

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

ORDER #471

TRIAL PROCEDURES

Counsel have submitted their respective memoranda regarding trial protocol issues. Upon consideration of those memoranda, the lengthy status conference held on December 22, 2003, and the entire record in this case, the Court hereby enters the following Order, which will govern the trial of this case. This Order may be subject to modifications as subsequent events require.

**I. TRIAL SCHEDULE**

Trial ordinarily will be held Monday through Thursday from 9:30 a.m. to, depending on the convenience of the Court, witnesses and counsel, 4:30 p.m. There will be a lunch break of approximately one hour starting between 12:30 p.m. and 1:00 p.m., again depending on the convenience of the Court, witnesses and counsel. There will be one 15 minute break in the morning and another 15 minute break in the afternoon.

On Thursday afternoons at the end of the trial day, counsel and the Courtroom Clerk are to meet in order to confirm which exhibits have been admitted into evidence during that trial week. At the end of each trial day, if necessary, the Court will reserve 15 minutes to discuss scheduling matters for the next day.

## **II. TRIAL LIMITS**

Each side shall have a limited number of hours within which it may conduct all live witness examinations, including direct, cross and redirect.<sup>1</sup> Plaintiff will be allowed 50% of the hours allotted for trial; Joint Defendants, including Liggett Group, Inc., will be allowed 50% of the hours allotted for trial.<sup>2</sup> Plaintiff shall inform the Court, no later than June 15, 2004 of the total number of hours it requests to present its case-in-chief; Defendants shall inform the Court no later than July 15, 2004, of the total number of hours they request to present their rebuttal and affirmative defenses. The Court will thereafter determine the total number of

---

<sup>1</sup> In-court hours spent on prior deposition testimony (written or videotaped) will be included in the number of hours allotted.

<sup>2</sup> The allocation of hours between Plaintiff and Joint Defendants is a difficult issue. While Defendants have argued that Plaintiff is entitled to only 40% of the hours allocated because it has chosen to sue nine separate defendants whose separate interests must be respected, it is also true that Plaintiff bears the burden of proof as to each of those nine defendants. Upon careful reflection and in the exercise of its discretion to ensure fairness to all in the conduct of this trial, the Court concludes that a 50%-50% allocation is fair to all parties concerned.

hours to be allowed for Plaintiff's case-in-chief and Defendants' rebuttal and affirmative defenses.

### **III. INTERIM SUMMATIONS**

Plaintiff shall provide, in writing, no later than June 15, 2004, an outline (topical or chronological) of the order in which it plans to present its case, and to designate those points at which an interim summation would be most appropriate. Defendants shall provide in writing, no later than July 1, 2004, an outline (topical or chronological) of the order in which they plan to present their case and to designate those points at which an interim summation would be most appropriate. The Court will thereafter designate at what points counsel will be permitted to present a time-limited interim summation of the evidence presented at the conclusion of preceding segments of the trial.

### **IV. ORDER OF TRIAL**

#### **A. Opening Statements**

Plaintiff will be allocated one five-hour trial day for its opening statement. Defendants will be allocated one five-hour trial day for opening statements, to be divided amongst themselves as they wish.<sup>3</sup> Any demonstrative materials used during opening

---

<sup>3</sup> While five hours of opening statements for a trial of several months may not appear overly generous, it must be remembered that this Court has already read close to 2,000 pages of preliminary proposed findings of fact and conclusions of law and by the time of trial will have read an equal or greater amount of pages of final proposed findings of fact and conclusions of law.  
(continued...)

statements shall be disclosed to opposing counsel no later than September 3, 2004.

**B. Direct Examination of Witnesses**

One counsel for Plaintiff and one counsel for Defendants shall be designated as lead counsel for each and every witness, for purposes of direct examination, cross-examination and redirect examination.

One week prior to the start of each side's case-in-chief, that side will identify in writing to the Court and the other side the order in which it anticipates presentation of all its witnesses during its case-in-chief. The identification of witnesses is to separately identify (1) fact witnesses, (2) expert witnesses, (3) adverse witnesses and (4) witnesses to be offered by means of prior trial or deposition testimony (written or videotaped).<sup>4</sup>

After the trial begins, in order to alert and update the Court on the anticipated order of witnesses, counsel for a party that is presenting witnesses the following week shall provide the Court<sup>5</sup> and the other parties, no later than 5:00 p.m. on the Monday

---

<sup>3</sup>(...continued)

It is fair to say that at that point, the Court will have a very clear view of what the parties intend to prove.

<sup>4</sup> See Section V, infra, as to the presentation of prior trial or deposition testimony.

<sup>5</sup> Wherever this Order requires that materials be provided to the Court, counsel shall provide two courtesy copies to Chambers.

preceding the following week of trial, with written notice of the witnesses and exhibits intended to be presented during that week of trial. That notice of witnesses and exhibits shall include witnesses to be offered by prior trial or deposition testimony (written or videotaped), even though such prior testimony may not be presented in open Court.

Parties are encouraged upon sufficient advance notice to arrange for the transportation and presentation of witnesses under their control. No later than 30 days after the submission of final pre-trial witness lists, each party shall notify the appropriate opposing party of the names of those individuals deemed under the control of the opposing party that the notifying party wishes to call in its case-in-chief (or rebuttal case). The "controlling" party shall inform the notifying party within 7 days of notification whether it will produce that individual for trial, subject to reasonable arrangements regarding timing of the presentation of the person, or whether it disputes that it has "control" over the individual. For purposes of this paragraph, all current employees, officers, and directors are deemed under the control of a party.

#### **1. Written Direct Examination**

The direct testimony of all witnesses--both fact witnesses and expert witnesses--shall be presented in writing. In addition, live testimony on direct examination by an expert witness relating to

demonstrative evidence will be permitted, but may not exceed one hour per witness. Such time will be counted against the total number of hours allocated to that party for trial examination.

By 5:00 p.m. of the Monday preceding the following week of trial, the parties who have listed witnesses for direct examination for that following week shall serve on the Court and opposing counsel, in written question and answer format,<sup>6</sup> the direct examination testimony of those witnesses who are planned for presentation during that following week. Counsel shall specify whether there is to be any live testimony relating to demonstrative evidence and, if so, how much time is anticipated for such testimony.

By 5:00 p.m. of the Monday preceding the following week of trial, counsel shall also serve on the Court and opposing counsel, in writing for each witness, a list of all exhibits, as well as copies of any demonstrative and summary exhibits, that the party plans to either submit or refer to as part of the direct testimony of that witness. Summary exhibits shall indicate the underlying data and sources for the exhibit consistent with the provisions of Fed. R. Evid. 1006.

---

<sup>6</sup> Counsel are directed to present this question and answer format just as if the witness was testifying in open court.

## **2. Adoption of Written Direct Examination**

When a witness is called for direct testimony, that witness, after being introduced and sworn, shall adopt all or part of his or her written testimony under oath in open Court.

## **3. Procedures for Adverse Witnesses and Any Other Witnesses for Which a Written Direct Examination Cannot Be Obtained**

a. If the adverse status of a witness is challenged, then the offering party must file the appropriate memorandum of law pursuant to the procedures set forth in Section XII, infra, identifying the basis upon which the offering party believes that the witness is adverse within the meaning of Fed. R. Evid. 611(c).

A party offering an adverse witness is expected to provide a written direct examination where possible by use of prior trial or deposition testimony (written or videotaped).

b. If a party proposes to present a witness who has given no prior trial or deposition testimony (written or videotaped), for whom the party is unable to obtain a written direct examination, that party shall notify the Court and other parties in its notice of witnesses and exhibits to be filed by 5:00 p.m. of the Monday preceding the week in which that witness is to be called. Counsel is to indicate the circumstances rendering it impossible to obtain a written direct examination from the witness. Counsel is also to serve, as required under Section IV. B. 1., a

list of all exhibits and copies of any demonstrative and summary exhibits, that are intended to be used in the direct examination of the witness.

**C. Cross-Examination**

All parties shall have the right to cross-examination. Cross-examination shall be held live. Defendants shall identify the lead counsel for the conduct of cross-examination of each witness. Defense counsel for the remaining Defendants shall be allowed only non-repetitive, non-cumulative cross-examination of witnesses. Re-cross-examination is presumptively not allowed and will be available only with leave of Court.

**D. Redirect Examination**

Redirect examination shall be held live. For redirect examination of a defense witness, only the party presenting the direct examination of that witness may conduct redirect.

**E. Rebuttal Case for the United States<sup>7</sup>**

The United States will have the opportunity to present rebuttal evidence after the close of Defendants' case. At the close of Defendants' case, the United States shall inform the Court of the total number of hours it requests to present its rebuttal

---

<sup>7</sup> Parties are cautioned that the Court will strictly apply the rules on rebuttal evidence. See Black's Law Dictionary (Abridged Sixth Edition, 1991), defining "rebuttal evidence" as "[e]vidence given to explain, repel, counteract or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party."



case. The Court will thereafter determine the total number of hours to be allowed for rebuttal. There shall be a two week hiatus between the close of the Defendants' case and the rebuttal case. By 5:00 p.m. of the Monday preceding the first week of rebuttal testimony, the Government shall serve on the Court and opposing counsel, in written question and answer format, the direct testimony of those witnesses who are planned for presentation during that following week. Counsel shall specify whether there will be any live expert testimony relating to demonstrative evidence and, if so, how much time is anticipated for such testimony.

By 5:00 p.m. of the Monday preceding the first week of rebuttal testimony, counsel shall also serve on the Court and opposing counsel, in writing, for each witness, a list of all exhibits, as well as copies of any demonstrative and summary exhibits that the party plans to either submit or refer to as part of the direct testimony of that witness.

Thereafter, the procedure identified in Section IV. B. 1. shall govern the presentation of rebuttal witnesses.

Once the Court determines the number of total hours to be allowed for rebuttal, Plaintiff will be allocated 50% of those hours and the Joint Defendants, as a group, will be allocated 50% of those hours.

**V. PRESENTATION OF PRIOR TRIAL OR DEPOSITION TESTIMONY (WRITTEN OR VIDEOTAPED)**

Any party who will be calling witnesses for examination via prior trial or deposition testimony, written or videotaped, shall serve on opposing counsel, by 5:00 p.m. of the Monday preceding the following week of trial in which the testimony is to be presented, the written designation of prior testimony that they expect to submit, as well as a list of all exhibits for each witness, including any demonstrative and summary exhibits, that the party plans to submit in conjunction with the prior trial or deposition testimony.

Any objection to any portion of the proffered prior trial or deposition testimony or accompanying exhibits, and the counter-designation of the testimony, shall be filed with the Court and served on opposing counsel in writing by 5:00 p.m. of the Wednesday following the Monday preceding the following week of trial in which the witness will be called via his or her prior deposition testimony. Responses to objections shall be filed with the Court and served on opposing counsel in writing by 5:00 p.m. of the Thursday following the Monday preceding the following week of trial in which the witness will be called via his or her prior deposition testimony.

Parties offering prior trial or deposition testimony (written or videotaped) shall highlight those portions to be introduced into evidence in red, and the party designating transcript portions in opposition, shall highlight their counter-designations in blue. In

the case of videotaped testimony, the moving party shall supply the Court with a transcript of the testimony with the parties' designations.

Absent extraordinary good cause, the Court will not allow transcripts to be read into the record or videotaped testimony to be presented during trial. Such testimony will be entered into the record as an exhibit and will be reviewed by the Court at a convenient time.

#### **VI. PRESERVATION OF OBJECTIONS**

Any objections made by lead defense counsel will be deemed made by all other Defendants, unless expressly disclaimed. Other defense counsel are entitled to state further grounds for objection, if such grounds are totally different from those presented by lead counsel.

#### **VII. APPLICATION OF THE RULE ON WITNESSES**

Fact witnesses are to be excluded from the courtroom until they have completed their testimony. Fact witnesses are prohibited from reviewing the trial transcripts of the testimony of other fact witnesses. Fact witnesses who have completed their testimony are prohibited from discussing that testimony with any other fact witness who has not yet concluded his or her testimony. Fact witnesses are prohibited from discussing their testimony with counsel until such testimony is concluded. This paragraph does not apply to the testimony of expert witnesses.

### **VIII. EXHIBITS**

A party offering an exhibit at trial shall produce one pre-marked original/copy for the Court, one copy for the Courtroom Clerk, one copy for the Law Clerk, one copy for the witness, and one copy for each Joint Defendant if so requested. At the close of each witness's testimony, the party presenting that witness shall move their requested exhibits into evidence. No exhibits shall be moved into evidence which were not included on the exhibit list submitted by 5:00 p.m. of the Monday preceding the following week of trial in which the witness actually testified, unless there is a showing of extraordinary good cause. No objections to exhibits will be considered unless they were served on the Court and opposing counsel no later than 5:00 p.m. of the Wednesday preceding the following week of trial in which the witness actually testified, unless there is a showing of extraordinary good cause.

### **IX. DEMONSTRATIVE EXHIBITS**

Parties shall identify and produce all demonstrative exhibits they intend to use at trial no later than 5:00 p.m. of the Monday preceding the following week of trial in which the exhibit will be offered. Any objections to such demonstrative exhibits shall be filed pursuant to the procedures set forth in Section XII.

### **X. SUMMARY EXHIBITS**

Parties shall identify and produce all summary exhibits they intend to use at trial no later than 5:00 p.m. of the Monday

preceding the following week of trial in which the exhibit will be offered. At the time the summary exhibit is identified and produced, the party offering it shall indicate to opposing counsel the underlying documents or materials upon which the summary exhibit is based, unless such documents or materials have been previously made available for inspection. Any objections to such summary exhibit shall be filed pursuant to the procedures set forth in Section XII.

#### **XI. OFFERS OF PROOF**

Pursuant to Fed. R. Evid. 103(a)(2), when a party wishes to make an offer of proof during direct and redirect examination of witnesses, that party is to submit for the record, within 48 hours of the time of the exclusionary ruling, a written summary of the evidence it sought to present. During cross-examination, a party may make their offer of proof orally.

#### **XII. MOTIONS, OBJECTIONS, AND OTHER TRIAL DISPUTES**

Any party seeking a ruling on any issue--whether a motion in limine relating to witnesses and exhibits, objections to the adverse status of witnesses, objections to witnesses and/or exhibits, etc.--shall serve on the Court and opposing counsel a written statement of the issue in dispute and an informal memorandum of law in support of its request no later than 5:00 p.m. of the Wednesday preceding the following week of trial in which the dispute in question must be resolved. Parties are to confer about

the dispute and exert their best efforts to resolve it. In the event they cannot, the party opposing the request for a ruling shall serve the Court and opposing counsel its written response no later than 5:00 p.m. of the Thursday preceding the following week of trial in which the dispute in question must be resolved. Neither party's memorandum of law shall exceed three pages in length. No disputes may be submitted, for the first time, either the night before or the day when the dispute in question must be resolved.

### **XIII. PROTECTIVE ORDER**

The Special Master is hereby directed to work with the parties in developing an appropriate and comprehensive protective order which will cover pre-trial and trial proceedings. While the Court hopes that parties will be able to reach an agreement on this issue, if they are not, the Special Master shall submit a Report and Recommendation pursuant to Order #51.

### **XIV. MISCELLANEOUS**

Counsel are to inform the Court, in writing, no later than February 1, 2004, what their space needs are for support personnel during the course of the trial.

\* \* \*

If either party foresees an unanticipated major logistical problem with the procedures outlined herein, they may file a Notice with a supporting memorandum of no more than five pages, calling

the Court's attention to such problem. Any response must be filed five days thereafter and may be no more than five pages. Parties are warned not to reargue issues that have been fully discussed in Report and Recommendation #129 briefing, in open court or in written submissions. At the same time, the Court wishes to remove any unintended obstacle to the efficient management of trial.

January 16, 2004

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

**Copies via ECF to counsel  
of record**