

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

**COMMISSIONERS:**        **Joseph J. Simons, Chairman**  
                                  **Noah Joshua Phillips**  
                                  **Rohit Chopra**  
                                  **Rebecca Kelly Slaughter**  
                                  **Christine S. Wilson**

**In the Matter of**

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

**and**

**Juul Labs, Inc.**  
**a corporation,**

**Respondents.**

**Docket No. 9393**

**MOTION TO RESCHEDULE THE EVIDENTIARY HEARING DUE TO THE  
ONGOING PANDEMIC**

Altria Group, Inc. and Juul Labs, Inc. (“JLI”), move for a 90-day continuance of the evidentiary hearing scheduled to commence April 13, 2021.<sup>1</sup> Last year, in light of the unprecedented health crisis plaguing the world, the Commission “found that it would be in the public interest to mitigate the transmission of and impact of COVID-19” and reset the evidentiary hearing originally scheduled for January 5, 2021 for April 13, 2021—perhaps in anticipation that it might then be safe to proceed with an in-person hearing. *See* Third Order Regarding Scheduling in Light of Public Health Emergency (June 3, 2020).

Unfortunately, as the Office of the Administrative Law Judges recently recognized, the

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<sup>1</sup> Respondents understand that the Chief Administrative Law Judge (“Chief ALJ”) will certify this motion to the Commission pursuant to 16 C.F.R. § 3.22(a). The Commission’s June 3 order states that “[t]he Administrative Law Judge retains discretion to make a recommendation to the Commission regarding an alternative hearing date.” Respondents respectfully request that the Chief ALJ recommend that the Commission grant the relief sought in this motion.

COVID-19 public health concerns remain “ongoing.” Ex. A, Email from D. Gross to Complaint and Respondent Counsel (Jan. 11, 2021). In fact, they have intensified. And although FDA recently approved two vaccines, public health officials expect that the country will not achieve widespread vaccination until late June or early July. As a result, Respondents request a short adjournment of the hearing date to avoid the serious risks posed by a spring hearing.

The two other possibilities both create intractable problems. The Commission could retain the April date and hold an in-person hearing. But doing so would create a non-trivial risk of COVID-19 infection for the Chief ALJ, the witnesses, Complaint Counsel, Respondents’ counsel, and their support teams—many of whom are unlikely to be vaccinated by April. Alternatively, the Commission could retain the April date while holding a virtual hearing. But doing so would not diminish the risk to the trial teams, who would still need to gather in person to plan for the hearing, prepare numerous witnesses, and ultimately try a lengthy and important antitrust case. What a virtual trial would diminish, instead, is the Chief ALJ’s ability to assess the credibility of the testifying witnesses—something that is critical to ensuring a fair trial and which is one reason why both the Federal Trade Commission Act and the Commission itself recognize the importance of an in-person hearing.

There is no reason to pursue either of these possibilities. Instead, the Commission should grant a finite, 90-day continuance, allowing time for those involved in this case to be vaccinated, and ultimately allowing the hearing to be conducted safely, in-person, and without unusual restrictions and complications. Under the Commission’s rules, this continuance can be granted “upon a showing of good cause.” 16 C.F.R. § 3.21(c)(1); *id.* § 3.41(b). And keeping the trial participants safe during an unprecedented public-health crisis surely qualifies under that standard.

## **BACKGROUND**

On April 1, 2020, the FTC filed an administrative complaint against Respondents.

Complaint at 1. The complaint alleges that Altria and JLI formed “a series of agreements . . . whereby Altria ceased to compete in the U.S. market for closed-system electronic cigarettes [hereinafter “e-vapor”] . . . in return for a substantial ownership interest in JLI, by far the dominant player in that market.” *Id.* The complaint was accompanied by a notice specifying that the evidentiary hearing would begin on January 5, 2021. *Id.* at 15.

In the weeks that followed, the Commission entered a series of orders modifying the timeline and protocols for the evidentiary hearing in response to the rapidly spreading pandemic. On April 3, 2020, the Commission, acting *sua sponte* and citing the “declared public health emergency,” found that it was “in the public interest to mitigate the transmission and impact of COVID-19,” and stayed the proceeding until April 20, 2020. Order Regarding Scheduling in Light of Public Health Emergency (Apr. 3, 2020). Ten days later, the Commission stayed the proceeding for an additional 45 days, again because of COVID-19. Second Order Regarding Scheduling in Light of Public Health Emergency (Apr. 13, 2020). The following month, the Commission entered a third scheduling order precipitated by the pandemic, this time rescheduling the evidentiary hearing for April 13, 2021, over three months after the original hearing date. June 3 Order.

On July 6, 2020, the Commission issued an order addressing “Public Access to the Evidentiary Hearing in Light of the Public Health Emergency.” That order instructs that public access to the evidentiary hearing “shall be allowed only via telephone conference or live streaming.” It also limits physical attendance at the hearing to “no more than ten people,” namely the Chief ALJ and two of his staff, the testifying witness, two Complaint Counsel, two Respondents’ counsel, one attorney for the witness, and a court reporter.

The Commission simultaneously entered parallel orders in three other Part Three proceedings slated for evidentiary hearings: *In re Axon Enterprise & Safariland*, No. 9389; *In re Peabody Energy Corp. & Arch Coal, Inc.*, No. 9392; and *In re Thomas Jefferson University &*

*Albert Einstein Healthcare Network*, No. 9392. See Press Release, Federal Trade Commission, Due to COVID-19 Pandemic, FTC Grants Public Access to Four Administrative Proceedings Via Telephone or Live Streaming (July 6, 2020). Because of subsequent developments in those cases, none are currently scheduled for an evidentiary hearing. Nor are Respondents aware of any other Part Three proceeding with an evidentiary hearing scheduled before the summer of 2021.

In August 2020, following a telephonic scheduling conference, the Chief ALJ issued a scheduling order setting forth pre-hearing deadlines. Document production and depositions are ongoing, with discovery scheduled to conclude in early February. Because Complaint Counsel and Counsel for Respondents “recognize the need to avoid travel and to maintain social distancing among the attorneys, court reporting personnel, and witnesses,” depositions are being conducted remotely. Stipulation and Order Concerning Remote Deposition Practices and Protocols 1 (Nov. 23, 2020).

Respondents’ counsel have also tried to develop a plan to keep their trial team, clients, and witnesses safe during the evidentiary hearing itself. For an in-person hearing, many of the attorneys representing Respondents, as well as many of the contemplated witnesses, would need to arrange safe travel to Washington (as well as lodging for the duration of the hearing). Meanwhile, large, complicated trials like this one—whether in person or remote—require an enormous amount of in-person interaction outside the hearing room: preparing witnesses, organizing documents, creating demonstrative materials—the list goes on. It is nearly impossible to have the interactions that a trial like this requires without creating a material risk of COVID-19 transmission.

## ARGUMENT

Under Section 3.41 of the FTC’s Rules of Practice, the Commission may “may order a later date for the evidentiary hearing to commence” based “upon a showing of good cause.” 16 C.F.R. § 3.41(b); see also *id.* § 3.21(c)(1) (similar). As the Commission has recognized, COVID-19 is a

“public health emergency” and has been designated as such by both the Department of Health and Human Services and the President. *See* June 3 Order. The Commission has repeatedly concluded that, because of that ongoing emergency, “good cause exists to . . . reschedule . . . evidentiary hearing[s].” Apr. 3 Order; Apr. 13 Order; June 3 Order. To Respondents’ knowledge, the FTC has not held an evidentiary hearing since March of 2020. Although the Commission and the parties have endeavored to conduct these proceedings safely and responsibly to the extent within their control, Respondents contend that good cause exists to continue the hearing for an additional 90 days.

Two sets of changed circumstances underpin this request. *First*, unlike in July, when the Commission adapted to physical distancing rules by limiting the hearing to ten participants, the anticipated duration of pandemic is no longer indefinite. The FDA recently approved two highly-effective vaccines, with more in the pipeline, and government officials anticipate that these vaccines will be become available to the general public *beginning* in April.<sup>2</sup> Accordingly, Dr. Anthony Fauci, the Director of the National Institute for Allergy and Infectious Diseases, recently predicted that the country will achieve herd immunity “at the end of June or in early July.”<sup>3</sup> Based on these projections, Respondents submit that a 90-day continuance will likely provide adequate time for the participants in the evidentiary hearing to receive vaccinations.

*Second*, in the months since the Commission’s July 6 order, the pandemic has worsened. In the District, the daily case rate has “multiplied nearly eight-fold since early July” and is expected to climb higher still following the winter holidays.<sup>4</sup> All told, the U.S. has recorded over 22 million

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<sup>2</sup> Carolyn Crist, *Fauci: ‘Umbrella of Protection’ Possible by Summer*, WebMD (Dec. 23, 2020), <https://www.webmd.com/lung/news/20201223/fauci-umbrella-of-protection-possible-by-summer>.

<sup>3</sup> *Id.*

<sup>4</sup> *See* Muriel Bowser, Mayor of D.C., Order 2020-127, Extension of the Public Emergency and Public Health Emergency (Dec. 18, 2020), [https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page\\_content/attachments/Mayor%27s%20Order%20127%2012-18-2020.pdf](https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Mayor%27s%20Order%20127%2012-18-2020.pdf).

infections and 375,000 deaths, with over 1.7 million positive cases in the last seven days.<sup>5</sup> Meanwhile, a new, highly-transmissible virus strain is now circulating in the U.S., magnifying the risk of infection.<sup>6</sup>

Under these circumstances, even a ten-person evidentiary hearing carries significant risks. Those in the FTC hearing room, even if masked and distanced, will be breathing the same air for hours on end. And a rotating cast of witnesses, some of whom are represented by independent counsel, will significantly increase the overall number of people to whom the ongoing participants—the Chief ALJ, his staff, the court reporter, two Complaint Counsel, and two Respondents’ counsel—will be exposed. Indeed, the Commission itself has acknowledged that “gatherings of people in close proximity may facilitate the spread of the disease.” July 6 Order. And even if the number of people in the hearing room is limited, this trial will still require people to gather “in close proximity” elsewhere. Given the size of the case, the fluid demands of preparing for a dynamic evidentiary hearing, and the need to coordinate among a multi-firm defense effort, Respondents will require one or more “war rooms” in which large teams of lawyers and support staff—many of whom interact with families and child-care workers—work long days in close quarters.

Beyond the paramount health concerns, the limitations on in-person attendance would prejudice Respondents. The current order indicates that two Respondents’ counsel—effectively one per party—could be present. In practice, this would mean that the client representative could not be in the hearing room—a major problem given that in-house counsel are critical to this

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<sup>5</sup> See *CDC COVID Data Tracker*, Centers for Disease Control and Prevention, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesinlast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days) (last visited Jan. 13, 2021).

<sup>6</sup> See Joel Achenbach & Gen Guarino, *CDC foresees spread in U.S. of highly contagious coronavirus variant*, Wash. Post (Jan. 6, 2021 5:52 PM), [https://www.washingtonpost.com/health/covid-variant-contagious-spread/2021/01/06/73a1b716-4fc2-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/health/covid-variant-contagious-spread/2021/01/06/73a1b716-4fc2-11eb-83e3-322644d82356_story.html).

proceeding.

Although the Office of Administrative Law Judges recently suggested that “the evidentiary hearing in this matter” might “be conducted remotely by video conference,” Ex. A, Email from Gross to Counsel, a virtual hearing is no substitute for an in-person trial. The FTC Act contemplates in-person trials. *See* 15 U.S.C. § 45(b) (The Commission shall serve a complaint and notice of hearing “on a date and *at a place therein fixed*” and “[t]he person, partnership, or corporation so complained of *shall have the right to appear at the place* and time so fixed . . . .”) (emphases added); *see also id.* § 21(b) (same language). Moreover, even if the hearing could be conducted remotely, the reality is that the trial team’s *preparations* before and during that hearing could not be. As explained above, trying a case like this one requires extensive in-person interaction behind the scenes. And that interaction will create a substantial risk of COVID-19 exposure even if the hearing is conducted virtually. The risk is no less significant for the FTC’s antitrust enforcement staff, which has been working remotely since March of last year.<sup>7</sup> Acknowledging these practical realities, the New York Supreme Court recently concluded that for a complex, multi-week proceeding, even a virtual trial carried intolerable risks. Ex. B, *Ambac Assurance Corp v. Countrywide Home Loans*, No. 651612/2010, slip op. at 3 (Dec. 24, 2020).

Moreover, credibility determinations are critical in this case. Respondents contend that “Altria withdrew its products for its own independent reasons, including regulatory reasons.” Transcript of Prehearing Scheduling Conference at 17 (Aug. 3, 2020). The FTC argues that “this justification is pretextual.” *Id.* at 12. When resolving that factual dispute, the credibility of witnesses during the hearing will be an important factor. And judging witness credibility is not

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<sup>7</sup> Ian Conner, *2020: Remote work with real results*, Fed. Trade Comm’n (Jan. 5, 2021 at 9:42 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/01/2020-remote-work-real-results>.

something that can be done effectively via a remote trial. Fluid cross-examination, body language, eye contact, and the ability to simultaneously view exhibits are all critical to a determination of credibility; none of this translates well to a trial-by-Zoom. Given that the FTC seeks to unwind a complex \$12.8 billion transaction, Respondents should be afforded the right to present their defense with live testimony so that the Chief ALJ can better assess the witnesses' credibility.

Despite Complaint Counsel's objection to this motion, a 90-day continuance would cause no prejudice. Indeed, it is shorter than the overall postponement (98 days) the Commission initiated in a trio of scheduling orders last spring, when the trajectory of the pandemic was still highly uncertain. And Respondents are not seeking a corresponding extension for discovery deadlines.<sup>8</sup>

Nor will the proposed continuance harm the public interest. The Commission did not seek injunctive relief in federal court and there is no particular urgency associated with the issues here. The primary relief sought is an order requiring Altria to "divest[]" its stake in JLI as a means of "restor[ing] Respondents' incentives to compete." Complaint at 16. But, even on Complaint Counsel's theory, the prospect of any competitive benefits is distant, attenuated, and uncertain. As the FTC's complaint explains, e-vapor products are heavily regulated by FDA and require a Premarket Tobacco Product Application ("PMTA"). *Id.* at 7. Altria's prior e-vapor products, which were among a class of products allowed to remain on the market while a PMTA was being prepared, were discontinued in the fall of 2018 and the relevant application deadline has since passed. *Id.* As a result, even if divestiture were ultimately ordered, Altria cannot immediately place those products back on the market; rather, Altria would first need to go through the lengthy PMTA process. And any *new* product created by Altria would both take years to develop and *then* require PMTA approval

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<sup>8</sup> Respondents acknowledge that it might be necessary to modify some deadlines immediately preceding the trial itself, *e.g.*, the pretrial briefs and the final prehearing conference, but Respondents will not seek a commensurate 90-day extension of the broader discovery schedule.

before the new product could be marketed. *Id.* As a result, even if Complaint Counsel were to establish a violation that would justify divestiture, any benefit from the complaint’s proposed remedy would (at best) take *years* to materialize. By contrast, the negative public-health consequences from proceeding with this hearing would be felt immediately: The Commission has already “determined that it is in the public interest to mitigate the transmission and impact of COVID-19,” *see* July 6 Order—to say nothing of the private-health consequences for those involved in this hearing.

### RELIEF REQUESTED

For these reasons, Respondents respectfully request that the Commission exercise its discretion under Sections 3.21(c)(1) and 3.41(b) to continue the evidentiary hearing by 90 days, or until such later date as may be convenient for the Chief ALJ and the Commission.

Dated: January 15, 2021

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*Counsel for Altria Group, Inc.*

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

**COMMISSIONERS:       JOSEPH J. SIMONS, CHAIRMAN  
                              NOAH JOSHUA PHILLIPS  
                              ROHIT CHOPRA  
                              REBECCA KELLY SLAUGHTER  
                              CHRISTINE S. WILSON**

**In the Matter of**

**Altria Group, Inc.**

**and**

**JUUL Labs, Inc.**

**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 Reschedule the Evidentiary Hearing Due to the Ongoing Pandemic. In a good faith effort to resolve by agreement the issues raised by the Motion, Respondents have conferred with Complaint Counsel about the proposed continuance. Complaint Counsel opposes the Motion. Because the parties were unable to reach an agreement, Respondents respectfully submit this motion to continue the evidentiary hearing for 90 days.

Dated: January 15, 2021

David I. Gelfand  
Jeremy Calsyn  
Matthew I. Bachrack

Respectfully submitted,

s/ Beth Wilkinson

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

**COMMISSIONERS:**        **JOSEPH J. SIMONS, CHAIRMAN  
NOAH JOSHUA PHILLIPS  
ROHIT CHOPRA  
REBECCA KELLY SLAUGHTER  
CHRISTINE S. WILSON**

**In the Matter of**

**Altria Group, Inc.**

**and**

**JUUL Labs, Inc.**

**Docket No. 9393**

**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION TO RESCHEDULE THE  
EVIDENTIARY HEARING DUE TO THE ONGOING PANDEMIC**

Good cause having been shown,

**IT IS HEREBY ORDERED THAT** Respondents' Motion to Reschedule the Evidentiary Hearing Due to the Ongoing Pandemic is **GRANTED**; and commencement of the evidentiary hearing in this matter is moved from April 13, 2021 to July 12, 2021.

By the Commission.

Donald S. Clark  
Secretary

ISSUED:

# EXHIBIT A

**From:** [Gross, Dana](#)  
**To:** [1032-Altria-JUUL-DL](#); [CGSH-Jeremy Calsyn](#); [Feinstein, Deborah](#); [CGSH-Jessica Hollis](#); [Moses, Jonathan M.](#); [Beth Wilkinson](#); [James Rosenthal](#)  
**Cc:** [Arthaud, Victoria](#); [Gebler, Hillary](#)  
**Subject:** Docket 9393 Altria Group/Juul Labs  
**Date:** Monday, January 11, 2021 12:45:51 PM

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Dear Counsel:

Please provide a joint statement apprising the ALJ of the status of discovery and any settlement negotiations. The requested statement need not be filed with the Office of the Secretary but shall be provided by email to the Office of Administrative Law Judges using the [OALJ@FTC.GOV](mailto:OALJ@FTC.GOV) email address no later than 2:00 p.m. on January 14, 2021.

Due to ongoing public health concerns related to COVID-19, and in the likely event that the evidentiary hearing in this matter will be conducted remotely by video conference, the parties are encouraged, in advance of the hearing, to take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and to submit such trial testimony as an exhibit in lieu of presenting the expert's testimony via live video at trial. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although the parties are encouraged to submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, you may choose to do trial depositions for all or fewer than all experts.

Regards,

*Dana L. Gross*

Legal Support Specialist  
Office of Administrative Law Judges  
(202) 326-3723

# **EXHIBIT B**

<b>Ambac Assur. Corp. v Countrywide Home Loans, Inc.</b>
2020 NY Slip Op 34293(U)
December 24, 2020
Supreme Court, New York County
Docket Number: 651612/2010
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**PUBLIC**

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM**

*Justice*

-----X

INDEX NO. 651612/2010

AMBAC ASSURANCE CORP., *et al.*,

MOTION DATE 12/18/2020

Plaintiffs,

MOTION SEQ. NO. 057

- v -

COUNTRYWIDE HOME LOANS, INC., *et al.*,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 057) 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110

were read on this motion to/for STAY.

In ordinary times New York courts favor in-person trials conducted in a courthouse. These are not such times given the worldwide COVID-19 pandemic. On this motion (motion sequence number 057), plaintiff insists the trial of this case, currently scheduled to commence in February 2021, cannot go forward in-person in the courthouse because of the substantial risk of infection it poses and that, while potentially feasible, a virtual Bench trial may not be held absent its consent, which consent it has withheld. The court has already advised counsel that an in-person trial is not feasible, given each side expects it would require eight lawyers and four support persons present in the courtroom at the same time during the full five week long trial. Whether a trial shall be held virtually is for the court to decide in the exercise of its sound discretion based on the circumstances (*see Jackson v State*, 165 AD 3d 1523, 1528 [3d Dept 2018]).

New York Judiciary Law §2-b(3) authorizes the court “to devise and make new process and forms of proceedings” that are “necessary to carry into effect the[ir] powers and jurisdiction.” Since COVID 19, the New York courts have exercised that authority and used technology to conduct the business of the courts, including virtual hearings and trials (*see, e.g., Ciccone v One West 64<sup>th</sup> Street, Inc.*, 2020 WL 6325719 [NY Sup Ct Sep 08, 2020] and the cases cited therein). Such authority has been employed during COVID-19 despite objection by the parties (*see, e.g., A.S. v N.S.*, 68 Misc. 3d 767, 768 [NY Sup Ct 2020] [allowing case to proceed over objection where the pandemic was held an “exceptional circumstance”]).

CPLR 4013, cited by AMBAC as authority barring a virtual absent consent, provides:

Upon stipulations of the parties, the judge who is to preside at the trial of an issue may direct trial in whole or in part at a specific place other than the courthouse.

Nothing in this provision prevents the court from holding the trial over objection in a location other than the courthouse in exceptional circumstances (*see Fiorenti v Cent. Emergency Physicians PLLC*, 39 AD 3d 804, 806 [2d Dept 2007] [where, interpreting Judiciary Law § 4, the court noted that the right to a public trial “is not, absolute . . . and has never been viewed as imposing a rigid, inflexible straitjacket on the courts.” The “right to a public trial may be circumscribed by competing interests, such as . . . unhealthy conditions of justice”]; *see also, People v Knapp*, 113 AD 3d 154, 159-60 [3d Dept 1985] [rejecting manslaughter defendant’s argument that he was denied a fair trial because his trial was held over the objection of both parties in a church hall during renovations at the courthouse]). Neither *Armstrong v Loveland* (99 AD28, 30-32 ([3d Dept 1904]), nor *In re Sawyer* (13 Misc 3d 497, 501-03 [Sup Ct Oneida Cty 2006]), holds otherwise. In *Armstrong*, the 3d Department held that CPA 437, the predecessor statute to CPLR 4013, required that a stipulation to hold the trial in a location other than the courthouse must be “in writing” that was “filed in the office of the clerk.” The statute no longer requires a writing. In *Sawyer*, Supreme Court Justice Julian found respondent’s argument that CPLR 1403 precludes testimony by video “not persuasive” and allowed a witness to testify by video over a party’s objection.

Even if the court were to hold that the trial must be held in the courthouse absent consent of the parties, the conduct of this trial would qualify because it would be conducted from the courthouse in either Manhattan or White Plains (*see Jackson*, 165 AD3d at 1528), where the Appellate Division, Third Department held the trial in that case was conducted in the Court of Claims even though the claimant was required to participate “via video conference from prison” (*id.*).

Ambac argues that a trial of this size, complexity and length cannot be conducted without exposing the participants to substantial risk to their health (Ambac Br. at 7, Doc. 2107). Countrywide responds that trials and arbitrations are being held widely using videoconference applications, “often with glowing reviews” (Countrywide Br. at 9). The court agrees that current technology allows virtual trials to be held seamlessly and a growing number of courts have

endorsed expansion of its use (*see e.g., Fin. Guar. Ins., Co., v Putnam Advisory Co.*, 2020 WL 5518146 at \*4 (SDNY Sep 14, 2020)).

In support of its claim that the conduct of a trial of this case virtually presents a substantial risk, Ambac submits an affidavit of Rina Marfatia, MD, who is board certified in infectious diseases and currently assists essential businesses to design COVID-19 protocols and plans to allow them to operate safely with maximum mitigation of risk. She reviewed the affirmations submitted to the court on this motion regarding the logistical and practical needs of remote trial preparation for this case and opines that “there is a high risk of COVID-19 transmission to trial participants and their contacts at home and in the community should the case . . . proceed” as presently scheduled (Marfatia Aff, ¶ 9, Doc. 2106).

She recites that even with a virtual trial, lawyers located in other states would need to travel to New York City and comply with quarantine requirements. They would have to stay in local hotels for the multi-week trial. Several lawyers and staff from four law firms representing Ambac would need to be in the same room at times. Discrete groups within the trial team would be working together in the same space for long periods each day over the course of the trial. Several attorneys and staff are in the high risk category and many family members of trial participants also fall in this category (*id.* ¶¶ 11-16). Presumably counsel for Countrywide would face similar challenges. She opines that these realities would make it difficult to form a “closed loop” during trial preparation and trial to prevent the spread of COVID-19. She concludes “performing this trial in the current pandemic is unsafe” (*id.* ¶ 17).

The facts provided by Ambac and the views expressed by Dr. Marfatia constitute persuasive evidence that proceeding with trial, even virtually, would be risky. A case of this length and complexity poses risks, particularly where it is highly likely that each side will organize a “war room” that necessarily involves several people working in close proximity indoors for long hours daily over a period of many weeks. Countrywide’s observation that Ambac’s conduct of trial preparation in-person at their law firms will be “the direct consequence of their own chain of decisions” (Countrywide Br. at 11) is not an adequate response.

Accordingly, the motion to stay trial (Motion Seq. No. 057) is hereby **GRANTED** and this action is stayed until trial may be safely held in person or virtually.

PUBLIC

12/24/2020

DATE

*O.P. Sherwood*  
O. PETER SHERWOOD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 15, 2021, I caused a true and correct copy of the foregoing to be served via email upon the following:

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