

**IN THE 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.

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

**MEMORANDUM IN SUPPORT OF REYNOLDS'S MOTION TO SEAL REYNOLDS'S
REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE CERTAIN EXPERT OPINIONS
OF JOSEPH C. MCALEXANDER AND ACCOMPANYING EXHIBIT 1**

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 support of their Motion to Seal. The proposed sealed material includes confidential, proprietary, and competitively sensitive business information of Reynolds, PM/Altria, and/or third parties 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 requires that, when a party moves to file material under seal, the party must file contemporaneously with the material for which sealing is requested a motion for leave to file under seal, a non-confidential supporting memorandum, and a separate non-confidential notice that specifically identifies the motion as a sealing motion, and a non-confidential proposed

order that recites the findings required by governing case law to support the propose sealing. The non-confidential memorandum must include:

- (1) A non-confidential description of what material has been filed under seal;
- (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;
- (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.

Loc. R. Civ. P. 5(C).

“[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. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014). As set forth in the Fourth Circuit’s decision in *Ashcraft v. Connoco, 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 282, 288 (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. 11-cv-00272-REP-DWD, 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 met here.

The materials that Reynolds moves for leave to seal include highly confidential and proprietary business information of the Reynolds, PM/Altria, and/or third parties and should be kept under seal permanently for the reasons described below.

II. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Reynolds seeks leave to file under seal unredacted versions of the following:

1. Reynolds's Reply in Support of Its Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander.

Reynolds further moves to file wholly under seal the following exhibit accompanying the Reply In Support:

2. Accompanying Exhibit 1.

Specifically, the sensitive information that Reynolds moves for leave to file under seal, and to redact from a publicly filed version, includes proprietary and commercially sensitive materials from Reynolds, PM/Altria, and/or third parties relating to federal regulatory proceedings for approval of tobacco products, the commercialization of the technologies at issues and relationship with third-party suppliers, marketing strategies for the use of the products at issue, and expert reports and deposition testimony regarding confidential business information.

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. Reynolds's sealing motion was publicly docketed in accordance with Local Civil Rule 5. PM/Altria will have an opportunity to respond and, once the "public has had ample opportunity to object" to Reynolds's motion and "the Court has received no objections," the first requirement under *Ashcraft*, 218 F.3d at 302, may be deemed satisfied. *GTSI Corp. v. Wildflower Int'l, Inc.*, No. 1:09-cv-123-JCC, 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *U.S. ex rel Carter v.*

Halliburton Co., No. 1:10-cv-864-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. REYNOLDS HAS SOUGHT THE LEAST DRASTIC MEASURES.

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 has filed a publicly redacted version of Reynolds’s Reply in Support of Its Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander, in addition to a sealed version, and have redacted only those limited portions it seeks to seal. Reynolds has filed Exhibit 1 wholly under 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 information that Reynolds seeks to seal includes confidential, proprietary, and competitively sensitive business information of Reynolds, PM/Altria, and/or third parties, each of which could face harm if such information were to be released publicly. The public has no legitimate interest in information that is confidential to Reynolds, PM/Altria, and/or third parties. *Id.* at *4. 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 Reynolds’s Reply in Support of Its Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and accompanying Exhibit 1 under seal, with a publicly filed version containing strictly limited redactions. Reynolds’s Reply in Support of Its Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and accompanying Exhibit^o1 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. 1:08-cv-00371-JCC, 2008 WL 4924711, at *1 (E.D. Va. Nov. 13, 2008); *U.S. ex rel. Carter*, 2011 WL 2077799, at *3. As noted, the portions of Reynolds's Reply in Support of Its Motion to Exclude Certain Expert Opinions of Joseph C. McAlexander and accompanying Exhibit 1 that are redacted concern confidential information of Reynolds, PM/Altria, and/or third parties.

IV. CONCLUSION

For the foregoing reasons, Reynolds respectfully requests that that the Court grant this Motion and enter the proposed Order.

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