

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

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

Plaintiffs and Counterclaim  
Defendants,

v.

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

Defendants and Counterclaim  
Plaintiffs.

Civil Action No. 1:20-cv-393-LO-TCB

**MEMORANDUM IN SUPPORT OF PMI/ALTRIA'S MOTION FOR  
LEAVE TO FILE DOCUMENTS UNDER SEAL**

Pursuant to Local Civil Rule 5(C), Altria Client Services, LLC, Philip Morris USA Inc., and Philip Morris Products S.A. (collectively, "PMI/Altria") respectfully move the Court for leave to file their Opposition to RJR's Motions *in Limine* Nos. 1-3 ("Opposition") and Exhibits E-G, L-Q, and U, thereto under seal.

PMI/Altria also respectfully move for leave to file publicly a redacted version of the Opposition that omits confidential information. All of the materials PMI/Altria seek to file under seal have been designated by at least one party as confidential under the stipulated protective order.

**I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED**

PMI/Altria respectfully seek leave to file the following documents under seal:

- An unredacted version of their Opposition to RJR's Motion *in Limine* No. 6;
- Exhibit E, which are excerpts from the confidential deposition transcript of David Clissold;

- Exhibit F, which are excerpts from the confidential Amended and Supplemented Opening Expert Report of Stacy Ehrlich;
- Exhibit G, which are excerpts from the confidential Expert Report of Davide B. Clissold, Esq. in Response to Amended and Supplemented Opening Report of Stacy Ehrlich;
- Exhibit L, which are excerpts from the confidential Amended and Supplemental Opening Expert Report of Paul K. Meyer;
- Exhibit M, which are excerpts from the confidential deposition transcript of James N. Figlar, Ph.D.;
- Exhibit N, which are excerpts from the confidential Report of Ryan Sullivan, Ph.D.;
- Exhibit O, which are excerpts from the confidential Second Supplemental Opening Expert Report of Joseph C. McAlexander III Regarding U.S. Patent Numbers 6,803,545 and 10,420,374;
- Exhibit P, which are excerpts from the confidential Second Amended and Supplemental Opening Expert Report of John Abraham Relating to US Patent Nos. 10,104,911 and 10,555,556;
- Exhibit Q, which are excerpts from the Supplemental Opening Expert Report of Harold J. Walbrink Relating to Infringement; and
- Exhibit U, which confidential FDA correspondence with R.J. Reynolds Vapor Company.

## II. ARGUMENT

Although there is a general presumption that the public has the right to access documents in the files of the courts, this presumption may be overcome “if the public’s right of access is outweighed by competing interests.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citation omitted); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). To determine whether the interests in sealing the records outweigh the public’s right of access, a court must follow a three-step process: (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents; and (3) articulate specific reasons and factual findings supporting its decision to

seal. *Ashcraft*, 218 F.3d at 302; *Adams v. Object Innovation, Inc.*, No. 11-cv-00272, 2011 WL 7042224, at \*4 (E.D. Va. Dec. 5, 2011), *report and recommendation adopted*, 2012 WL 135428 (E.D. Va. Jan. 17, 2012). All three requirements are satisfied here.

First, the public has received notice of the request to seal and will have a reasonable opportunity to object. In accordance with Local Civil Rule 5 procedures, this sealing motion was publicly docketed, satisfying the first requirement. RJR will have an opportunity to respond, and once the “public has had ample opportunity to object” to PMI/Altria’s motion and “the Court has received no objections,” the first *Ashcraft* requirement may be deemed satisfied. *See GTSI Corp. v. Wildflower Int’l, Inc.*, No. 09-cv-00123, 2009 WL 1248114, at \*9 (E.D. Va. Apr. 30, 2009); *U.S. ex rel. Carter v. Halliburton Co.*, No. 10-cv-00864, 2011 WL 2077799, at \*3 (E.D. Va. May 24, 2011) (“[T]he parties provided public notice of the request to seal that allowed interested parties a reasonable opportunity to object—nearly two weeks.”).

Second, PMI/Altria seek to seal and to redact from the public record only information that the parties must keep confidential pursuant to the stipulated protective order. PMI/Altria will file publicly a redacted version of its Opposition in addition to a sealed version. Moreover, the exhibits filed under seal contain competitively sensitive information the disclosure of which would cause harm. This selective and narrow protection of confidential material constitutes “the least drastic method of shielding the information at issue.” *Adams*, 2011 WL 7042224, at \*4. The public has no legitimate interest in information that is confidential to PMI/Altria and RJR. *See Adams*, 2011 WL 7042224, at \*4 (“[T]here is no legitimate public interest in disclosing the proprietary and confidential information of [the defendant] . . . and disclosure to the public could result in significant damage to the company.”). The information that PMI/Altria seek to seal and redact

includes confidential, proprietary, and competitively sensitive business information of the parties and/or third parties, each of which could face harm if such information were released publicly.

Third, there is support for filing portions of PMI/Altria's Opposition under seal, with a publicly filed version containing strictly limited redactions. As an initial matter, the stipulated protective order requires that this information remain confidential. And the redacted portions of the Opposition only pertain to this confidential information. Moreover, the exhibits filed under seal contain information that the parties have designated as competitively sensitive business information. Sealing these materials is therefore proper because the public's interest in access is outweighed by a party's interest in "preserving confidentiality" of limited amounts of confidential information that is "normally unavailable to the public." *Flexible Benefits Council v. Feltman*, No. 08-cv-00371, 2008 WL 4924711, at \*1; *U.S. ex rel. Carter*, 2011 WL 2077799, at \*3.

### **III. CONCLUSION**

PMI/Altria respectfully request that the Court grant this Motion and enter the attached proposed Order.

Dated: February 11, 2022

Respectfully submitted,

/s/ Maximilian A. Grant

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