

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 99-2496 (GK)  
 :  
 PHILIP MORRIS USA INC., :  
 f/k/a PHILIP MORRIS INC., :  
 et al., :  
 :  
 Defendants. :

MEMORANDUM OPINION

The United States has filed an Emergency Motion to have the depositions and trial testimony of Messrs. Gulson and Welch, who are located in Australia, conducted by teleconference and/or video conference. Pursuant to Order #597 which granted Joint Defendants' Motion in Limine to take the depositions of Messrs. Gulson and Welch at least five business days prior to their trial testimony, the United States is requesting that such deposition and trial testimony be taken by use of either teleconference and/or video conference in order to save significant amounts of time, money, and inconvenience at a time when all counsel are particularly busy preparing for the commencement of trial on September 21, 2004. In making this request, the United States relies upon Fed. R. Civ. P. 30(b)(7) and 43(a). The United States also points out that "the usual rule . . . in federal litigation, [is that] in the absence of special circumstances, a party seeking discovery must go where the

desired witnesses are normally located.” Yaskawa Elec. v. Kollmorgen Corp., 201 F.R.D. 443, 444 (N.D. Ill. 2001).

Defendants raise several objections, none of which, in the present context, are persuasive.<sup>1</sup> The most significant objection is that the procedure requested by the Government would be prejudicial because Defendants would not be able to observe the witnesses' demeanor and credibility in person. While that objection has a superficial appeal, its appeal fades in light of the facts. Mr. Gulson is the former in-house counsel for BATCo's then-wholly-owned-subsidiary, W.D. & H.O. Wills. Mr. Welch is a former Chief Executive of the Tobacco Institute of Australia. Its members include W.D. & H.O. Wills, Philip Morris Australia, and R.J. Reynolds Australia. The United States has already provided transcripts of two television interviews with Mr. Welch as part of its numerous submissions. Based upon the former positions held by these two men, and their involvement with many, if not all, of the Defendants, it is difficult to believe that Defendants will be assessing their credibility and demeanor for the very first time in the video conference of their depositions and trial testimony. Indeed, such a claim - in the context of these individuals' positions in the industry - borders on the disingenuous. These two witnesses are no strangers to the Defendants.

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<sup>1</sup> Defendants' argument that the Government's Motion is essentially a Motion for Reconsideration of Order #597 is totally without merit.

Defendants also raise various procedural problems they foresee with video conferencing, all of which seem trivial to the Court. For example, as the Government points out in its reply, Defendants have numerous attorneys in Australia who, it is fairly certain, could be available to hand exhibits to the witnesses in person at the depositions while their counterparts were handing duplicate copies of those exhibits to counsel for the United States in Washington, D.C. While there undoubtedly will be some difficulties caused by the time differences between Australia and the United States, they pale in comparison with the logistical difficulties of bringing these two men to the United States from Australia, with their attorneys, and keeping them here for five business days between the taking of their depositions and the giving of their testimony at trial. Moreover, as everyone knows, international travel has become only more burdensome and difficult in these days of concern about national security and terrorism. In short, the United States has made an adequate showing that "compelling circumstances" exist, under Rule 43(a), to justify the use of video conferencing.

Finally, in terms of the Court's ability as fact-finder to assess the credibility and demeanor of these witnesses, a video of their testimony is no different and no less satisfactory than their actual testimony in open court. That is the procedure we are using for numerous other witnesses whose prior video testimony has been

designated and there is no reason it will not be equally satisfactory for these witnesses.

We are three weeks away from trial. Both counsel and the Court need to maximize the efficient use of their time and resources. For all the foregoing reasons, the Government's Emergency Motion will be **granted**.

August 30, 2004

/s/ \_\_\_\_\_  
Gladys Kessler  
United States District Judge

**Copies via ECF to all counsel  
of record**

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ORDER #637

Upon consideration of the United States' Emergency Motion to have Messrs. Gulson and Welch's Depositions Conducted by Teleconference or Video Conference and Trial Testimony Conducted by Video Conference, the Joint Defendants' Opposition, the United States' Reply, and all other briefing before the Court, it is this 30th day of August, 2004,

**ORDERED** that the United States' Emergency Motion to have Messrs. Gulson and Welch's Depositions Conducted by Teleconference or Video Conference and Trial Testimony Conducted by Video Conference be and hereby is **GRANTED**; and it is further

**ORDERED** that the depositions of Messrs. Gulson and Welch pursuant to Order #597 be conducted by teleconference or video conference; and it is further

**ORDERED** that the trial testimony of Messrs. Gulson and Welch be conducted by video conference.

/s/  
Gladys Kessler  
United States District Judge

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counsel of record**