

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

PHILIP MORRIS PRODUCTS S.A.,

Plaintiff,

v.

R.J. REYNOLDS VAPOR COMPANY

Defendant.

No. 1:20-cv-393-LMB-TCB

**MEMORANDUM IN SUPPORT OF PHILIP MORRIS' MOTION FOR
LEAVE TO FILE DOCUMENTS UNDER SEAL**

Pursuant to Local Civil Rule 5(C), Plaintiff Philip Morris Products S.A. ("Philip Morris") respectfully moves the Court for leave to file its Brief in Support of Philip Morris' Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty ("Brief") and Exhibits 4-5, 11, 13-20, 22-24, 26-27, 30-31, 34-36, 38, 40-44, 47-48, 51, and 56 thereto ("Exhibits") under seal.

I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Philip Morris respectfully seeks leave to file the following documents under seal:

- An unredacted version of its Brief in Support of Philip Morris' Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty ("Brief"); and
- Exhibit 4 to Philip Morris' Brief, which includes excerpts from the June 8, 2022 a.m. trial transcript, which has not yet been publicly released.
- Exhibit 5 to Philip Morris' Brief, which is the confidential declaration of Dr. Moira Gilchrist, dated August 12, 2022.
- Exhibit 11 to Philip Morris' Brief, which includes excerpts from a market report that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 13 to Philip Morris' Brief, which includes excerpts from the June 9, 2022 p.m. trial transcript, which has not yet been publicly released.

- Exhibit 14 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 15 to Philip Morris' Brief, which includes excerpts from the deposition transcript of Nicholas Gilley, dated December 1, 2020, that Reynolds designated as confidential business information subject to the Protective Order.
- Exhibit 16 to Philip Morris' Brief, which includes excerpts from Reynolds' responses to Interrogatory No. 30, dated April 30, 2021, which Reynolds designated as confidential business information subject to the Protective Order.
- Exhibit 17 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 18 to Philip Morris' Brief, which includes excerpts from a design document that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 19 to Philip Morris' Brief, which includes excerpts from the July 21, 2022 hearing transcript, which has not yet been publicly released.
- Exhibit 20 to Philip Morris' Brief, which includes excerpts from Reynolds' responses to Interrogatory No. 7, dated September 17, 2020, which Reynolds designated as confidential business information subject to the Protective Order.
- Exhibit 22 to Philip Morris' Brief, which includes excerpts from the Report of Ryan Sullivan, Ph.D., dated March 24, 2021, which Reynolds designated as confidential business information subject to the Protective Order.
- Exhibit 23 to Philip Morris' Brief, which includes excerpts from the deposition transcript of Moira Gilchrist, dated June 18, 2021, which Philip Morris designated as confidential subject to the Protective Order.
- Exhibit 24 to Philip Morris' Brief, which includes excerpts of a financial spreadsheet that Altria Client Services, LLC produced and designated as confidential business information subject to the Protective Order.
- Exhibit 26 to Philip Morris' Brief, which includes excerpts from the Third Amended and Supplemental Opening Expert Report of Paul K. Meyer, dated April 15, 2022, which Philip Morris designated as confidential business information subject to the Protective Order.
- Exhibit 27 to Philip Morris' Brief, which includes excerpts from a presentation that Philip Morris produced and designated as confidential business information subject to the Protective Order.

- Exhibit 30 to Philip Morris' Brief, which includes from the June 9, 2022 a.m. trial transcript, which has not yet been publicly released.
- Exhibit 31 to Philip Morris' Brief, which includes excerpts from the deposition transcript of Kara Calderon, dated November 12, 2020, that Reynolds designated as confidential business information subject to the Protective Order.
- Exhibit 34 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 35 to Philip Morris' Brief, which includes excerpts from a report that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 36 to Philip Morris' Brief, which includes excerpts from the June 8, 2022 p.m. trial transcript, which has not yet been publicly released.
- Exhibit 38 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 40 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 41 to Philip Morris' Brief, which includes excerpts from document that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 42 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 43 to Philip Morris' Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Exhibit 44 to Philip Morris' Brief, which is the Declaration of Paul K. Meyer, dated August 12, 2022, that was designated by Philip Morris as including information produced by Reynolds as confidential under the Protective Order.
- Exhibit 47 to Philip Morris' Brief, which includes excerpts from a document that Reynolds produced and designated as confidential business information subject to the Protective Order.

- Exhibit 48 to Philip Morris' Brief, which includes excerpts from the deposition transcript of Dr. James Figlar, dated June 3, 2022, that Reynolds designated as containing confidential business information subject to the Protective Order.
- Exhibit 51 to Philip Morris' Brief, which includes excerpts from the June 14, 2022 a.m. trial transcript, which has not yet been publicly released.
- Exhibit 56 to Philip Morris' Brief, which are royalty reports produced by Philip Morris as confidential subject to the Protective Order.

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. Reynolds will have an opportunity to respond, and once the “public has had ample opportunity to object” to Philip Morris’ 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, Philip Morris seeks to seal and to redact from the public record only information that the parties must keep confidential pursuant to the stipulated protective order. Philip Morris will file publicly a redacted version of its Brief 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 Philip Morris, Reynolds, or third parties. *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 Philip Morris seeks to seal and redact includes confidential, proprietary, and competitively sensitive business information of Reynolds, Philip Morris, and third parties, that Philip Morris is required to seal under the Protective Order entered this case. Reynolds, Philip Morris, and/or third parties could face harm if such information were released publicly.

Third, there is support for filing portions of Philip Morris’ Brief 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 Brief only pertain to this confidential information. Moreover, the Exhibits filed under seal contain information that Reynolds, Philip Morris, or a third party has 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

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