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

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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.

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

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**REYNOLDS'S MEMORANDUM IN RESPONSE TO, AND IN SUPPORT OF, PM/ALTRIA'S
MOTION TO SEAL PMI/ALTRIA'S OPPOSITION TO RJR'S *DAUBERT* MOTION TO
EXCLUDE CERTAIN EXPERT OPINIONS OF JOSEPH C. MCALEXANDER AND
EXHIBITS A-C, AND E-H**

Pursuant to Rule 5.2(d) of the Federal Rules of Civil Procedure and Rule 5(C) of the Local Civil Rules, RAI Strategic Holdings, Inc., and R.J. Reynolds Vapor Company (collectively, "Reynolds") respectfully submit this memorandum in response to, and in support of, Philip Morris Products S.A., Philip Morris USA Inc., and Altria Client Services, LLC's (or collectively "PM/Altria") Motion to Seal PMI/Altria's Opposition to RJR's *Daubert* Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and Exhibits A-C, and E-H (Dkt. 1018). The proposed sealed material includes Reynolds's confidential, proprietary, and competitively sensitive business, financial, and design information and falls within the scope of the Stipulated Protective Order. (Dkt. 103.) These confidential materials should remain under seal.

I.   LEGAL STANDARD

Local Civil Rule 5(C) requires that, when a party moves to file material under seal that another party has designated as confidential, "the party designating the material as confidential must file a response to the motion complying with requirements (2), (3), and (4) above along with a proposed order" that "shall recite the findings required by governing case law to support the proposed sealing." Loc. R. Civ. P. 5(C). These requirements are: "(2) A statement why sealing is necessary, and why another procedure will not suffice, as well as appropriate evidentiary support for the sealing request; (3) References to the governing case law, an analysis of the appropriate standard to be applied for that specific filing, and a description of how that standard has been satisfied; [and] (4) Unless permanent sealing is sought, a statement as to the period of time the party seeks to have the matter maintained under seal and how the matter is to be handled upon unsealing." *Id.*

"[T]he right [of the public] to inspect and copy judicial records is not absolute." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Access to court records has been denied where "court files might have become a vehicle for improper purposes." *Id.* In particular, a corporation's

"strong interest in preserving the confidentiality of its proprietary and trade-secret information …

may justify partial sealing of court records." *Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir.

2014). As set forth in the Fourth Circuit's decision in *Ashcraft v. Conoco, Inc.*, a court has the

authority to seal court documents "if the public's right of access is outweighed by competing

interests." 218 F.3d 288, 302 (4th Cir. 2000). Before granting a motion to seal, a court must

consider the following: "(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) provide specific reasons and factual findings supporting its decision to seal the documents

and for rejecting the alternatives." *Id.*; *Adams v. Object Innovation, Inc.*, No. 3:11CV00272-REP-

DWD, 2011 WL 7042224, at *4 (E.D. Va. Dec. 5, 2011), *report & recommendation adopted*, 2012

WL 135428 (E.D. Va. Jan. 17, 2012). All three requirements are met here.

The materials that PM/Altria moves for leave to seal include highly confidential,

proprietary, and competitively sensitive business, financial, and design information of Reynolds

and should be kept under seal permanently for the reasons described below.

II.   DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

PM/Altria seeks leave to file under seal un-redacted versions of PMI/Altria's Opposition

to RJR's *Daubert* Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and

Exhibits A-C, and E-H (Dkt. 1018). Specifically, the sensitive information that PM/Altria moves

for leave to file under seal, and to redact from a publicly filed version, includes confidential,

proprietary, and commercially sensitive business, financial, and design information of Reynolds

and/or third parties:

- PMI/Altria's Opposition to RJR's *Daubert* Motion to Exclude Certain Expert

  Opinions of Joseph C. McAlexander; and

- Exhibit A, an excerpt of an expert report;

- Exhibit B, an excerpt of an expert report;

- Exhibit C, an excerpt of an expert report;

- Exhibit E, an excerpt of an expert report;

- Exhibit F, an excerpt of an expert report;

- Exhibit G, an excerpt of a deposition transcript; and

- Exhibit H, an excerpt of an interrogatory response.

III.   ARGUMENT

A.   THE PUBLIC HAS HAD AMPLE NOTICE.

The public has received notice of the request to seal and has had reasonable opportunity to object. PM/Altria's sealing motion was publicly docketed in accordance with Local Civil Rule 5, and Reynolds now files this memorandum in support of sealing. The "public has had ample opportunity to object" to PM/Altria's motion and, since "the Court has received no objections," the first requirement under *Ashcraft*, 218 F.3d at 302, has been satisfied. *GTSI Corp. v. Wildflower Int'l, Inc.*, No. 1:09CV123 (JCC), 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *United States. ex rel. Carter v. Halliburton Co.*, No. 1:10CV864 (JCC/TCB), 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.").

B.   PM/ALTRIA HAS SOUGHT THE LEAST DRASTIC MEASURES.

PM/Altria seeks to seal and redact from the public record only information that the parties must keep confidential pursuant to the Stipulated Protective Order. (Dkt. 103.) PM/Altria has filed publicly redacted versions of its Opposition to RJR's *Daubert* Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and Exhibits A-C, and E-H (Dkt. 1022), and has redacted

only those limited portions it seeks to seal. 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 "proposal to redact only the proprietary and confidential information, rather than seal the entirety of his declaration, constitutes the least drastic method of shielding the information at issue."). The public has no legitimate interest in information that is confidential to Reynolds. *Id.* The information that PM/Altria seeks to seal includes confidential, proprietary, and competitively sensitive business information of Reynolds and/or third parties, each of which could face harm if such information were to be released publicly. No procedure other than filing this information under seal is sufficient to preserve the confidential and sensitive nature of the information.

C.   THE MATERIALS ARE HIGHLY SENSITIVE AND CONFIDENTIAL.

There is support for filing portions of PMI/Altria's Opposition to RJR's *Daubert* Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and Exhibits A-C, and E-H under seal with publicly filed versions containing strictly limited redactions. PMI/Altria's Opposition to RJR's *Daubert* Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and Exhibits A-C, and E-H contain material that falls within the scope of the Stipulated Protective Order. (Dkt. 103.) Placing these materials under seal is proper because the public's interest in access is outweighed by a party's interest in "preserving confidentiality" of the limited amount of confidential information that is "normally unavailable to the public." *Flexible Benefits Council v. Feltman*, No. 1:08CV00371 (JCC), 2008 WL 4924711, at *1 (E.D. Va. Nov. 13, 2008*)*; *United States ex rel. Carter*, 2011 WL 2077799, at *3. As noted, the portions of PMI/Altria's Opposition to RJR's *Daubert* Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and Exhibits A-C, and E-H that are redacted concern confidential information of Reynolds and/or third parties.

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