

**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

**REYNOLDS'S MEMORANDUM IN RESPONSE TO, AND IN SUPPORT OF,  
PMP's MOTION TO SEAL (DKT. 1408)**

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.’s (“PMP’s”) Motion to Seal portions of Philip Morris’ Brief in Support of Philip Morris’ Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty (“Brief”) and accompanying exhibits (Dkt. 1408).

The proposed sealed material includes (1) confidential and proprietary information made available to FDA as part of the regulatory process, and Reynolds’s internal documents related to its confidential regulatory strategies; and (2) internal financial projections, costs data, and information about Reynolds’s future business plans, and historical forecasts or business plans regarding its Vuse products. The Court previously granted Reynolds’s motion to seal certain trial exhibits containing these same types of confidential information. (*See* Dkt. 1266.)

Specifically, Reynolds supports filing under seal copies of PMP’s Brief, accompanying Exhibits 4, 13, 14, 17-19, 30, 34-36, 38, 40-44, 47, and 51, and certain portions of accompanying Exhibits 15 and 48.<sup>1</sup> For at least Exhibits 17, 38, 41, 42, 43, and the redacted portions of Exhibits 15 and 48, as well as the portions of PMP’s Brief citing thereto, this information was not admitted into evidence at trial. And for all of the above-listed documents that Reynolds supports sealing, the information falls within the scope of the Stipulated Protective Order. (Dkt. 103.) These confidential materials should remain under seal.

If the Court agrees, Reynolds respectfully requests that the Court grant PMP’s motion to seal (Dkt. 1408) and order PMP to file an amended public redacted copy of Exhibits 15 and 48 with only the limited redactions identified in Exhibits A-B attached hereto.

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<sup>1</sup> Reynolds’s proposed redactions to Exhibits 15 and 48 are attached hereto as Exhibits A-B.

## I. LEGAL STANDARD

The law of the regional circuit applies to non-substantive issues of patent law, including the question whether to seal district court records. *See Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1357 (Fed. Cir. 2020). A motion to seal implicates both substantive and procedural requirements. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004).

Substantively, the Court must determine the nature of the information and the public's right to access. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). "The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment." *Va. Dep't of State Police*, 386 F.3d at 575. "While the common law presumption in favor of access attaches to all 'judicial records and documents,' the First Amendment guarantee of access has been extended only to particular judicial records and documents." *Stone*, 855 F.2d at 180 (internal citation omitted). Moreover, the common law right to inspect records and documents "is not absolute." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). Accordingly, some documents "fall within the common law presumption of access, while others are subject to the greater right of access provided by the First Amendment. Still others may not qualify as 'judicial records' at all." *U.S. v. Moussaoui*, 65 F. App'x 881, 889 (4th Cir. 2003) (internal citation omitted).<sup>2</sup>

Although "the Supreme Court has not addressed whether the First Amendment's right of access extends to civil trials or other aspects of civil cases . . . , the Fourth Circuit[ ] ha[s] recognized that the First Amendment right of access extends to civil trials and some civil filings." *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). Even so, public access to

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<sup>2</sup> "Judicial records" are "documents filed with the court [that] play a role in the adjudicative process, or adjudicate substantive rights." *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013).

civil trial records “is not absolute,” and restrictions can be justified by concerns that such records “might . . . become a vehicle for improper purposes,” such as where the records serve “as sources of business information that might harm a litigant’s competitive standing.” *Nixon*, 435 U.S. at 598.

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).

Procedurally, 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.*

## II. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

PMP seeks leave to file under seal un-redacted versions of its Brief and accompanying Exhibits 4-5, 11, 13-20, 22-24, 26-27, 30-31, 34-36, 38, 40-44, 47-48, 51, and 56 to PMP’s Brief. (Dkt. 1408). Reynolds supports filing under seal copies of the following documents (*see* Dkt. 1409 at 1-4):

- Unredacted version of PMP’s 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 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 PMP’s Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.
- Certain portions of Exhibit 15 to PMP’s 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. (Reynolds’s proposed redactions are attached as Exhibit A.)
- Exhibit 17 to PMP’s Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order.

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