

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

In the Matter of

Altria Group, Inc.

and

JUUL Labs, Inc.

Docket No. 9393

**STIPULATION AND ORDER CONCERNING REMOTE DEPOSITION
PRACTICES AND PROTOCOLS**

WHEREAS, the COVID-19 public health crisis (the “Crisis”) has impacted and continues to affect the conduct of this action (the “Litigation”);

WHEREAS, Complaint Counsel and Counsel for Respondents Altria Group, Inc. and JUUL Labs, Inc. (collectively, “Counsel”) for the parties (“Parties”) recognize the need to avoid travel and to maintain social distancing among the attorneys, court reporting personnel, and witnesses who may be deposed in this matter;

WHEREAS, Counsel have met and conferred about practices and protocols in order to minimize the health risks of conducting depositions during the Crisis; and

WHEREAS, the Parties stipulate and agree to the following practices and procedures (the “Protocol”) to govern remote depositions (as that term is defined below);

NOW, THEREFORE, IT IS HEREBY ORDERED:

I. Definitions

1. “Attending Counsel” shall mean any legal counsel for a party (including counsel of record and agency/in-house counsel) who is not Deposing Counsel or Defending Counsel, but who is attending a Remote Deposition either in person or remotely.

2. “Defending Counsel” shall mean legal counsel representing the Witness with respect to a deposition in this Litigation. In the event a non-party Witness does not have counsel, then “Defending Counsel” shall mean the Witness.

3. “Deposing Counsel” shall mean the legal counsel of the party or Parties noticing and/or questioning the Witness at a Remote Deposition in this litigation.

4. “Noticing Party” means a party that noticed a Remote Deposition of a Witness pursuant to Rule 3.33 of the Part 3 Rules of Practice for Adjudicative Proceedings (the “Part 3 Rules of Practice”).

5. “Platform” means the video-conferencing computer application that the Noticing Party utilizes to enable a Remote Deposition in accord with this Protocol.

6. “Primary Counsel” means counsel designated by the Parties and the Witness at the beginning of the Remote Deposition as provided in Paragraph 18.

7. “Remote Deposition” means any deposition by oral examination conducted pursuant to Rule 3.33 of the Part 3 Rules of Practice where fewer than all of the participants—including Deposing Counsel, Defending Counsel, Attending Counsel, the Witness, court reporters, or videographers—are physically present in the same location at the time the deposition is taken. A “Remote Deposition” is a deposition conducted on the Platform, which will allow for Deposing Counsel, Defending Counsel, Attending Counsel, the Witness, court reporters, and videographers to participate without attending the deposition in person or by other means to which the Parties may agree for a particular deposition or Witness.

8. “Witness” means any person or entity whose Remote Deposition has been noticed in this Litigation.

II. Agreement to Conduct Remote Depositions

9. Remote Depositions in this case shall be taken in compliance with applicable local and state regulations and orders governing the Witness’s location, and any federal guidance, regulations or orders concerning social distancing and public health.

10. It is presumed that all depositions in this case shall be Remote Depositions. A copy of this stipulation shall be provided to each Witness or Defending Counsel.

11. The Parties hereby expressly waive all objections to any Remote Deposition, and the admissibility of any testimony given during a Remote Deposition, based solely on the fact it was a Remote Deposition. Testimony given during a Remote Deposition, including both the transcript and video record, if any, may be used at a trial, at hearings, in motions, or in other modes in these proceedings to the same extent that in-person deposition testimony may be used at trial, at hearings, in motions, or in other modes in these proceedings.

12. Notwithstanding any other rule to the contrary, the Parties stipulate that the Witness’s oath or affirmation may be administered remotely.

III. Technology to be Used for Remote Depositions

13. Any Platform must allow for the court reporter to accurately record, and for all participating attorneys and the court reporter to hear and see, the Witness and all Primary Counsel.

14. The Parties agree to use U.S. Legal Support (the “Vendor”) for all Remote Depositions, except that, in the event that circumstances prevent or significantly impede the effective use of the Vendor, other vendors may be used upon consent of the Parties, which will not be unreasonably withheld.

15. The Noticing Party shall be responsible for arranging the taking of a Remote Deposition, including retention of a vendor that will provide a Platform to be used consistent with this Protocol, and ensuring that email invitations to attend the deposition are sent to the Witness, the court reporter and any Attending or Defending Counsel who, no later than three (3) days before the deposition, informs the Noticing Party of their intent to attend the deposition and provides their email address to the Noticing Party.

16. The Parties shall ensure that the Witness has access to technology that meets the minimum standards required by the Platform to ensure the transmission of audio and video feeds via the Platform.

17. Remote Depositions subject to this Protocol shall be recorded by stenographic means. Either Party may also request a video recording of the deposition at the requesting Party’s expense, and each Party will bear its own costs for copies of transcripts and copies of video recordings of any deposition. Neither video recording nor stenography shall occur when the Parties are off the record. No one other than the court reporter—or the court reporter’s designee—and the videographer may use video, audio, or still images to record any part of a Remote Deposition.

18. Prior to the start of a Remote Deposition, each of the Parties shall identify no more than one counsel each to serve as Primary Counsel. Similarly, if the Witness is a non-party Witness, then the Witness shall also identify no more than one counsel to serve as Primary Counsel during the Remote Deposition.

19. Unless the Parties agree otherwise, the video feed visible to the Witness shall be limited to the images of Primary Counsel, the image of the court reporter, any exhibits being displayed to the Witness, and the image of the Witness.

20. Each Party shall give the other Party notice if it reasonably expects a deposition could include Confidential Material (as that term is defined in the protective order entered in this litigation). As appropriate during a deposition, any counsel shall make note on the record of their reasonable belief that Confidential Material is about to be discussed and any Attending Counsel who are not permitted access to such Confidential Material shall sign off from the Remote Deposition feed. When discussion of Confidential Material has been completed, such Attending Counsel may re-join the deposition. Primary Counsel for the Party whom such

Attending Counsel represents shall be responsible for notifying Attending Counsel that they may re-join the Remote Deposition feed. The time used to allow Attending Counsel to sign off or re-join the Remote Deposition feed shall not count against the time allowed for the deposition.

21. The Parties may agree to utilize a “chat” feature on the Platform to communicate with the Witness or the court reporter only if the chat feed is available and displayed to all Attending Counsel, Defending Counsel, Deposing Counsel and the court reporter throughout the deposition, and only if it is used solely for the purpose of allowing them to alert one another about any technical issues that arise during the deposition. All other “chat,” instant message, and/or texting features that may be visible to or used to communicate with the Witness are prohibited and shall be disabled during the deposition if possible. Breakout room features may be enabled only for breaks and recesses off the record.

22. Each Party as well as counsel for the Witness shall be responsible for ensuring that they have a means of communicating with co-counsel or the Witness, as appropriate, during breaks in the deposition. The Parties agree not to oppose reasonable accommodations to allow such conferences during breaks, as well as communications among co-counsel during the Remote Deposition.

IV. Technical Difficulty

23. The Parties or counsel for the Witness may elect to have a technical specialist attend a Remote Deposition to ensure that technical issues are resolved in a timely manner.

24. If technical difficulties result in the inability of any Primary Counsel or the Witness to receive either the audio or video feed of a Remote Deposition, the deposition shall be paused. The remaining Primary Counsel shall note the disconnection on the record as soon as they become aware of it. The deposition must immediately be suspended until the disconnected Primary Counsel or the disconnected Witness has re-joined the deposition and has full access to both audio and video. Any portion of the deposition that has been transcribed while a Primary Counsel or the Witness was disconnected or experiencing technical difficulties must be re-read upon the resolution of the technical difficulty, and the disconnected Primary Counsel must be given an opportunity to object to any questions or answers that occurred in their absence. If the technical difficulties cannot be resolved, then the deposition shall be suspended until the concerns are resolved by the Parties or, if necessary, by order of the Court.

25. If at any time the court reporter or videographer indicates that they are unable to transcribe or record the deposition due to technical difficulties, the deposition shall be paused and the Parties will attempt to resolve those issues. The suspended time will not count against the time allowed for the deposition. If the technical difficulties cannot be resolved to the satisfaction of the court reporter, the deposition shall be suspended.

26. If technical difficulties arise during the taking of a Remote Deposition, counsel for the Parties must meet and confer as soon as is practicable, by telephone or other means, to determine whether the Remote Deposition can proceed or should be continued to a future date. If technical difficulties arise that make the completion of a Remote Deposition impracticable,

counsel for Parties and the Witness shall resume the Remote Deposition at a mutually convenient opportunity within a reasonable period of time.

V. Exhibits

27. To the extent possible, the Parties agree to display exhibits in a manner that allows all Attending Counsel and the Witness to view the exhibit. However, the Noticing Party shall be responsible for ensuring that any exhibits that Deposing Counsel wishes to mark and use at a Remote Deposition can be shown to the Witness in a manner that enables at least the Witness, the court reporter, and Primary Counsel to view the exhibits in their entirety and in a manner that is legible during the course of the deposition. The Parties agree that the Witness shall be afforded the opportunity to print a hard copy of the exhibit, to the extent practicable, if they so choose. If the electronic version of the exhibit may be viewed in its entirety in a manner that is legible, any time spent printing a hard copy of an exhibit shall not count against the time allowed for the deposition. The Parties further agree that the preferred method of marking exhibits for a Remote Deposition is through the Platform enabled for Remote Depositions, which shall enable Deposing Counsel to share exhibits with the Witness, court reporter, and all Attending Counsel.

28. Any Noticing Party that wishes to use hard copies as exhibits during a deposition must ensure that the Witness, the court reporter, Primary Counsel, counsel for the opposing Party, and counsel for any non-Party Witness each receive a physical copy of the documents no fewer than 24 hours before the start of the deposition. Each recipient of the physical copies of the exhibits shall not review any exhibit until it is introduced as an exhibit by the Noticing Party at the Remote Deposition. Notwithstanding the use of a physical copy, an exhibit introduced by the Noticing Party shall also be marked through the Platform, which electronic copy will be the official exhibit, absent agreement otherwise by the Parties. If a Party provides documents in sealed envelopes, the Witness and any other recipient of the hard-copy exhibits shall not open the envelopes until asked to do so during the Remote Deposition and shall only open the envelopes on video. Non-party Witnesses and their Defending Counsel shall not retain any copies of documents sent in advance of or used during the deposition and shall confirm that they will return or destroy any such documents at the end of the deposition. Nothing in this paragraph is meant to preclude Defending Counsel who represents a Witness and is physically located in the same room as the Witness during the Remote Deposition from providing a hard copy of an exhibit that has been introduced to the Witness, provided that doing so does not unreasonably delay the Remote Deposition.

29. If, during the course of questioning, the Witness wishes to review a document or transcript that is being displayed, the Deposing or Primary Counsel then questioning the Witness shall display or facilitate access to all other portions of the document or transcript requested by the Witness before requiring an answer to the question.

30. If the Platform does not permit the court reporter to mark exhibits remotely, Deposing Counsel shall be responsible for marking exhibits and ensuring that such marks are communicated to the court reporter and other Attending Counsel during or as soon as is practicable after the deposition.

31. The Parties shall use a Platform that will allow the Witness and all Primary Counsel to have a complete copy and personal control of each exhibit when it is introduced and through the duration of questioning regarding that exhibit. To the extent that such functionality is not available for any exhibit during a deposition, the deposition shall be suspended until the resolution of the technical difficulties, and the Parties shall make best efforts to resume the deposition as expeditiously as possible.

VI. Miscellaneous Provisions

32. The Parties shall conduct a joint test of a Platform prior to taking the first Remote Deposition using that Platform. A Party that fails to participate in such a test shall waive any objections to using the Platform. The Noticing Party shall conduct a test of the Platform with the technology it intends to use to participate in a Remote Deposition before the time at which a Remote Deposition is scheduled to begin.

33. No person may be physically located in the same room as the Witness during the taking of a Remote Deposition except: (a) a non-attorney who is present solely for the purpose of providing technical assistance to the Witness in using the Platform; (b) Defending Counsel who represents a Witness; (c) any other counsel as the Parties may agree no later than two business days before the Remote Deposition; and (d) the court reporter and videographer. Any Defending Counsel or other counsel located in the same room as the Witness must be logged onto the Platform with a separate video connection or be otherwise visible to a camera at all times during the on-the-record portion of the Remote Deposition. At the beginning of the Remote Deposition, every person logged onto the Platform or otherwise viewing or listening to the deposition must be identified for the record. Any person joining or leaving the deposition after it begins must be identified at the time of their arrival or departure.

34. During on-the-record portions of a Remote Deposition, the Witness may not communicate with any person, except through the Platform, by any means, including through gestures, handwritten communications, email, chat, instant messaging, or text messaging. As referenced in Paragraph 21 all private chat features provided in a Platform shall not be used and must be disabled if possible. This restriction does not apply to conversations between the Witness and Defending Counsel during breaks or other recesses not on the record, which can occur in breakout rooms provided by the Platform or other means, to the extent such breaks or recesses and any such conversations taking place during them occur in the manner permitted under applicable rules and procedures.

35. During the Remote Deposition, the Witness shall not review, read, have before them, or otherwise consult any outside sources of information, including documents (except those presented as exhibits), cell phones, smart phones, computers, the Internet, text or instant messaging services, emails, chats, blogs, or websites such as Twitter, Facebook, or LinkedIn. This obligation does not apply to communications between the Witness and their counsel during breaks or recesses, to the extent any such communications occur in the manner permitted under applicable rules and procedures, nor does this obligation prevent the Witness from using email,

text, the Internet, social media, or other forms of electronic or telephonic communication during breaks for purposes not related to the subject matter of the Remote Deposition.

36. Based on their experience under this Protocol and the needs of individual witnesses, (a) the Parties, or the Parties and any non-party Witness, may stipulate to modifications of this Protocol applicable to an individual Remote Deposition; or (b) the Parties may stipulate and submit to the Court for its approval modifications to this Protocol applicable to all depositions.

37. The Noticing Party shall serve a copy of this Protocol with any subpoena for a Remote Deposition. The Parties shall use their best efforts to obtain the consent of a non-party Witness to this Protocol after service of the Subpoena. If a Party cannot obtain a non-party Witness’s consent to this Protocol, it shall inform the other Parties.

38. All persons attending depositions taken by remote means are reminded that the typical rules of professionalism and etiquette during depositions still apply. All persons attending depositions taken pursuant to this order who do not have an immediate need to speak shall ensure that their telephone or video conference lines are muted. In addition, all persons attending depositions taken pursuant to this order shall ensure that they can do so in a space that is relatively free from distractions that would interfere with the deposition.

VII. Reservation of Rights

39. By entering into this stipulation and agreement, the Parties do not intend to limit their rights to seek relief from the Court if, at any time, any one or all of them determine that Remote Depositions are or have become impractical or prejudicial.

40. By entering into this stipulation and agreement, the Parties do not intend for this stipulation to act as a waiver of any Party’s rights or protections or applicable procedures under either 16 CFR Part 3, Rules of Practice for Adjudicative Proceedings, or 16 CFR Part 4, Miscellaneous Rules, or any Order entered in the Litigation.

Dated: November 23, 2020

Respectfully submitted,

s/ Dominic Vote
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[PROPOSED] ORDER ENTERING STIPULATION

On November 23, 2020, Federal Trade Commission Complaint Counsel and Respondents Altria Group, Inc. and JUUL Labs, Inc. filed a Stipulation and Order Concerning Remote Deposition Practices and Protocols (“Stipulation”) and jointly request that the Stipulation be entered as an order in this matter.

The joint request is GRANTED, and it is hereby ORDERED that the Stipulation shall be entered as an order in this matter.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, I filed the foregoing document 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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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

November 23, 2020

By: s/ James Abell
James Abell