] counsel to reschedule the deposition as soon as possible” and “dual-tracking two options” to that end, as far as Respondents are aware, Complaint Counsel have taken no action on either option.

Since the Court issued its order on March 16, there has been radio silence from Complaint Counsel on this issue. Complaint Counsel have not, to Respondents’ knowledge, initiated the process to request authorization of a deposition in Switzerland despite becoming aware of this issue in late January and raising the possibility again in mid-March. Complaint Counsel have not provided Respondents with any information about any efforts to find an alternative means to take the deposition, like having the Declarant travel to another country. And Complaint Counsel have not moved the Court for relief from the deadline for concluding depositions of fact witnesses, which passed more than two months ago.

Despite their inaction, Complaint Counsel listed the Declaration on their exhibit list and apparently intend to introduce it into the record. But the Scheduling Order is clear: “no declaration shall be admitted unless a fair opportunity was available to depose the declarant.” Respondents have not had any opportunity to depose the Declarant and with only six weeks until the evidentiary hearing in this case, Complaint Counsel have not provided Respondents

with any information as to how the Declarant could possibly be deposed while complying with Swiss law. They appear to have taken no action at all to try to schedule a deposition of the Declarant.

The Declaration makes several baseless statements and Respondents have had no opportunity to question the Declarant about his assertions. As Complaint Counsel themselves have argued when the shoe was on the other foot, a deposition at this late stage would be highly prejudicial as Respondents are in final trial preparation with only six weeks before the hearing. *See In re Otto Bock HealthCare N. Am., Inc.*, 2018 WL 3491600, at *5 (F.T.C. June 27, 2018) (granting Complaint Counsel’s motion to exclude a witness listed by Respondents on their final witness list in violation of the scheduling order and noting that allowing a deposition only seven weeks before trial “would unnecessarily disrupt preparation for trial” and “imposes costs at a point when trial preparation and strategies have been, or are being, finalized”).

Fact discovery closed on February 8, and as the Court noted in its prior order, “it is undisputed that the Declarant was not deposed by that date, despite reasonable efforts by Respondents ...” Order at 2. The Court noted that while, at that time, it was “premature to rule on the admissibility of the Declaration because it is not apparent that the Declaration is going to be offered as an exhibit,” Respondents had the right to “object to the admissibility of the Declaration should it appear on Complaint Counsel’s final exhibit list, including by motion *in limine*.” *Id.* Complaint Counsel have since added the Declaration to their exhibit list even though Respondents have been unable to depose the Declarant. Under the plain language of the Scheduling Order, the Declaration is not admissible.

For similar reasons, Complaint Counsel should not be permitted to introduce testimony from the Declarant at the evidentiary hearing. *See In re Otto Bock*, 2018 WL

3491600, at *5. It would be highly prejudicial to Respondents if Complaint Counsel were allowed to call a witness whom Respondents have not had an opportunity to depose.

RELIEF REQUESTED

For the foregoing reasons, Respondents respectfully request that the Court exclude the Declaration and testimony from the Declarant.

Dated: April 20, 2021

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

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RESPONDENTS' MEET AND CONFER STATEMENT

Pursuant to the August 4, 2020 Scheduling Order, Respondents submit this statement in support of their Motion *in Limine* to Exclude a Declaration and a Witness. Respondents conferred with Complaint Counsel in good faith and did not reach agreement. Respondents contacted Complaint Counsel on April 19, 2021 and asked for Complaint Counsel's position on the Motion. On April 20, 2021, Complaint Counsel informed Respondents that they opposed the Motion.

Dated: April 20, 2021

Respectfully submitted,

s/ David. I. Gelfand

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PUBLIC

EXHIBIT A

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

In the Matter of

Altria Group, Inc.
a corporation,

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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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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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In the Matter of

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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

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FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

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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.

{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.¹ 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

¹ 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.

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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DECLARATION OF DAVID I. GELFAND IN SUPPORT OF MOTION TO ENFORCE THE DISCOVERY CUTOFF AND EXCLUDE THE DECLARATION OF ^(CONFIDENTIAL)

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 ^(CONFIDENTIAL)
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 B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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RESPONDENTS’ SUPPLEMENTAL FILING IN SUPPORT OF MOTION TO ENFORCE THE DISCOVERY CUTOFF AND EXCLUDE A DECLARATION

On March 2, 2021, Respondents filed a letter with the Court describing intervening circumstances relevant to Respondents’ February 22, 2021 Motion to Enforce the Discovery Cutoff and Exclude a Declaration (the “February 22 Motion”). Shortly thereafter, counsel for Respondent Juul Labs, Inc. was contacted by the Secretary’s Office and asked to re-style the letter as a Supplemental Memorandum in support of the February 22 Motion. The Supplemental Memorandum and a revised Proposed Order are attached.

Dated: March 3, 2021

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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

PROPOSED ORDER

Upon Respondents’ February 22, 2021 Motion to Enforce the Discovery Cutoff and Exclude a Declaration (the “February 22 Motion”) and Respondents’ March 3, 2021 Supplemental Memorandum in Support of the February 22 Motion, and having considered the papers in support and in opposition thereto, it is hereby

ORDERED, that if Complaint Counsel wish to admit or use the declaration discussed in the February 22 Motion (the “Declaration”), they must make the declarant available for a deposition by March 26, 2021, and it is further

ORDERED that unless Respondents are provided a fair opportunity to depose the declarant by March 26, 2021, the Declaration will be deemed 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
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

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF RESPONDENTS’
FEBRUARY 22, 2021 MOTION TO ENFORCE THE DISCOVERY CUTOFF AND
EXCLUDE A DECLARATION**

On February 22, 2021, Respondents in the above captioned matter filed their Motion to Enforce the Discovery Cutoff and Exclude a Declaration. That motion explained that Complaint Counsel was seeking to introduce a declaration from a third party even though Respondents were not given the opportunity to depose the declarant before the February 8 fact discovery cut-off in this case. Respondents noted that we had offered to take the deposition slightly out of time if it could be arranged before Respondents and Complaint Counsel had to proceed to pre-hearing steps such as deposing Complaint Counsel’s expert, serving exhibit lists, serving Respondents’ expert report, and filing motions *in limine*, if any.

The day after Respondents filed the motion, the Commission extended the hearing date from April 13 to June 2, 2021. As a result, Respondents and Complaint Counsel have agreed to a revised pre-hearing schedule. A Joint Motion for Second Revised Scheduling Order was filed with the Court on March 1.

During Respondents’ discussion with Complaint Counsel regarding the revised schedule, Respondents offered to extend the deadline for taking the declarant’s deposition to

late March. Respondents again asked Complaint Counsel to agree to either take the deposition before the extended deadline or exclude the declaration. Complaint Counsel declined.

In view of these circumstance, Respondents respectfully suggest that the Court resolve the pending Motion to Enforce the Discovery Cutoff and Exclude a Declaration by requiring that Complaint Counsel arrange for the declarant’s deposition to be taken by March 26, 2021 if Complaint Counsel wishes to admit or use the declaration in this matter. This would allow Respondents to take the deposition and consider the testimony obtained in that deposition before the March 31 deadline for deposing Complaint Counsel’s expert, who cites to the relevant declaration in his report.

Dated: March 3, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 3, 2021, I caused a true and correct copy of the foregoing Supplemental Filing In Support Of Motion To Enforce The Discovery Cutoff And Exclude A Declaration to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email to:

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EXHIBIT C

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

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
ENFORCE THE DISCOVERY CUTOFF AND EXCLUDE THE DECLARATION OF

{REDACTED}

Complaint Counsel respectfully asks the Court to deny Respondents’ Altria, Inc. (“Altria”) and JUUL Labs, Inc.’s (JLI”) Motion to Enforce Discovery Cutoff and Exclude the Declaration of {REDACTED}. {REDACTED} – an executive at {REDACTED} {REDACTED}, an e-cigarette competitor in the United States – has reliable information that is highly relevant for this proceeding and is willing to sit for a deposition. However, he now resides in Switzerland, and Swiss law prohibits even a remote deposition on Swiss soil without prior approval from the Swiss government.¹ {REDACTED} is willing to travel to another location for his deposition, but cannot currently travel due to temporary COVID-19 travel restrictions.

¹ See https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en#book_2/tit_13/lvl_1/lvl_d5241e797; Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, <https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf>. Both the United States and Switzerland are contracting states of the Hague Evidence Convention. See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>; <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Switzerland.html>.

Complaint Counsel and { [REDACTED] } counsel have been working diligently to reschedule the deposition as soon as it is legal and safe for { [REDACTED] } to travel or after prior approval from Swiss authorities is obtained, allowing { [REDACTED] } to be deposed remotely from Switzerland.

After Respondents filed this Motion, the Commission granted in part Respondents' request to postpone these proceedings. This 7-week delay gives more time for { [REDACTED] } to safely travel and/or obtain approval from the Swiss authorities, which means that a deposition could conclude without prejudice to Respondents. Indeed, on March 3, 2021, Respondents made a Supplemental Filing asking the Court for a different Order and agreeing to take a deposition through March 26, 2021. Supplemental memorandums that change the requested relief are not allowed under the Part 3 Rules or this Court's Scheduling Order. Notwithstanding Respondents' improper filing (which is actually a new motion), the 7-week delay in the hearing confirms that this issue is not ripe. There is still time for the deposition to go forward on or near the timeframe suggested by Respondents and therefore there may never be a dispute for this Court to resolve.

Should Complaint Counsel seek to include { [REDACTED] } declaration in its exhibit list (which has not yet been drafted) and should Respondents believe that they have been denied a fair opportunity to depose him, there may be a ripe dispute for this Court to resolve about its admissibility. The proper motion to bring that dispute before this Court would be a motion *in limine*. But there is no exhibit list, the witness is willing to be deposed, and Respondents are willing to depose him. There is no dispute for the Court to resolve today, and Respondents' motion should be denied.

FACTUAL BACKGROUND

Complaint Counsel produced { [REDACTED] } declaration to Respondents' Counsel on May 8, 2020, *nine months* before the close of discovery. Exhibits A, B. Respondents waited until January 11, 2021 – over five months after discovery commenced and just weeks before discovery was set to conclude – to issue a *Subpoena Ad Testificandum* to { [REDACTED] }. Exhibits A, E. A few days before the deposition could take place, however, { [REDACTED] } counsel notified the parties that the deposition would have to be rescheduled because the witness resides in Switzerland and could not travel due to COVID-19 travel restrictions. Exhibits A, F. A more detailed timeline of events is found in Exhibit A (declaration of Michael Lovinger).

ARGUMENT

In their revised motion, Respondents' agreed to take { [REDACTED] } deposition through March 26, 2021 despite their original Motion seeking an order from this Court to prevent that deposition in its entirety. The witness is willing to be deposed and Complaint Counsel and the witness have all agreed to proceed as quickly as possible with the deposition. Thus, there is no dispute for the Court to resolve today. That said, even the original motion was unpersuasive. Respondents have had { [REDACTED] } declaration for almost a year, and will not be prejudiced by a single deposition taken out of time. Respondents' premature motion is merely an attempt to preclude a relevant and reliable witness from testifying because of circumstances outside of anyone's control due to the global COVID-19 pandemic.

A. The Hearing Delay Requested by Respondents and Granted by the Commission Makes this Motion Premature

In their Motion, Respondents cited prejudice from having to serve exhibit lists and file motions *in limine* in March. However, following the Commission's Order Granting

the Court. Complaint Counsel is also concurrently working to seek prior approval from Swiss authorities to take a voluntary deposition of {REDACTED} in Switzerland. Exhibits J, K.

C. {REDACTED} Declaration Is Relevant, Reliable, and Consistent with Other E-Cigarette Competitors

On March 29, 2020, {REDACTED} submitted a declaration under penalty of perjury pursuant to 28 U.S.C. § 1746, and swore that it was true and correct to the best of his knowledge. Exhibit B. {REDACTED} declaration has important information that is relevant to the disputed issues before the Court. Among other things, {REDACTED} declaration provides reliable information on the following:

- {REDACTED}
 - {REDACTED} Exhibit B ¶ 33.
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
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 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
 - {REDACTED}
- {REDACTED}
 - {REDACTED} Exhibit B ¶ 34.

- { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

- { [REDACTED]
[REDACTED] } Exhibit B ¶ 38.

- { [REDACTED]
[REDACTED]
[REDACTED] }

- { [REDACTED] } Exhibit B ¶¶ 12-14, 21-22.

- { [REDACTED]
[REDACTED] }
- { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

- { [REDACTED]
[REDACTED] } Exhibit B ¶ 18.

- { [REDACTED]
[REDACTED]
[REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]. Exhibit B ¶¶ 23-27.

- [REDACTED]

[REDACTED]

[REDACTED]. Exhibit B ¶¶ 28-32.

Moreover, [REDACTED] declaration is consistent with the declarations that all other U.S. e-cigarette competitors submitted in this matter, and which Respondents did not challenge. This supports the reliability of [REDACTED] declaration, and excluding

[REDACTED]

[REDACTED] would leave a gap in the record.

D. The Commission and Other Courts Have Been Flexible With Respect to Disruptions Caused by the COVID-19 Pandemic

The Commission has shown flexibility in scheduling, and has made safety a priority with respect to the COVID-19 pandemic. On three separate occasions, the Commission issued orders rescheduling this matter in light of the public health emergency.² On January 15, 2021, Respondents’ Counsel moved for a 90-day continuance of the evidentiary hearing, and cited a July 6, 2020 Order where the Commission “determined that it is in the public interest to mitigate

² See Order Regarding Scheduling In Light of Public Health Emergency, Docket No. 9393, April 3, 2020; Second Order Regarding Scheduling In Light of Public Health Emergency, Docket No. 9393, April 13, 2020; Third Order Regarding Scheduling In Light of Public Health Emergency, Docket No. 9393, June 3, 2020.

the transmission and impact of COVID-19.”³ Complaint Counsel believes that the same principle to mitigate the transmission and impact of COVID-19 should apply with respect to the scheduling of { [REDACTED] } deposition and admission of his declaration.

Other courts have also concluded that the COVID-19 pandemic presents “good cause” that warrants extensions of time to complete discovery. *See, e.g., Son Gon Kang v. Credit Bureau Connection, Inc.*, No. 1:18-cv-01359-AWI-SKO, 2020 U.S. Dist. LEXIS 61229, 2020 WL 1689708, at *8 (E.D. Cal. Apr. 7, 2020); *Wilkins v. ValueHealth, LLC*, No. 19-1193-EFM-KGG, 2020 U.S. Dist. LEXIS 84913, 2020 WL 2496001, at *2 (D. Kan. May 14, 2020); *Macias v. KDF Foxdale, L.P.*, No. 5:18-cv-07712-EJD, 2020 U.S. Dist. LEXIS 77392, 2020 WL 2097607, at *2 (N.D. Cal. May 1, 2020); *Hope Med. Enters. v. Fagron Compounding Serv., LLC*, 2020 U.S. Dist. LEXIS 230904, *4-5 (C.D. Cal. May 22, 2020).

E. Respondents Arguments Are Not Persuasive

Respondents cite just one case⁴ – that is easily distinguishable – in their attempt to prevent the Court from reviewing relevant and reliable information. In their original Motion, Respondents argue that they “will be denied a fair hearing if { [REDACTED] } declaration is admitted into the record.” But the declarations at issue in *Soto* were from plaintiffs seeking to represent a class who had been ordered by the court to appear for depositions on three separate occasions, but refused to do so. *See Soto* at *40-41 (E.D. Cal., 2013). In this instance, { [REDACTED] } is absolutely willing to sit for a deposition, but has been legally prohibited

³ Commission Order on Public Access to the Evidentiary Hearing in Light of the Public Health Emergency, Docket No. 9393, July 6, 2020

⁴ *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).

CONCLUSION

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

Dated: March 5, 2021

Respectfully Submitted,

s/ Michael Lovinger
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Counsel Supporting the Complaint

INDEX OF EXHIBITS

Exhibit	Date	Description
A	March 4, 2021	Declaration from Michael Lovinger, Complaint Counsel
B	March 29, 2020	Declaration from { [REDACTED] }
C	May 8, 2020	Production Letter from Erik Herron, Complaint Counsel
D	Sept. 14, 2020	<i>Subpoena Duces Tecum</i> Issued by Respondents' Counsel to { [REDACTED] }
E	January 11, 2021	<i>Subpoena Ad Testificandum</i> Issued by Respondents' Counsel to { [REDACTED] } to testify on January 28, 2021
F	January 25, 2021	Email from David Kully, counsel for { [REDACTED] }
G	January 26, 2021	Letter from David Gelfand, Respondents' Counsel
H	January 27, 2021	Email from Michael Lovinger
I	January 29, 2021	Email from David Gelfand
J	February 8, 2021	Emails from David Kully, David Gelfand, and Michael Lovinger
K	February 26, 2021	Declaration from David Kully
L	February 18, 2021	Emails from { [REDACTED] }; J.J. Snidow, Respondents Counsel; and Michael Lovinger
M	February 22, 2021	<i>Subpoena Ad Testificandum</i> Issued by Respondents' Counsel to { [REDACTED] } to testify on March 10, 2021
N	January 29, 2021	<i>Subpoena Ad Testificandum</i> Issued by Respondents' Counsel to { [REDACTED] } to testify on February 9, 2021

EXHIBIT D

**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

**DECLARATION OF DAVID I. GELFAND IN SUPPORT OF MOTION *IN LIMINE* TO
EXCLUDE A DECLARATION AND A WITNESS**

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. On March 16, 2021, Complaint Counsel contacted me and asked if Respondents would consent to relief Complaint Counsel intended to seek by motion to this Court, consisting of a recommendation to the Commission that the Commission authorize a federal court action to request that Swiss authorities authorize the deposition of the Declarant. Respondents informed Complaint Counsel that same day that they would take no position on the proposed motion.

* * *

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

Dated: April 20, 2021

/s/ David I. Gelfand

David I. Gelfand

EXHIBIT E

On January 25, 2021, the Declarant’s counsel informed Respondents that the Declarant had relocated to Switzerland and would not participate in a remote deposition due to restrictions under Swiss law. The Declarant’s counsel also advised that the Declarant would be unable to travel to a country where the Declarant could lawfully participate in a remote deposition because of travel restrictions related to COVID-19.

Respondents have continued communicating with the Declarant’s counsel but there has been no indication that circumstances will change and no new deposition date has been provided. Complaint Counsel has also been endeavoring to schedule the Declarant’s deposition, by pursuing the approval of Swiss authorities to take the deposition in Switzerland and, alternatively, by attempting to arrange the Declarant’s travel to the United States or to a third county for the purpose of providing deposition testimony.

III.

The Scheduling Order in this case, as revised, set February 8, 2021 as the deadline for concluding depositions of fact witnesses. It is undisputed that the Declarant was not deposed by that date, despite reasonable efforts by Respondents; however, Complaint Counsel is continuing its efforts to obtain the deposition of the Declarant, and Rule 3.21(c)(2) allows a party to seek an extension of any scheduling order deadline, where the party can demonstrate good cause. 16 C.F.R. § 3.21(c)(2) (“The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing.”). It is premature at this time to determine whether, if such a motion were to be filed, the circumstances would support good cause to allow a late deposition of the Declarant.

It is also premature to rule on the admissibility of the Declaration because it is not apparent that the Declaration is going to be offered as an exhibit. Complaint Counsel’s final exhibit list is not due until April 12, 2021. Additional Provision 9 of the Scheduling Order makes clear that “no declaration shall be admitted unless a fair opportunity was available to depose the declarant.” Respondents retain the right to object to the admissibility of the Declaration should it appear on Complaint Counsel’s final exhibit list, including by motion *in limine*.

IV.

For all the foregoing reasons, Respondents’ Motion is DENIED WITHOUT PREJUDICE.

ORDERED

D. Michael Chappell
Chief Administrative Law Judge

Date: March 16, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 20, 2021, I caused a true and correct copy of the foregoing Motion *In Limine* to Exclude a Declaration and a Witness to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I caused the foregoing document to be served via email to:

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