

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

IN RE PEANUT FARMERS
ANTITRUST LITIGATION

Court File No. 2:19-cv-00463-RAJ-LRL

Honorable Raymond A. Jackson
Honorable Lawrence R. Leonard

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR MODIFICATION
OR RECONSIDERATION OF COURT'S ORDER (ECF NO. 99)
TO EXTEND TRIAL DATE**

I. INTRODUCTION

Plaintiffs submit this Memorandum in Support of their Motion for Modification or Reconsideration of the Court's Order (ECF No. 99) to Extend the Trial Date. Specifically, Plaintiffs request the trial date of this case to be extended by at least 120 days from the Court's previously set date of January 19, 2021 to at least May 19, 2021 due to delays and challenges associated with the coronavirus pandemic (COVID-19). In the alternative, Plaintiffs request the trial date of this case to be extended until at least late March 2021 to avoid conflict with the trial date of another antitrust class action in this District (*In re: Interior Molded Doors Antitrust Litig.*, No. 3:18-cv-00718-JAG (E.D. Va.)) for which several of Plaintiffs' counsel in this case are either co-lead counsel for the class, liaison counsel for the class, or class counsel.

Modification or reconsideration of the Court's February 26, 2020 Order will prevent manifest injustice by mitigating the delays and challenges the parties have experienced so far (and will continue to experience) in the discovery process as a result of the public health crisis. Plaintiffs have shown good cause for their request and submit this Motion in good faith only after the parties encountered case-specific hardships due to COVID-19, despite the parties' diligent efforts to adhere to their discovery timelines and case schedule. Modification or reconsideration

of the Court's order will also allow key counsel to adequately represent the Peanut farmer plaintiffs in trial, as counsel cannot do so otherwise with a conflicting trial date for another antitrust class action in this District.

Plaintiffs have conferred with Defendants on this Motion, and Plaintiffs understand that Defendants seek a longer extension of the trial date (*i.e.*, until at least July 13, 2021) and of corresponding interim dates than Plaintiffs' proposal here and have additional reasons they believe warrant such an extension. Plaintiffs' understanding is Defendants will provide their position in a separately filed response to Plaintiffs' Motion. Plaintiffs do not oppose Defendants' request for additional time but believe a 120-day extension of the trial date is most appropriate for the reasons explained herein.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs commenced this action on September 5, 2019. ECF No. 1. On December 17, 2019, the Court entered a Rule 16(b) Scheduling Order setting a December 1, 2020 trial date. ECF No. 78. During the parties' Rule 16(b) Scheduling Conference, the parties expressed concern for completing the tasks involved in the case with a December 1, 2020 trial date. Subsequently, on February 10, 2020, pursuant to the parties' discussions with Judge Morgan's Courtroom Deputy Clerk during their Rule 16(b) Scheduling Conference, the parties filed a Consent Motion to Amend the Rule 16(b) Scheduling Order, requesting a trial date extension until May 11, 2021. ECF No. 89. On February 14, 2020, after this case was reassigned from Judge Morgan, the Court denied the parties' Consent Motion. ECF No. 95. However, on February 26, 2020, the Court granted Defendant Birdsong Corporation's Motion for Reconsideration of the Court's February 14, 2020 denial (ECF No. 96), to extend the trial date until January 19, 2021 (and projected to last four weeks) due to Birdsong's counsel's conflict with the trial date of another antitrust case in this District. ECF Nos. 97, 99.

On March 13, 2020, the President of the United States declared a national emergency due to the outbreak of the COVID-19 in the United States. That same day, this Court's Chief Judge Davis issued General Order No. 2020-02 in recognition of the exigent circumstances created by COVID-19, continuing all civil and criminal (grand and petit) jury empanelments, jury trials, and grand jury proceedings before any district or magistrate judge in any courthouse in the District until further Order of the Court. On March 16, 2020, Chief Judge Davis issued General Order No. 2020-03, suspending all in-person civil and criminal proceedings in all of the District's courthouses. The suspension was subsequently extended two more times: on March 24, 2020 under General Order No. 2020-07, and on April 10, 2020 under General Order No. 2020-12. The COVID-19 pandemic continues to this date, with the Centers for Disease Control and Prevention reporting over 1.5 million total cases in the country.¹

As a result of COVID-19 delays and related challenges, on May 20, 2020, the Honorable Judge Gibney, Jr. of this District granted an extension for the trial date and case schedule in *In re: Interior Molded Doors Antitrust Litig.*, No. 3:18-cv-00718-JAG (E.D. Va.) ("*Doors*"), continuing the trial date to February 8, 2021. *See Doors*, ECF Nos. 198, 220. The May 20, 2020 order reflects the second time Judge Gibney, Jr. granted the parties' joint motion to extend the trial date and case schedule in *Doors* in light of the COVID-19 pandemic. *See Doors*, ECF Nos. 205-06.

As indicated above, the January 19, 2021 trial currently set for this case under ECF No. 99 is projected to last up to four weeks and therefore almost certainly will overlap with the February 8, 2021 trial for *Doors*. Plaintiffs' counsel in this case holds key leadership roles in *Doors*; in

¹ *See* Centers for Disease Control and Prevention COVID Data Tracker, available at <https://www.cdc.gov/covid-data-tracker/> (last accessed May 19, 2020).

particular, Mr. Wyatt Durette, Jr. and Mr. Kevin Funk of Durette, Arkema, Gerson & Gill PC are interim liaison counsel for the direct purchaser plaintiffs and the proposed class, and Mr. Jeffrey Corrigan of Spector Roseman & Kodroff, P.C. is interim co-lead counsel for direct purchaser plaintiffs and the proposed class in *Doors*. Freed Kanner London & Millen LLC (“FKLM”) and Lockridge Grindal Nauen P.L.L.P. (“LGN”), lead counsel in this case, also serve as counsel for the direct purchaser class in the *Doors* matter.

III. LEGAL STANDARD

Under Fed. R. Civ. P. 16(b)(4), courts may modify scheduling orders for good cause. *See also* Eastern District of Virginia, Local Rule 7(G) (“No continuance will be granted other than for good cause and upon such terms as the Court may impose.”); *Anderson v. Warren*, No. 4:14cv28, 2016 WL 10957682, at *1 (E.D. Va. May 4, 2016) (referencing prior modification of Rule 16(b) Scheduling Order due to defendant’s military duty requirements); *SunTrust Banks, Inc. v. Robertson*, No. 2:09cv197, 2010 WL 11566593, at *2 n.3 (E.D. Va. Aug. 12, 2010) (referencing prior modification of Rule 16(b) Scheduling Order).

Good cause exists if “deadlines cannot reasonably be met despite the party’s diligence.” *Midgett, Tr. of Hardcastle Charitable Remainder Annuity Trust U/A Aug. 6, 2007 v. Hardcastle*, No. 2:17cv663, 2018 WL 4365580, at *9 (E.D. Va. July 19, 2018) (Jackson, J.) (citations omitted). Courts consider the following four factors in evaluating good cause: (1) danger of prejudice to the non-moving party; (2) length of delay and its potential impact on judicial proceedings; (3) reason for the delay; and (4) whether the movant acted in good faith. *Id.* (citations omitted); *see also Roe v. Howard*, No. 1:16-cv-562, 2017 WL 3709088, at *1 (E.D. Va. June 30, 2017) (citation omitted).

In addition, under Fed. R. Civ. P. 54(b) courts have discretion to reconsider interlocutory orders “that adjudicate[] fewer than all the claims or the rights and liabilities of fewer than all the parties . . . at any time before the entry of a judgment adjudicating all the claims and all the parties’

rights and liabilities.” Fed. R. Civ. P. 54(b); *MicroStrategy Servs. Corp. v. OpenRisk LLC*, No. 1:14CV1244 JCC/IDD, 2015 WL 2126924, at *1 (E.D. Va. May 6, 2015). In particular, courts have discretion “to depart from a previous ruling ‘(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not [previously] available; or (3) to correct a clear error of law or prevent manifest injustice.’” *Eramo v. Rolling Stone LLC*, No. 3:15-CV-00023, 2016 WL 5942328, at *1 (W.D. Va. Oct. 11, 2016) (quoting *Mayfield v. Nat’l Ass’n for Stock Car Auto Racing Inc.*, 674 F.3d 369, 378 (4th Cir. 2012)). Scheduling orders are considered to be interlocutory orders. *See, e.g., Midgett, Tr. of Hardcastle Charitable Remained Annuity Trust U/A Aug. 6, 2007 v. Hardcastle*, No. 2:17-cv-663, 2018 WL 4781178, at *2, 4 (E.D. Va. Oct. 3, 2018) (Jackson, J.) (granting in part motion for reconsideration and reconsidering defendant’s motion to amend scheduling order); *Felman Prod., Inc. v. Indus. Risk Insurers*, No. 3:09-0481, 2009 WL 3668038, at *1-2 (S.D.W. Va. Nov. 3, 2009) (evaluating motion for reconsideration of court’s amendment to scheduling order); *see also* ECF No. 99 (granting Defendant Birdsong Corporation’s Motion for Reconsideration of the Trial Date, finding good cause to be shown).

IV. ARGUMENT

The factors traditionally considered by courts in these circumstances support Plaintiffs’ Motion to extend the trial date in this case.

a. Extending the Trial Date Prevents Manifest Injustice in Light of Recent Events

Plaintiffs have good cause to seek an extension of the trial date; modification or reconsideration of the Court’s February 26, 2020 order prevents manifest injustice in light of the recent delays and challenges associated with COVID-19, as well as in light of the May 20, 2020 order in *Doors* setting a conflicting trial date. *Eramo*, 2016 WL 5942328, at *1; *see also United Food & Commercial Workers’ Union, Local No. 293 v. Noah’s Ark Processors, LLC*,

No. 8:18CV466, 2020 WL 1663584, at *3 n.2 (D. Neb. Apr. 4, 2020) (recognizing the COVID-19 pandemic as a “legitimate basis [that may] leave[] . . . parties unable to comply with the scheduling order”); *Macias v. KDF Foxdale, L.P.*, No. 5:18-cv-07712-EJD, 2020 WL 2097607, at *2, 4 (N.D. Cal. May 1, 2020) (modifying scheduling order to grant parties’ request to continue deadlines for 60 days due to COVID-19 prejudicing discovery efforts).

As highlighted above, over the past several months, this District has issued several orders continuing in-person civil and criminal proceedings, further extending the dates each time. In addition to states’ stay-at-home orders limiting travel to essential purposes (which for certain counsel continue to this date), the Centers for Disease Control and Prevention has also advised that crowded travel settings such as airports may increase the likelihood of exposure to COVID-19 for all travellers, and expressly recommends that travellers at higher risk for COVID-19 complications avoid air travel.² There are numerous upcoming deadlines and anticipated depositions in this case that would require travel by attorneys and witnesses, including those who may be at higher risk of COVID-19 complications. Although there are potential alternatives to travel, such as video conferencing systems, these alternatives require additional planning can entail delays— as the Court recognized when extending the trial date in *Doors*. *See Doors*, ECF Nos. 198, 205-06, 220. Furthermore, many key witnesses in this instant litigation are in remote regions, given the rural nature of the Peanut farming and shelling industry, and this may add complications if and when the parties implement these technological alternatives. Moreover, delays can be encountered where the parties disagree as to whether a virtual deposition is an acceptable medium for a particularly important witness.

² *See* Centers for Disease Control and Prevention, Coronavirus and Travel in the United States, available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (last accessed May 20, 2020).

The parties have faced case complications associated with the health pandemic. The parties set a date for the first deposition in the litigation but recognize there are continuously changing logistic variables to account for—such as witness availability and childcare—making the process uncertain and time-consuming. The parties’ structured data negotiations and discussions of other electronically stored information have been delayed as well, as key Defendant employees assisting with the process became unavailable, citing COVID-related reasons. Decl. of Kimberly A. Justice in Supp. of Pls’ Mot. (“Justice Decl.”), ¶¶ 3-4. Further, the small rural town of Albany in rural Georgia is located in one of the country’s primary Peanut production regions and unfortunately became one of the worst coronavirus hotspots in the United States during the past month.³ This outbreak in Albany and in greater Georgia has complicated discovery proceedings, especially the timeline of third-party document negotiations and productions. *See* Justice Decl. ¶¶ 5-6.

An extension of the trial date will help offset the prejudice of all these public health challenges the parties have encountered and unfortunately will continue to encounter. *See Romo v. Costco Wholesale Corp.*, No. 19cv1120-JAH (MSB), 2020 WL 1624589, at *1 (S.D. Cal. Apr. 2, 2020) (granting motion to amend scheduling order, finding despite the parties’ diligence, the “need for sufficient time to complete discovery, prepare [parties’] respective expert witnesses, file and/or oppose pre-trial motions . . . and/or seek any other relief permitted . . . in order to provide an initial measure of relief from any prejudice caused by the COVID-19 emergency”); *cf. N. Carolina State Conference of NAACP v. Cooper*, No. 1:18CV1034, 2020 WL 2113460, at *5-6 (M.D.N.C. May 4, 2020) (rejecting parties’ COVID-19 related concerns as “only speculative

³ *See* Business Insider, How a Small Georgia City Far From New York Became One of the Worst Coronavirus Hotspots in the Country, *available at* <https://www.businessinsider.com/coronavirus-hotspot-albany-georgia-funderals-covid-19-cases-per-capita-2020-4> (last accessed May 20, 2020).

anticipat[ion] . . . of public health-related constraints”) (internal quotation marks omitted) (alteration in original).

To add to the delays and challenges to this case caused by COVID-19, plaintiffs’ counsel received an order this week on May 20, 2020 in the *Doors* antitrust litigation extending the *Doors* trial date to February 8, 2021 because of the public health pandemic. ECF Nos. 198, 220. The same counsel will be taking a lead role in representing the Peanut farmer plaintiffs in this trial and cannot do so if they must also appear in the *Doors* trial. The probability of a conflict in the trial dates between this case and *Doors* would serve an injustice by unnecessarily depriving Plaintiffs of key counsel. *See* ECF Nos. 97, 99 (granting Defendant Birdsong Corporation’s Motion for Reconsideration of the Trial Date due to conflict in trial dates for Birdsong counsel). As discussed above, Plaintiffs’ counsel has been intimately involved in the *Doors* litigation, most prominently with Mr. Durette’s role as interim liaison counsel and Mr. Corrigan’s role as co-lead counsel. In the instant matter, Mr. Corrigan has been designated by co-lead counsel to lead all of plaintiffs’ efforts regarding expert analysis and testimony, which will be critical at the trial of this matter. Mr. Corrigan has years of experience in expert work in class cases and was specifically selected to represent the class in this capacity. Mr. Durette has decades of experience in this District and was specifically called upon for his ability to assist the class in the direct purchaser plaintiffs’ action. Having effective local counsel before the jury is especially important where a prominent defendant is local for this Division of the Eastern District of Virginia. The absence of Mr. Corrigan and Mr. Durette at trial in this matter would substantially prejudice Plaintiffs.⁴

⁴ Attorneys with both FKL M and LG N are also counsel for the proposed direct purchaser class in *Doors*; however, the attorneys are not lead counsel and have not been designated to serve key roles at trial at this time, so although their inability to participate in the *Doors* trial would be prejudicial, it would not have the same impact as Mr. Durette’s and Mr. Corrigan’s absence from trial in this matter.

b. Plaintiffs' Request to Extend the Trial Date is Presented in Good Faith

Plaintiffs' Motion is being presented in good faith and granting Plaintiffs' Motion will not prejudice Defendants or the course of this litigation. *Midgett*, 2018 WL 4365580, at *9. As detailed above, Plaintiffs submit this Motion after new evidence and changes came to light regarding both the national health crisis and the conflicting trial date in *Doors*. *Eramo*, 2016 WL 5942328, at *1. In addition, these COVID-19 challenges are not abstract or speculative; rather, the parties have worked diligently over the past several months to adhere to their discovery timelines and case schedule, but have encountered case-specific delays and hardships as a result of the pandemic. *Romo*, 2020 WL 1624589, at *1. Plaintiffs seek an extension of the trial date in this case only after realizing these delays and hardships would prejudice the course of this litigation under the Court's February 26, 2020 ordered trial date, and only after receiving a conflicting trial date from another case in this District⁵.

V. CONCLUSION

For these reasons, Plaintiffs respectfully ask the Court to grant Plaintiffs' Motion for Modification or Reconsideration of the Court's Order (ECF No. 99) and extend the trial date of this case until at least May 19, 2021 due to delays and challenges associated with COVID-19, or in the alternative, extend the trial date of this case until at least late March 2021 to avoid conflict with the trial date of another case in this District for which Plaintiffs' counsel are scheduled.

⁵ Additionally, in these unprecedented circumstances, the Court could hopefully ease the impact of delays imposed on litigants during the District's indefinite continuance of trials scheduled during the COVID-19 lockdown.

Respectfully submitted,

Dated: May 28, 2020

By /s/ Wyatt B. Durette, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sends an electronic copy of the foregoing to all counsel of record in this case.

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