

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

RAI STRATEGIC HOLDINGS, INC. AND R.J.
REYNOLDS VAPOR COMPANY

Plaintiffs-Counterclaim
Defendants,

v.

ALTRIA CLIENT SERVICES LLC; PHILIP
MORRIS USA INC.; PHILIP MORRIS
PRODUCTS S.A.

Defendants-Counterclaim
Plaintiffs.

Case No. 1:20-cv-00393-LO-TCB

**COUNTERCLAIM PLAINTIFFS' MEMORANDUM IN SUPPORT OF
UNOPPOSED MOTION FOR APPOINTMENT OF COMMISSIONERS, AND
DIRECTION OF SUBMISSION OF HAGUE CONVENTION APPLICATION FOR
AUTHORIZATION OF THE DULY APPOINTED COMMISSIONERS TO TAKE
EVIDENCE PURSUANT TO ARTICLE 17 OF THE HAGUE CONVENTION OF 18
MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR
COMMERCIAL MATTERS**

Counterclaim Plaintiffs hereby move the Court for entry of an order duly appointing counsel for the parties as Commissioners for the purpose of taking the voluntary testimony by oral examination under oath via videoconference in Switzerland of six (6) witnesses,¹ whom have been identified by the parties as witnesses who will be deposed in this case, who either live or work in Switzerland pursuant to Article 17 of the Hague Convention of 18 March 1970 on Taking Evidence Abroad in Civil or Commercial Matters (the “Hague Convention”). Counterclaim Plaintiffs have conferred with its Swiss counsel, Bär and Karrer, who has advised to use the procedures of Article 17 of the Hague Convention to facilitate the taking of evidence in Switzerland.

Article 17 of the Hague Convention provides that “[i]n a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if – (a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and (b) he complies with the conditions which the competent authority has specified in the permission. A Contracting State may declare that the evidence may be taken under this Article without its prior permission.” Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, Article 17, *available at* <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>. Therefore, pursuant to Article 17 of the Hague Convention, a U.S. court can appoint certain U.S. attorneys to take the

¹ For avoidance of doubt, the witnesses at issue in this motion are Moira Gilchrist, Filip Tack, Masja Hoogland, Michel Thorens, Noori Brifceni, and Edward Kiernan.

voluntary testimony of a witness in Switzerland. Counterclaim Defendants do not oppose this motion.

Swiss law can prohibit the taking of evidence in Switzerland for purposes of a foreign civil proceeding absent compliance with treaties or international agreements. *See, e.g., U.S. Embassy in Switzerland and Liechtenstein*, at <https://ch.usembassy.gov/u-s-citizen-services/local-resources-of-u-s-citizens/living-in-ch/judicial-information/obtaining-evidence/> (last visited November 12, 2020). Indeed, the Swiss Penal Code provides that attorneys attempting to take a deposition or carry out other activities on behalf of a foreign state in Switzerland outside of these authorized methods are subject to arrest on criminal charges. *See, e.g., Article 271 of the Swiss Penal Code* (<https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>). Thus, to comply with Swiss law, Counterclaim Plaintiffs must comply with the Hague Convention in providing testimony in this matter. Both the United States and Switzerland are parties to the Hague Convention. Switzerland ratified the Hague Convention on November 2, 1994. *See Hague Conf. on Private Int'l Law, Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last updated April 2020).

Counterclaim Plaintiffs respectfully requests that the Court issue an order appointing the following counsel for Counterclaim Plaintiffs and Counterclaim Defendants as commissioners pursuant to Article 17 of the Hague Convention of 18 March 1970 on Taking Evidence Abroad in Civil or Commercial Matters:

Counsel at Latham & Watkins LLP for Counterclaim Plaintiffs (located at 555 11th Street NW, Suite 1000, Washington, DC 20004; 330 N Wabash Avenue, Suite 2800, Chicago, IL 60611; 505 Montgomery Street, Suite 2000, San Francisco, CA 94111; 355 South Grand Avenue, Suite 100 Los Angeles, CA 90071; 140 Scott Drive Menlo Park, CA 94025): Maximilian Grant,

Bert Reiser, Matthew Moore, Jamie Underwood, Brenda Danek, Gregory Sobolski, Lawrence Gotts, Clement Naples, Brett Sandford, Thomas Yeh, and Surendra Ravula.

Counsel at Bär & Karrer AG for Counterclaim Plaintiffs (located at Brandschenkestrasse 90, 8027 Zurich, Switzerland): Matthew Reiter and Martina Athanas.

Counsel at Jones Day for Counterclaim Defendants (located at 1420 Peachtree Street, N.E., Suite 800, Atlanta, GA 30309; 77 West Wacker, Suite 3500, Chicago, IL 60601; 901 Lakeside Avenue, Cleveland, OH, 44114; 4655 Executive Drive, Suite 1500, San Diego, CA 92121; 555 California Street, 26th Floor, San Francisco, CA 94104; 90 South 7th Street, Suite 4950, Minneapolis, MN 55402; 51 Louisiana Avenue, N.W., Washington, DC, 20001; 250 Vesey Street, New York, NY 10281; 555 South Flower Street, 50th Floor, Los Angeles, CA 90071; 150 West Jefferson, Suite 2100, Detroit, MI, 48226; 2727 North Harwood Street, Suite 500, Dallas, TX, 75201): Stephanie Parker, William Devitt, David Maiorana, Emily Baker, Frank Bayuk, Robert Breetz, Douglas Clark, Michael Lavine, Sanjiv Laud, Christopher Liu, Kenneth Luchesi, John Marlott, Kevin McCarthy, John Michalik, Amelia Murray, Michael Quinlan, Nicole Smith, Alexis Smith, Michelle Smit, Emily Tait, Thomas Vitt, Jennifer Weizenecker, and Jeffrey White.

For the foregoing reasons, Counterclaim Plaintiffs respectfully request that the Court issue an order appointing the persons listed above as commissioners for the purpose of taking voluntary testimony by oral examination under oath via videoconference in Switzerland. The Court's signed order will be filed together with the necessary application for authorization from the relevant Swiss authorities.

Dated: March 5, 2021

Respectfully submitted,

By: /s/ Maximilian A. Grant

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Altria Client Services LLC, Philip Morris USA Inc.,
and Philip Morris Products S.A.*

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