

**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

**PMI/ALTRIA'S MEMORANDUM IN RESPONSE TO, AND IN SUPPORT OF,
REYNOLDS'S MOTION TO SEAL DOCUMENTS IN SUPPORT OF OPPOSITION
TO PM/ALTRIA'S DAUBERT MOTION TO EXCLUDE THE DESIGN-AROUND
TESTIMONY OF DAVID CLISSOLD**

Pursuant to Rule 5.2(d) of the Federal Rules of Civil Procedure and Local Civil Rule 5(C), Altria Client Services LLC (“ACS”), Philip Morris USA Inc. (“PM USA”), and Philip Morris Products S.A. (“PMP”) (collectively, “PMI/Altria”) respectfully submit this memorandum in response to, and in support of Reynolds’s Motion to Seal Documents in Support of Opposition to PM/Altria’s *Daubert* Motion to Exclude the Design-Around Testimony of David Clissold and Accompanying Exhibits 1-4, and 6 (“Reynolds’s Motion to Seal”) filed by RAI Strategic Holdings, Inc. and R.J. Reynolds Vapor Company (collectively, “Reynolds”).

The proposed sealed material identified above includes PMI/Altria’s confidential, financial, proprietary, and competitively sensitive business information that 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.*

The Supreme Court has held that “the 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). For example, 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 the Fourth Circuit has explained, a court has the authority to seal court documents “if the public’s right of access is outweighed by competing interests.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000).

II. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Reynolds moved for leave to file under seal the unredacted versions of its Memorandum in Support of its Opposition to PM/Altria’s *Daubert* Motion to Exclude the Design-Around Testimony of David Clissold and Accompanying Exhibits 1-4, and 6 attached thereto (Dkt. 953). The sensitive information that Reynolds moved for leave to file under seal, and to redact from a publicly filed version, includes proprietary and commercially sensitive information and documents of PMI/Altria, Reynolds, and/or third parties.

III. 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*, 218 F.3d at 302 (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) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Ashcraft*, 218 F.3d at 302; *see also Adams v. Object Innovation, Inc.*, No. 11-cv-272, 2011 WL 7042224, at *4 (Dec. 5, 2011), *report & recommendation adopted*, 2012 WL 135428 (E.D. Va. Jan. 17, 2012). Here, three requirements are met.

First, the public has received notice of the request to seal and has had reasonable opportunity to object. Reynolds’s Motion to Seal was publicly docketed a week ago on February 11, 2022, in accordance with Local Civil Rule 5, and PMI/Altria now files this memorandum in support of sealing. Since the “public has had ample opportunity to object” to Reynolds’s Motion to Seal and “the Court has received no objections,” the first requirement under *Ashcraft* is met. 218 F.3d at 302; *see also GTSI Corp. v. Wildflower Int’l, Inc.*, No. 09-cv-123, 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *U.S. ex rel Carter v. Halliburton Co.*, No. 10-cv-864, 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, Reynolds 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. Reynolds filed publicly redacted versions of its Memorandum in Support of its Opposition to PMI/Altria’s *Daubert* Motion to Exclude the Design-Around Testimony of David Clissold and Accompanying Exhibits 1-4, and 6, in addition to sealed versions, and redacted only the limited portions that Reynolds 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 PMI/Altria, Reynolds, and/or third parties. *Id.* The information that Reynolds seeks to seal includes PMI/Altria's confidential, proprietary, and competitively sensitive business information, and thus PMI/Altria 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.

Third, there is support for filing portions of Reynolds's unredacted Memorandum and accompanying Exhibits under seal, with publicly filed versions containing strictly limited redactions. Reynolds's Memorandum contains 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. 08-cv-371, 2008 WL 4924711, at *1 (E.D. Va. Nov. 13, 2008); *U.S. ex rel. Carter*, 2011 WL 2077799, at *3. As discussed, the portions of Reynolds's Memorandum and accompanying Exhibits that are sealed concern confidential information of PMI/Altria, Reynolds, and/or third parties.

IV. CONCLUSION

For the foregoing reasons, PMI/Altria respectfully request that Reynolds's Motion to Seal (Dkt. 953) be granted and that such sealing be maintained until further Order of this Court.

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