

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.,	:	
<u>et al.</u> ,	:	
	:	
Defendants.	:	

ORDER #878

Before the Court is a pleading by BATCo pursuant to Orders #471, 471A and 471B, raising five evidentiary objections to the testimony of Frederick T. Gulson. Upon consideration of the Objections, the United States' Response, the applicable case law, and the entire record herein, and for the reasons stated below, the Court concludes that the testimony of Mr. Gulson is to be taken in its entirety and the record of that Court proceeding is to be sealed until final resolution of all outstanding Objections.

There is a long, tangled history regarding BATCo's and BATAS' efforts to establish the privileged nature of the documents and testimony covered by the pending Objections. The issues raised are complex and involve proceedings in both Australian and United States trial and appellate Courts. Moreover, Report & Recommendation #172, which is pending before this Court, involves

many of the same issues raised in the pending Objections.¹ The BATCo objections were fully briefed as of February 11, 2005. Because of the complexity of the issues raised, the Court heard oral argument yesterday, February 15, 2005.

The matter is further complicated by the logistics of Mr. Gulson's situation. He is an Australian citizen who is testifying voluntarily, although the Government is paying his expenses. He has come to the United States voluntarily, and the United States Government asserts no control over him. He was scheduled to testify today, Wednesday, February 16, 2005. The Court was informed yesterday that he is ill with the flu and the testimony was postponed until tomorrow, February 17, 2005. However, there is no question that Mr. Gulson will return to Australia on Friday, February 18, 2005, and, therefore, his testimony must be completed by the end of the Court day tomorrow. Counsel have assured the Court that that can be accomplished.

Taking all of these factors into consideration, and attempting to balance them, the Court concludes that the best solution will be to take Mr. Gulson's testimony in its entirety, However, such testimony will be accepted only conditionally and subject to the

¹ Of the many Reports and Recommendations issued by Special Master Levie, only three remained unresolved by this Court prior to commencement of trial in September. Unfortunately, Report & Recommendation #172 was one of those three and it has been impossible, given the intense trial schedule, to address that Report & Recommendation.

Court's final rulings on the Objections raised by BATCo. In order to fully preserve all of BATCo's rights, the testimony will be taken under seal and in a closed courtroom. The testimony will remain under seal until further order of the Court.

The Court is well aware that case law from the D.C. Circuit establishes that "[t]he first amendment guarantees the press and public a general right of access to Court proceedings." Washington Post v. Robinson, 935 F.2d 282, 287 (D.C. Cir. 1991). However, this right of access is far from absolute, as courts have recognized numerous exceptions to the general rule of openness. See Nixon v. Warner Communications 435 U.S. 589, 598 (1978) (listing various exceptions). Although much of the available case law on the subject of openness arises in the criminal context, the "presumption of openness" applies in the civil context as well. See Johnson v. Greater Southeast Community Hosp. Ctr., 951 F.2d 1267, 1277 (D.C. Cir. 1991). This presumption may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984).

In United States v. Hubbard, 650 F.2d 293, 317-322 (D.C. Cir. 1980), the Court of Appeals set forth factors that should be considered in determining when it is appropriate to restrict access to court proceedings and court documents. Applying those factors,

the Court concludes that the temporary closing of these proceedings is appropriate for all of the following reasons: there is no need for immediate public access to the documents and testimony at issue; BATCo has strongly objected to disclosure of such testimony and documents; the legal issues surrounding the assertions of privilege are complex and need further consideration; the practicalities and logistics of the situation determine that the testimony be taken now rather than risk losing it altogether or requiring the additional expense and inconvenience of bringing Mr. Gulson back to the United States; BATCo will suffer no prejudice because all matters will be sealed until the Court rules; the Government will suffer no prejudice because the testimony of the witness, over whom it has no control, will be taken and preserved; and the most complete record will be made for appellate review.

For all these reasons, the Court concludes that these narrowly tailored measures meet the requirements of Hubbard and are appropriate to protect the interests of all concerned. Accordingly, it is this 16th day of February, 2005, hereby

ORDERED that the testimony of Frederick T. Gulson shall be taken under seal; and it is further

