

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

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In the Matter of ) )  
 ) )  
Altria Group, Inc., ) )  
a corporation, ) ) Docket No. 9393  
 ) )  
and ) )  
 ) )  
JUUL Labs, Inc. ) )  
a corporation, ) )  
 ) )  
Respondents. ) )  
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ORDER GRANTING RESPONDENTS’ MOTION *IN LIMINE*  
TO EXCLUDE A DECLARATION AND WITNESS

I.

On April 20, 2021, Respondents Altria Group, Inc. and JUUL Labs, Inc. (collectively, “Respondents”) filed a Motion *in Limine* to Exclude a Declaration and a Witness (“Motion”). Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed an opposition to the Motion on April 30, 2021 (“Opposition”). On May 4, 2021, Respondents filed a motion for leave to file a reply, together with Respondents’ proposed reply (“Reply”). The motion for leave to file the Reply is GRANTED.

Respondents rely on the terms of Additional Provision 9, which was included in the August 4, 2020 Scheduling Order at the joint request of the parties. That provision states:

A party that obtains a declaration from a non-party must produce the declaration at least three days before the non-party is scheduled to be deposed, but no later than January 18, 2021 absent a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, *and no declaration shall be admitted unless a fair opportunity was available to depose the declarant.*

August 4, 2020 Scheduling Order, Additional Provision 9 at 7 (emphasis added) ([https://www.ftc.gov/system/files/documents/cases/d09393\\_alj\\_scheduling\\_orderpublic.pdf](https://www.ftc.gov/system/files/documents/cases/d09393_alj_scheduling_orderpublic.pdf)). Based on Additional Provision 9, Respondents seek an order precluding admission into evidence of the declaration of a witness who Respondents have not had the opportunity to depose

(“Declaration”). Respondents further request that Complaint Counsel be precluded from introducing any trial testimony from the declarant (“Declarant”).

As set forth below, the Motion is GRANTED.

## II.

Based on a review of the record, including the Motion, Opposition, Reply, and the exhibits submitted therewith, the following is a summary of the relevant facts.

Complaint Counsel produced the Declaration to Respondents in May 2020. In December 2020, Respondents began discussions with the Declarant’s counsel to schedule a deposition. In early January 2021, the Declarant’s counsel agreed to a date of January 28, 2021 for a deposition, and Respondents sent the Declarant’s counsel a deposition subpoena directed to the Declarant.

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.

After being notified of the cancellation of the January 28, 2021 deposition of the Declarant, Respondents’ counsel continued communicating with the Declarant’s counsel. However, Respondents came to believe that circumstances would not change, and on February 22, 2021, Respondents filed a motion to enforce the discovery cutoff, which had passed on February 8, 2021 without a deposition of the Declarant, and to exclude the Declaration based upon the prohibition in Additional Provision 9 of the August 4, 2020 Scheduling Order. Complaint Counsel opposed that motion, asserting that Complaint Counsel was working to provide for the deposition of the Declarant, either in Switzerland with the prior approval of Swiss authorities, or remotely from another country if the Declarant could travel without violating COVID travel restrictions.

On March 16, 2021, Respondents’ motion was denied without prejudice as premature (“March 16 Order”) because Complaint Counsel had not yet served a final exhibit list that would show an intention to introduce the Declaration into evidence. Should the Declaration be included in the final exhibit list, the Order noted, Respondents retained the right to object. With respect to the discovery cutoff, the March 16 Order noted that FTC Rule 3.21(c)(2) would permit an extension of the discovery cutoff upon a showing of good cause.

On April 12, 2021, Complaint Counsel served Respondents with Complaint Counsel’s Final Exhibit List, which included the Declaration as PX8007. The Declarant has also been included as a potential witness on Complaint Counsel’s Final Witness List.

### III.

Relying on Additional Provision 9, Respondents' Motion seeks to preclude the Declaration from admission into evidence and to preclude the Declarant from testifying at trial.<sup>1</sup> Respondents argue that they have not had a fair opportunity to depose the Declarant and thereby test various assertions in the Declaration. Respondents assert that because under Additional Provision 9, "no declaration shall be admitted unless a fair opportunity was available to depose the declarant," the Declaration is not admissible. According to Respondents, this same reasoning should preclude allowing trial testimony from the Declarant.

Respondents further argue that it is unlikely that the Declarant's deposition will occur. Respondents assert that, in the weeks since the March 16 Order, Complaint Counsel does not appear to have taken any steps to procure the deposition of the Declarant. Respondents state that in March 2021, Complaint Counsel advised Respondents' counsel that it intended to move for certification to the Commission of a request to seek approval of the Declarant's deposition from Swiss authorities, but that the record does not show any motion or other effort by Complaint Counsel to further the process of obtaining such approval. Moreover, Respondents argue, allowing a deposition at this stage of the litigation, with less than four weeks remaining before trial, would be prejudicial because it would interfere with trial preparation and impose additional costs.

Complaint Counsel is similarly pessimistic about the possibility of obtaining the Declarant's deposition in the near future. In its Opposition, Complaint Counsel summarizes the current status as follows:

Due to the pandemic health crisis and related travel restrictions, the Declarant, who is currently located in Switzerland, has not been deposed. He cannot be lawfully deposed on Swiss soil absent permission from Swiss authorities pursuant to international law. After careful consideration and analysis, Complaint Counsel believes the international law procedures have made it and continue to make it unlikely – particularly during an international pandemic – that a deposition of the Declarant would occur in time for the evidentiary hearing.

Opposition at 2.

Complaint Counsel argues that Respondents have failed to demonstrate that the challenged evidence is inadmissible on all potential grounds, and that the Declaration is relevant, material, and reliable. In this regard, Complaint Counsel notes that Respondents' expert witness cited the Declaration to support certain assertions in the expert's report. In their Reply, Respondents maintain that it is sufficient to show that admission of the Declaration or related testimony would violate Additional Provision 9, and that they do not also need to establish that the evidence is irrelevant, immaterial, or unreliable. Respondents further assert in their Reply

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<sup>1</sup> Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, \*18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

that the citations to the Declaration in their expert's report were only used to support two uncontroverted facts, one of which, according to Respondents, was clearly within the Declarant's knowledge and the other was a matter of public government record.

Complaint Counsel further claims that Respondents would not be prejudiced by the admission of the Declaration. According to Complaint Counsel, the Declarant remains willing to be deposed outside of Switzerland, if COVID restrictions permit, and therefore "it is possible that an opportunity to take th[e] deposition may still arise either in advance of trial or in time to be incorporated into post-trial submissions." Opposition at 5. Complaint Counsel further contends that even without a deposition of the Declarant, Respondents are not prejudiced because they obtained documents from the companies addressed in the Declaration and can thereby test the Declarant's assertions about them. Complaint Counsel concludes that the better solution is for the Administrative Law Judge to deny Respondents' Motion, reserve judgment until the evidence is put into context at trial and in post-trial filings, and assign whatever weight the Administrative Law Judge deems appropriate.

#### IV.

As stated above, Additional Provision 9 of the August 4 Scheduling Order clearly bars admission of a declaration where there has not been a fair opportunity to depose the declarant, and Respondents here have not had that opportunity with the Declarant. This provision is a recognition of the importance of the deposition as a method of discovering and testing the bases of assertions in a declaration, which by their nature are one-sided, and are often drafted by attorneys. Indeed, a deposition is the closest a party will get to being able to cross-examine a declarant. To require a party to defend against evidence that the party has not been able to sufficiently examine or test is prejudicial. Moreover, Additional Provision 9 was jointly proposed by the parties for inclusion in the Scheduling Order issued in this case.

Based on the record presented, and for all the reasons set forth above, Respondents' Motion is GRANTED, and it is hereby ORDERED that the Declaration shall not be admitted as an exhibit into the record in this case, and no trial testimony from the Declarant will be allowed into the record.

Notwithstanding the foregoing, in the event that the Declarant becomes available for a deposition and is deposed by Respondents prior to June 15, 2021, Complaint Counsel may file an appropriate motion for relief from this Order. A motion to reopen discovery to take the deposition of the Declarant will not be required.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: May 5, 2021