

**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.

Case No. 1:20-cv-00393-LMB-WEF

**PHILIP MORRIS' MEMORANDUM IN RESPONSE TO, AND IN SUPPORT OF,
REYNOLDS' MOTION TO SEAL (DKT. 1419)**

Pursuant to Rule 5.2(d) of the Federal Rules of Civil Procedure and Local Civil Rule 5(C), Plaintiff Philip Morris Products S.A. (“Philip Morris”) respectfully submits this memorandum in response to, and in support of, Defendant R.J. Reynolds Vapor Company’s (“Reynolds”) Motion to Seal portions of its Memorandum in Opposition to Plaintiff’s Motion for a Permanent Injunction or, Alternatively, an Ongoing Royalty and Exhibits 1-4, 9-14, 18-21, 23, 25, 26, 28-31, 39, 42 and 44 thereto (“Motion to Seal,” Dkt. 1419). The proposed sealed material identified above includes Philip Morris’ 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 an unredacted version of the memorandum submitted in support of its Memorandum in Opposition to Plaintiff’s Motion for a Permanent Injunction or, Alternatively, an Ongoing Royalty and Exhibits 1-4, 9-14, 18-21, 23, 25, 26, 28-31, 39, 42 and 44 thereto. Specifically, 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 Philip Morris.

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' Motion to Seal was publicly docketed on September 2, 2022, in accordance with Local Civil Rule 5, and Philip Morris now files this memorandum in support of sealing. Since the "public has had ample opportunity to object" to Reynolds' 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 provisions of the Stipulated Protective Order. Dkt. 103. Reynolds filed publicly a redacted version of its Memorandum, in addition to a sealed version, 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 Philip Morris. *Id.* The information that Reynolds seeks to seal includes Philip Morris' confidential, proprietary, and competitively sensitive business information, and thus Philip Morris 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 under seal portions of Reynolds' unredacted Memorandum and Exhibits 1-4, 9-14, 18-21, 23, 25, 26, 28-31, 39, 42 and 44 thereto. Reynolds' Memorandum and certain accompanying exhibits 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. 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 sealed portions of Reynolds' Memorandum and certain Exhibits contain Philip Morris' confidential information.

IV. CONCLUSION

Philip Morris respectfully requests that Reynolds' Sealing Motion (Dkt. 1419) be granted and that such sealing be maintained until further order of this Court.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.