

**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-WEF

**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 Reply Brief in Support of Philip Morris' Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty ("Reply") and Exhibits 57-58, 65-66, 70, and 74-78 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 Reply Brief in Support of Philip Morris' Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty ("Reply"); and
- Exhibit 57 to Philip Morris' Reply, which includes excerpts from the deposition transcript of Kara Calderon, dated November 12, 2020, which Reynolds designated as confidential subject to the Protective Order.
- Exhibit 58 to Philip Morris' Reply, which is excerpts from Reynolds' Responses to Philip Morris' First Set of Interrogatories, dated September 17, 2020, which Reynolds designated as confidential subject to the Protective Order.
- Exhibit 65 to Philip Morris' Reply, which includes excerpts from the deposition transcript of Dr. Moira Gilchrist, dated June 18, 2021, which Philip Morris designated as confidential subject to the Protective Order.

- Exhibit 66 to Philip Morris' Reply, 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 70 to Philip Morris' Reply, which includes excerpts from the June 8, 2022 p.m. transcript of the jury trial in this case, which has not yet been publicly released.
- Exhibit 75 to Philip Morris' Reply, which is the declaration of Stacy Ehrlich, dated September 9, 2022, which Philip Morris designated as confidential subject to the Protective Order.
- Exhibit 75 to Philip Morris' Reply, which includes excerpts from the transcript of the March 18, 2022 hearing in this case, which has not yet been publicly released.
- Exhibit 76 to Philip Morris' Reply, which is the Declaration of Paul K. Meyer, dated September 9, 2022, that was designated by Philip Morris as including information produced by at least one party as confidential under the Protective Order.
- Exhibit 77 to Philip Morris' Reply, which includes the production email and metadata report of a financial spreadsheet that Reynolds' produced and designated as confidential business information subject to the Protective Order.
- Exhibit 78 to Philip Morris' Reply, 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.

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 Reply 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/or 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' Reply 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 Reply only pertain to this confidential information. Moreover, the Exhibits filed under seal contain information that Reynolds, Philip Morris, and/or a third party has designated as competitively sensitive business information. Sealing these materials is thus proper because the public's interest in access is outweighed by a party's interest in "preserving confidentiality" of limited amounts of confidential information that is "normally unavailable to the public." *Flexible Benefits Council v. Feltman*, No. 08-cv-371, 2008 WL 4924711, at *1; *U.S. ex rel. Carter*, 2011 WL 2077799, at *3.

III. CONCLUSION

Philip Morris respectfully requests that the Court grant this motion and enter the attached proposed Order.

Dated: September 9, 2022

Respectfully submitted,

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